

ANNEX

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

1. Sources of military jurisdiction

The sources of military jurisdiction include the Constitution and international law. International law includes the law of war.

2. Exercise of military jurisdiction

(a) *Kinds*. Military jurisdiction is exercised by:

(1) A government in the exercise of that branch of the municipal law which regulates its military establishment. (Military law).

(2) A government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require. (Martial law).

(3) A belligerent occupying enemy territory. (Military government).

(4) A government with respect to offenses against the law of war.

(b) *Agencies*. The agencies through which military jurisdiction is exercised include:

(1) Courts-martial for the trial of offenses against military law and, in the case of general courts-martial, of persons who by the law of war are subject to trial by military tribunals. See Parts II, III, and IV of this Manual for rules governing courts-martial.

(2) Military commissions and provost courts for the trial of cases within their respective jurisdictions. Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.

(3) Courts of inquiry for the investigation of any matter referred to such court by competent authority. *See* Article 135. The Secretary concerned may prescribe regulations governing courts of inquiry.

(4) Nonjudicial punishment proceedings of a commander under Article 15. *See* Part V of this Manual.

3. Nature and purpose of military law

Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purposes of military law ~~is~~ are to promote justice, to deter misconduct, to facilitate appropriate accountability, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

4. The Evolving Military Justice System

The military operates a modern criminal justice system that recognizes and protects the rights of both the victims of alleged offenses and those accused of offenses. The continuous evolution of the military justice system has progressed through statutes, Executive Orders, regulations, and judicial interpretations. The Uniform Code of Military Justice (UCMJ), enacted in 1950, significantly enhanced the fairness of military justice across the armed forces, including by establishing a civilian appellate court at the system's apex. The Military Justice Act of 1968, which created the position of military judge and enhanced the role of lawyers in the system, resulted in further improvements. The promulgation of the Military Rules of Evidence by a 1980 Executive Order brought court-martial practice into closer alignment with federal civilian criminal practice. In 2014, Congress added a victims' rights article to the UCMJ and also made counsel available to represent certain victims of alleged UCMJ offenses. The Military Justice Act of 2016 further modernized the military justice system by expanding pretrial judicial authorities, updating trial and post-trial procedures, and enacting new punitive articles. Most recently, the National Defense Authorization Act for Fiscal Year 2022 made historic reforms to the military justice system, including the unprecedented transfer of prosecutorial discretion from commanders to

independent, specialized counsel to prosecute certain covered offenses, including sexual assault and domestic violence, as recommended by the Independent Review Commission on Sexual Assault in the Military to strengthen Service members' trust in the military justice system. These and many other improvements have been vital to maintaining a fair, just, and efficient military justice system. The system must continue to evolve to be worthy of those who protect our Nation and its freedoms.

54. Structure and application of the Manual for Courts-Martial

The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, the Nonjudicial Punishment Procedures (Parts I-V), and Appendix 12A. This Manual shall be applied in a manner consistent with the purpose of military law.

The Department of Defense (DoD), in conjunction with the Department of Homeland Security, publishes supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Preface, a Table of Contents, Discussions, Appendices (other than Appendix 12A, which was promulgated by the President), and an Index. These supplementary materials do not have the force of law.

The Manual shall be identified by the year in which it was printed; for example, "Manual for Courts-Martial, United States (20xx edition)." Any amendments to the Manual made by Executive Order shall be identified as "20xx" Amendments to the Manual for Courts-Martial, United States, "20xx" being the year the Executive Order was signed.

The ~~DoD-Department of Defense~~ Joint Service Committee (JSC) on Military Justice (JSC) reviews the Manual for Courts-Martial and proposes amendments to the ~~DoD-Department of Defense~~ (~~DoD~~) for consideration by the President on an annual basis. In conducting its annual review, the JSC is guided by DoD Instruction Directive 5500.17, "Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice (JSC)." DoD Instruction Directive 5500.17 includes provisions allowing public participation in the annual review process.

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

(a) R.C.M. 103 is amended as follows:

The following definitions and rules of construction apply throughout this Manual, unless otherwise expressly provided.

- (1) “Appellate military judge” means a judge of a Court of Criminal Appeals.
- (2) “Article” refers to articles of the Uniform Code of Military Justice unless the context indicates otherwise.
- (3) “Capital case” means a general court-martial to which a capital offense has been referred with an instruction that the case be treated as capital, and, in the case of a rehearing or new or other trial, for which offense death remains an authorized punishment under R.C.M. 810(d).
- (4) “Capital offense” means an offense for which death is an authorized punishment under the UCMJ and Part IV of this Manual or under the law of war.
- (5) “Commander” means a commissioned officer in command or an officer in charge except in Part V or unless the context indicates otherwise.
- (6) “Convening authority” includes a commissioned officer in command for the time being and successors in command.
- (7) “Copy” means an accurate reproduction, however made. Whenever necessary and feasible, a copy may be made by handwriting.
- (8) “Court-martial” includes, depending on the context:
 - (A) The military judge and members of a general or special court-martial;
 - (B) The military judge when a session of a general or special court-martial is conducted without members under Article 39(a);
 - (C) The military judge when a request for trial by military judge alone has been approved under R.C.M. 903;
 - (D) The military judge when the case is referred as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A); or

(E) The summary court-martial officer.

(9) “Days.” When a period of time is expressed in a number of days, the period shall be in calendar days, unless otherwise specified. Unless otherwise specified, the date on which the period begins shall not count, but the date on which the period ends shall count as one day.

(10) “Deferral” (declination) of an offense means a special trial counsel declines to prefer charges for an offense or declines to refer charges to court-martial. Once a special trial counsel declines to prefer or refer charges for an offense, a commander shall exercise authority within the scope of these rules.

~~(10)~~(11) “Detail” means to order a person to perform a specific temporary duty, unless the context indicates otherwise.

(12) “Exercise authority over” means any time a special trial counsel takes action related to a covered, related, or known offense. Special trial counsel must exercise authority over a covered offense and has discretion to exercise authority over any known or related offense. Once a special trial counsel has exercised authority over an offense, only a special trial counsel may dispose of that offense, until or unless special trial counsel defers the offense.

~~(11)~~(13) “Explosive” means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (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 compound, mixture, or device which is an explosive within the meaning of 18 U.S.C. § 232(5) or 844(j).

~~(12)~~(14) “Firearm” means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.

~~(13)~~(15) “Joint” in connection with military organization connotes activities, operations, organizations, and the like in which elements of more than one military service of the same nation participate.

(16) “Lead Special Trial Counsel” within the Department of Defense means a general or flag officer with

significant experience in military justice who is responsible for a dedicated office within each Military Department from which office they will provide for the overall supervision and oversight of the activities of the special trial counsel of that service, and who reports directly to the Secretary concerned, without intervening authority. Lead Special Trial Counsel applies to the Coast Guard only when operating as a service in the Department of the Navy.

~~(14)~~(17) “Members.” The members of a court-martial are the voting members detailed by the convening authority.

~~(15)~~(18) “Military judge” means a judge advocate designated under Article 26(c) who is detailed under Article 26(a) or Article 30a to preside over a general or special court-martial or proceeding before referral. In the context of a summary court-martial, “military judge” means the summary court-martial officer. In the context of a pre-referral proceeding or a special court-martial consisting of a military judge alone, “military judge” includes a military magistrate designated under Article 19 or Article 30a.

~~(16)~~(19) “Military magistrate” means a commissioned officer of the armed forces certified under Article 26a who is performing duties under Article 19 or 30a.

~~(17)~~(20) “Party-” in the context of parties to a court-martial or other proceeding under these rules, means:

(A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial or proceeding in question; and

(B) Any trial or assistant trial counsel representing the United States, and agents of the trial counsel or such counsel when acting on behalf of the United States with respect to the court-martial or proceeding in question.

(21) “Preferral” is the act by which a person subject to the UCMJ formally accuses another person subject to the UCMJ of an offense, in accordance with R.C.M. 307(b).

(22) “Referral” is the order of a convening authority or a special trial counsel that charges and specifications

against an accused will be tried by a specified court-martial.

(23) “Special trial counsel” means a judge advocate who is qualified, certified, and detailed as such by the Judge Advocate General of the armed force of which the officer is a member, or, in the case of the Marine Corps, by the Staff Judge Advocate to the Commandant of the Marine Corps, and who is independent of the military chains of command of both the victim and those accused of covered offenses over which a special trial counsel at any time exercises authority in accordance with Article 24a, UCMJ. Special Trial Counsel shall be well-trained, experienced, highly-skilled and competent in handling cases involving covered offenses. Within the Department of Defense, special trial counsel work within dedicated offices under the overall supervision and oversight of a Lead Special Trial Counsel, who shall be a judge advocate in a grade no lower than O-7 with significant military justice experience who reports directly to the Secretary of the applicable military department. Within the Coast Guard when not operating as a service in the Department of the Navy, special trial counsel work under the overall supervision and oversight of an officer designated under regulations prescribed by the Secretary concerned.

~~(18)~~(24) “Staff judge advocate” means a judge advocate so designated in the Army, Air Force, or Marine Corps, and means the principal legal advisor of a command in the Navy and Coast Guard who is a judge advocate.

~~(19)~~(25) “*Sua sponte*” means that the person involved acts on that person’s initiative, without the need for a request, motion, or application.

(26) “Trial counsel,” unless otherwise specified in these rules, includes special trial counsel.

~~(20)~~(27) “UCMJ” refers to the Uniform Code of Military Justice.

~~(21)~~(28) “War, time of.” For purpose of R.C.M. 1004(c)(6) and of implementing the applicable paragraphs of Parts IV and V of this Manual only, “time of war” means a period of war declared by Congress, or the factual determination by the President that the existence of hostilities warrants a finding that a “time of war” exists for purposes of R.C.M. 1004(c)(6) and Parts IV and V of this Manual.

~~(22)~~(29) The terms “writings” and “recordings” have the same meaning as in Mil. R. Evid. 1001.

~~(23)~~(30) The definitions and rules of construction in 1 U.S.C. §§ 1 through 5 and in 10 U.S.C. §§ 101 and 801.

(b) R.C.M. 104 is amended as follows:

Rule 104. ~~Unlawful e~~Command influence

(a) ~~Generally~~ *prohibitions.*

(1) *Convening authorities and commanders.*

(A) No court-martial convening authority, or commander nor any other commanding officer, may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

(B) No court-martial convening authority, nor any other commanding officer, may deter or attempt to deter a potential witness from participating in the investigatory process or testifying at a court-martial. The denial of a request to travel at government expense or refusal to make a witness available shall not by itself constitute unlawful command influence.

(2) *All persons subject to the UCMJ.* No person subject to the UCMJ may attempt to coerce or, by any unauthorized means, attempt to influence the action of:

(A) a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any case preliminary hearing officer or convening, approving, or reviewing authority with respect to such authority's judicial acts such preliminary hearing officer's or authority's acts concerning the following: any decision to place a Servicemember into pretrial confinement; disposition decisions; rulings on pre-referral matters; findings at a preliminary hearing; convening a court-martial; decisions concerning plea agreements; selecting members; decisions concerning witness requests;

~~taking action on any clemency or deferment request; or any appellate or post-trial review of a case.~~

(B) any preliminary hearing officer or convening, approving, or reviewing authority with respect to such preliminary hearing officer's or authority's acts concerning the following:

(i) any decision to place a service members into pretrial confinement;

(ii) disposition decisions;

(iii) rulings on pre-referral matters;

(iv) findings at a preliminary hearing;

(v) convening a court-martial;

(vi) decisions concerning plea agreements;

(vii) selecting members;

(viii) decisions concerning witness requests;

(ix) taking action on the findings or sentence;

(x) taking action on any clemency or deferment request; or

(xi) any appellate or post-trial review of a case

(3) *Scope.*

(A) *Instructions.* Paragraphs (a)(1) and (2) of this rule do not prohibit general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing personnel of a command in the substantive and procedural aspects of courts-martial.

(B) *Court-martial statements.* Paragraphs (a)(1) and (2) of this rule do not prohibit statements and instructions given in open session by the military judge or counsel.

(C) *Professional supervision.* Paragraphs (a)(1) and (2) of this rule do not prohibit action by the Judge Advocate General concerned under R.C.M. 109.

(D) *Offense.* Paragraphs (a)(1) and (2) of this rule do not prohibit appropriate action against a person

for an offense committed while detailed as a military judge, counsel, or member of a court-martial, or while serving as individual counsel.

(E) General statements regarding criminal activity or offenses. Paragraphs (a)(1) and (2) of this rule do not prohibit statements regarding criminal activity or a particular criminal offense that do not advocate a particular disposition, do not advocate a particular court-martial finding or sentence, and do not relate to a particular accused.

(b) Communication between superiors and subordinates.

(1) A superior convening authority or officer may generally discuss matters to consider regarding the disposition of alleged violations of this chapter with a subordinate convening authority or officer, and a subordinate convening authority or officer may seek advice from a superior convening authority or officer regarding the disposition of an alleged offense under this chapter.

(2) No superior convening authority or officer may direct a subordinate convening authority or officer to make a particular disposition in a specific case or otherwise substitute the discretion of such authority or such officer for that of the subordinate convening authority or officer.

~~(b)~~(c) Prohibitions concerning evaluations.

(1) Evaluation of members, defense counsel, and ~~defense~~ special victims' counsel. In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the UCMJ may:

(A) Consider or evaluate the performance of duty of any such person as a member of a court-martial;

or

(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.~~

(2) *Evaluation of military judge.*

(A) *General courts-martial.* Unless the general court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of the convening authority's staff may prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge detailed to a general court-martial, which relates to the performance of duty as a military judge.

(B) *Special courts-martial.* The convening authority may not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a special court-martial which relates to the performance of duty as a military judge. When the military judge is normally rated or the military judge's report is reviewed by the convening authority, the manner in which such military judge will be rated or evaluated upon the performance of duty as a military judge may be as prescribed in regulations of the Secretary concerned which shall ensure the absence of any command influence in the rating or evaluation of the military judge's judicial performance.

(c) R.C.M. 105 is amended as follows:

Rule 105. Direct communications: convening authorities and staff judge advocates; among staff judge advocates; with special trial counsel

(a) *Convening authorities and staff judge advocates.* Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice, and may communicate directly with special trial counsel, though any input by the convening authority regarding case dispositions shall be non-binding on the special trial counsel for cases involving covered, known, and related offenses.

(b) *Among staff judge advocates and with the Judge Advocate General.* The staff judge advocate of any command is entitled to communicate directly with the staff judge advocate of a superior or subordinate

command, the Judge Advocate General, or, in the case of the Marine Corps, the Staff Judge Advocate to the Commandant of the Marine Corps.

(c) Communications between special trial counsel, staff judge advocates, and convening authorities. Special trial counsel, staff judge advocates, and convening authorities may communicate directly while ensuring that all communications regarding case disposition for covered, related, and known offenses are non-binding on the special trial counsel, and free from unlawful or unauthorized influence or coercion.

(d) R.C.M. 201 is amended as follows:

(a) Nature of courts-martial jurisdiction.

(1) The jurisdiction of courts-martial is entirely penal or disciplinary.

(2) The UCMJ applies in all places.

(3) The jurisdiction of a court-martial with respect to offenses under the UCMJ is not affected by the place where the court-martial sits. The jurisdiction of a court-martial with respect to military government or the law of war is not affected by the place where the court-martial sits except as otherwise expressly required by this Manual or applicable rule of international law.

(b) Requisites of court-martial jurisdiction. A court- martial always has jurisdiction to determine whether it has jurisdiction. Otherwise for a court-martial to have jurisdiction:

(1) The court-martial must be convened by an official empowered to convene it;

(2) The court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here “personnel” includes only the military judge, the members, and the summary court-martial;

(3) Each charge before the court-martial must be referred to it by competent authority;

(4) The accused must be a person subject to court- martial jurisdiction; and

(5) The offense must be subject to court-martial jurisdiction.

(c) [Reserved].

(d) Exclusive and nonexclusive jurisdiction.

(1) Courts-martial have exclusive jurisdiction of purely military offenses.

(2) An act or omission ~~that~~ ~~which~~ violates both the UCMJ and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal, foreign or domestic, or, subject to R.C.M. 907(b)(2)(C) and regulations of the Secretary concerned, by both.

(3) Where an act or omission is subject to trial by court-martial and by one or more civil tribunals, foreign or domestic, the determination which nation, state, or agency will exercise jurisdiction is a matter for the nations, states, and agencies concerned, and is not a right of the suspect or accused.

(e) Reciprocal jurisdiction.

(1) Each armed force has court-martial jurisdiction over all persons subject to the UCMJ.

(2) *Convening Authorities.*

(A) A commander of a unified or specified combatant command may convene courts-martial over members of any of the armed forces.

(B) So much of the authority vested in the President under Article 22(a)(9) to empower any commanding officer of a joint command or joint task force to convene courts-martial is delegated to the Secretary of Defense, and such a commanding officer may convene general courts-martial for the trial of members of any of the armed forces assigned or attached to a combatant command or joint command.

(C) A commander who is empowered to convene a court-martial under subparagraphs (e)(2)(A) or (e)(2)(B) of this rule may expressly authorize a commanding officer of a subordinate joint command or subordinate joint task force, who is authorized to convene special and summary courts-martial, to convene such courts-martial for the trial of members of other armed forces assigned or attached to a joint command or joint task force, under regulations which the superior command may prescribe.

(3) *Convening a court-martial by a different armed force.*

(A) An accused should not ordinarily be tried by a court-martial convened by a member of a different armed force except when the circumstances described in subparagraphs (e)(2)(A) or (e)(2)(B) exist. However, failure to comply with this policy does not affect an otherwise valid referral.

(B) The non-binding policy stated by subparagraph (e)(3)(A) does not apply when one or more of the following circumstances exists:

(i) The court-martial is convened by a commander authorized to convene courts-martial under subparagraph (e)(2) of this rule;

(ii) The accused cannot be delivered to the armed force of which the accused is a member without manifest injury to the armed forces;

(iii) The court-martial is convened by a member of the Space Force to try a member of the Air Force; or

(iv) The court-martial is convened by a member of the Air Force to try a member of the Space Force.

~~(3) A member of one armed force may be tried by a court-martial convened by a member of another armed force, using the implementing regulations and procedures prescribed by the Secretary concerned of the military service of the accused, when:~~

~~(A) The court-martial is convened by a commander authorized to convene courts-martial under paragraph (e)(2) of this rule; or~~

~~(B) The accused cannot be delivered to the armed force of which the accused is a member without manifest injury to the armed forces.~~

~~An accused should not ordinarily be tried by a court-martial convened by a member of a different armed force except when the circumstances described in (A) or (B) exist. However, failure to comply with this policy does not affect an otherwise valid referral.~~

(4) Nothing in this rule prohibits detailing to a court-martial a military judge, member, or counsel who is a member of an armed force different from that of the accused or the convening authority, or both.

(5) ~~In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required by the UCMJ, shall be carried out by the department that includes the armed force of which the accused is a member. When a member of~~

one armed force is tried by a court-martial convened by a member of another armed force, the court-martial will use the implementing regulations and procedures prescribed by the Secretary concerned of the military service of the accused. In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required by the UCMJ, shall be carried out by the department that includes the armed force of which the accused is a member.

~~(6) When there is a disagreement between the Secretaries of two military departments or between the Secretary of a military department and the commander of a unified or specified combatant command or other joint command or joint task force as to which organization should exercise jurisdiction over a particular case or class of cases, the Secretary of Defense or an official acting under the authority of the Secretary of Defense shall designate which organization will exercise jurisdiction.~~

~~(6)(7) Except as provided in paragraphs (5) and (6) or as Unless otherwise directed by the President or Secretary of Defense, whenever action under this Manual is required or authorized to be taken by a person superior to—~~

~~(A) a commander of a unified or specified combatant command; or~~

~~(B) a commander of any other joint command or joint task force that is not part of a unified or specified combatant command,~~

~~the matter shall be referred to the Secretary of the armed force of which the accused is a member. The Secretary may convene a court-martial, take other appropriate action, or, subject to R.C.M. 504(c), refer the matter to any person authorized to convene a court-martial of the accused.~~

(7) When there is a disagreement between the Secretaries of two military departments or between the Secretary of a military department and the commander of a unified or specified combatant command or other joint command or joint task force as to which organization should exercise jurisdiction over a particular case or class of cases, the Secretary of Defense or an official acting under the authority of the Secretary of Defense shall designate which organization will exercise jurisdiction.

(f) *Types of courts-martial.*

[Note: R.C.M. 201(f)(1)(D) and (f)(2)(D) apply to offenses committed on or after 24 June 2014.]

(1) *General courts-martial.*

(A) *Cases under the UCMJ.*

(i) Except as otherwise expressly provided, general courts-martial may try any person subject to the UCMJ for any offense made punishable under the UCMJ. General courts-martial also may try any person for a violation of Articles 103, 103b, or 104a.

(ii) Upon a finding of guilty of an offense made punishable by the UCMJ, a general courts-martial may, within limits prescribed by this Manual, adjudge any punishment authorized under R.C.M. 1003.

(iii) Notwithstanding any other rule, the death penalty may not be adjudged if:

(a) Not specifically authorized for the offense by the UCMJ and Part IV of this Manual; or

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

(B) *Cases under the law of war.*

(i) General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against:

(a) The law of war; or

(b) The law of the territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or part by the military authority of the occupying power. The law of the occupied territory includes the local criminal law as adopted or modified by competent authority, and the proclamations, ordinances, regulations, or orders promulgated by competent authority of the occupying power.

(ii) When a general court-martial exercises jurisdiction under the law of war, it may adjudge any punishment permitted by the law of war.

(C) *Limitations in judge alone cases.* A general court-martial composed only of a military judge does not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been referred to trial as noncapital.

(D) *Jurisdiction for Certain Sexual Offenses.* Only a general court-martial has jurisdiction to try offenses under Articles 120(a), 120(b), 120b(a), and 120b(b), and attempts thereof under Article 80.

(2) *Special courts-martial.*

(A) *In general.* Except as otherwise expressly provided, special courts-martial may try any person subject to the UCMJ for any noncapital offense made punishable by the UCMJ and, as provided in this rule, for capital offenses.

(B) *Punishments.*

(i) Upon a finding of guilty, special courts-martial may adjudge, under limitations prescribed by this Manual, any punishment authorized under R.C.M. 1003, except death, dishonorable discharge, dismissal, confinement for more than 1 year, hard labor without confinement for more than 3 months, forfeiture of pay exceeding two-thirds pay per month, or any forfeiture of pay for more than 1 year.

(ii) A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may not be adjudged by a special court-martial when the case is referred as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

(C) *Capital offenses.*

(i) A capital offense for which there is prescribed a mandatory punishment beyond the punitive power of a special court-martial shall not be referred to such a court-martial.

~~(ii) An officer exercising general court-martial convening jurisdiction over the command which includes the accused may permit any capital offense other than one described in clause (C)(i) to be referred to a special court-martial for trial.~~

(ii) Other than offenses described in (C)(i):

(I) a general court-martial convening authority over the command that includes the accused may permit any capital offense to be referred to a special court-martial for trial

(II) a special trial counsel exercising authority over a capital offense may refer such an offense to special court-martial for trial.

~~(iii)(III)~~ The Secretary concerned may authorize, by regulation, ~~officers exercising special court-martial jurisdiction~~ special court-martial convening authorities to refer capital offenses, ~~other than those described in clause (C)(i)~~, to trial by special court-martial without first obtaining the consent of the ~~officer exercising~~ general court-martial convening authority. ~~jurisdiction over the command.~~

(D) *Certain Offenses under Articles 120 and 120b.* Notwithstanding subparagraph (f)(2)(A), special courts-martial do not have jurisdiction over offenses under Articles 120(a), 120(b), 120b(a), and 120b(b), and attempts thereof under Article 80. Such offenses shall not be referred to a special court-martial.

(E) *Limitations on trial by special court-martial consisting of a military judge alone.*

(i) No specification may be tried by a special court-martial consisting of a military judge alone under Article 16(c)(2)(A) if, before arraignment, the accused objects on the grounds provided in subclause (I) or (II) of this subparagraph and the military judge determines that:

(I) the maximum authorized confinement for the offense it alleges would be greater than two years if the offense were tried by a general court-martial, with the exception of a specification alleging wrongful use or possession of a controlled substance in violation of Article 112a(b) or an attempt thereof under Article 80; or

(II) the specification alleges an offense for which sex offender notification would be required under regulations issued by the Secretary of Defense.

(ii) If the accused objects to trial by a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), and the military judge makes a determination under clause (i), trial may be ordered by a special court-martial under Article 16(c)(1) or a general court-martial as may be appropriate.

(3) *Summary courts-martial.* See R.C.M. 1301(c) and (d)(1).

(g) *Concurrent jurisdiction of other military tribunals.* The provisions of the UCMJ and this Manual conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

(e) R.C.M. 301 is amended as follows:

(a) *Who may report.* Any person may report an offense subject to trial by court-martial.

(b) *To whom reports conveyed* ~~for disposition~~. Ordinarily, any military authority who receives a report of an offense shall forward as soon as practicable the report and any accompanying information to the immediate commander of the suspect. Competent authority superior to that commander may direct otherwise.

(c) *Special trial counsel.* All allegations of covered offenses shall be forwarded promptly to a special trial counsel. A special trial counsel shall have the authority to determine whether a reported offense is a covered, known, or related offense in accordance with R.C.M. 303A.

(f) R.C.M. 302 is amended as follows:

(a) *Definition and scope.*

(1) *Definition.* Apprehension is the taking of a person into custody.

(2) *Scope.* This rule applies only to apprehensions made by persons authorized to do so under subsection (b) of this rule with respect to offenses subject to trial by court-martial. Nothing in this rule limits the authority of federal law enforcement officials to apprehend persons, whether or not subject to trial by court-martial, to the extent permitted by applicable enabling statutes and other law.

(b) *Who may apprehend.* The following officials may apprehend any person subject to trial by court-martial:

(1) *Military law enforcement officials.* ~~Security police, military police, master at arms personnel, members of the shore patrol, and p~~ Persons designated by proper authorities to perform military criminal investigative, guard, or police duties, whether subject to the UCMJ or not, when in each of the foregoing instances, the official making the apprehension is in the execution of law enforcement duties;

(2) *Commissioned, warrant, petty, and noncommissioned officers.* All commissioned, warrant, petty, and noncommissioned officers on active duty or inactive duty training;

(3) *Civilians authorized to apprehend deserters.* Under Article 8, any civilian officer having authority to apprehend offenders under laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia, when the apprehension is of a deserter from the armed forces.

(c) *Grounds for apprehension.* A person subject to the UCMJ or trial thereunder may be apprehended for an offense triable by court-martial upon probable cause to apprehend. Probable cause to apprehend exists when there ~~are~~ is a reasonable ~~grounds~~ belief ~~to believe~~ that an offense has been or is being committed and the person to be apprehended committed or is committing it. Persons authorized to apprehend under paragraph (b)(2) of this rule may also apprehend persons subject to the UCMJ who take part in quarrels, frays, or disorders, wherever they occur.

(d) *How an apprehension may be made.*

(1) *In general.* An apprehension is made by clearly notifying the person to be apprehended that person is in custody. This notice should be given orally or in writing, but it may be implied by the circumstances.

(2) *Warrants.* Neither warrants nor any other authorizations shall be required for an apprehension under these rules except as required in paragraph (e)(2) of this rule.

(3) *Use of force.* Any person authorized under these rules to make an apprehension may use such force and means as reasonably necessary under the circumstances to effect the apprehension.

(e) *Where an apprehension may be made.*

(1) *In general.* An apprehension may be made at any place, except as provided in paragraph (e)(2) of this rule.

(2) *Private dwellings.* A private dwelling includes dwellings, on or off a military installation, such as single family houses, duplexes, and apartments. The quarters may be owned, leased, or rented by the residents, or assigned, and may be occupied on a temporary or permanent basis. "Private dwelling" does not include the following, whether or not subdivided into individual units: living areas in military barracks, vessels, aircraft, vehicles, tents, bunkers, field encampments, and similar places. No person may enter a private dwelling for the purpose of making an apprehension under these rules unless:

(A) Pursuant to consent under Mil. R. Evid. 314(e) or 316(c)(3);

(B) There is a reasonable belief that the delay necessary to obtain a ~~search~~ warrant or ~~search~~ authorization would result in the person sought to be taken into custody evading apprehension;

(C) In the case of a private dwelling which is military property or under military control, or nonmilitary property in a foreign country

(i) if the person to be apprehended is a resident of the private dwelling, there exists, at the time of the entry, reason to believe that the person to be apprehended is present in the dwelling, and the apprehension has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause to apprehend the person exists; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the entry has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause exists to apprehend the person and to believe that the person to be apprehended is or will be present at the time of the entry.

(D) In the case of a private dwelling not included in subparagraph (e)(2)(C) of this rule,

(i) if the person to be apprehended is a resident of the private dwelling, there exists at the time of the entry, reason to believe that the person to be apprehended is present and the apprehension is authorized by an arrest warrant issued by competent civilian authority; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority. A person who is not a resident of the private dwelling entered may not challenge the legality of an apprehension of that person on the basis of failure to secure a warrant or authorization to enter that dwelling, or on the basis of the sufficiency of such a warrant or authorization. Nothing in paragraph (e)(2)) affects the legality of an apprehension which is incident to otherwise lawful presence in a private dwelling.

(g) R.C.M. 303 is amended as follows:

Except for covered offenses as defined by Article 1(17), UCMJ, Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses. A commander who receives a report of a covered offense shall promptly forward the report to a special trial counsel in accordance with R.C.M. 301(c) and regulations prescribed by the Secretary concerned.

(h) R.C.M. 303A is added as follows:

Rule 303A. Determination by special trial counsel to exercise authority

(a) Initial determination. A special trial counsel has the exclusive authority to determine if a reported offense is a covered offense.

(b) Covered offense. If a special trial counsel determines that a reported offense is a covered offense or receives a preferred charge alleging a covered offense, special trial counsel shall exercise authority over that covered offense.

(c) Related offenses. If a special trial counsel exercises authority pursuant to subsection (b), special trial counsel may also exercise authority over any reported offense or charge related to a covered offense, whether alleged to have been committed by the suspect of the covered offense or by anyone else subject to the UCMJ.

(d) Known offenses. If special trial counsel exercises authority pursuant to subsection (b), special trial counsel may also exercise authority over any offense or charge alleged to have been committed by the suspect of the covered offense.

(e) Notification to command. When a special trial counsel exercises authority over any reported offense, special trial counsel shall notify the officer exercising special court-martial convening authority over the suspect.

(i) R.C.M. 304 is amended as follows:

(a) *Types of pretrial restraint.* Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.

(1) *Conditions on liberty.* Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.

(2) *Restriction in lieu of arrest.* Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

(3) *Arrest.* Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(4) *Confinement.* Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. *See* R.C.M. 305.

(b) *Who may order pretrial restraint.*

(1) *Of civilians and officers.* Only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer.

(2) *Of enlisted persons.* Any commissioned officer may order pretrial restraint of any enlisted person.

(3) *Delegation of authority.* The authority to order pretrial restraint of civilians and commissioned and warrant officers may not be delegated. A commanding officer may delegate to warrant, petty, and noncommissioned officers authority to order pretrial restraint of enlisted persons of the commanding officer's command or subject to the authority of that commanding officer.

(4) *Authority to withhold.* A superior competent authority may withhold from a subordinate the authority to order pretrial restraint.

(c) *When a person may be restrained.* No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

- (1) An offense triable by court-martial has been committed;
- (2) The person to be restrained committed it; and
- (3) The restraint ordered is required by the circumstances.

(d) *Procedures for ordering pretrial restraint.* Pretrial restraint other than confinement is imposed by notifying the person orally or in writing of the restraint, including its terms or limits. The order to an enlisted person shall be delivered personally by the authority who issues it or through other persons subject to the UCMJ. The order to an officer or a civilian shall be delivered personally by the authority who issues it or by another commissioned officer. Pretrial confinement is imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement.

(e) *Notice of basis for restraint.* When a person is placed under restraint, the person shall be informed of the nature of the offense which is the basis for such restraint.

(f) *Notification to Special Trial Counsel.* If a person who is alleged to have committed a covered offense is placed under restraint as defined in R.C.M. 304(a), the individual ordering restraint shall immediately notify a special trial counsel in accordance with regulations prescribed by the Secretary concerned.

~~(g)~~ *Punishment prohibited.* Pretrial restraint is not punishment and shall not be used as such. No person who is restrained pending trial may be subjected to punishment or penalty for the offense which is the basis for that restraint. Prisoners being held for trial shall not be required to undergo punitive duty hours or training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners. This rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement. Prisoners shall be afforded facilities and treatment under regulations of the Secretary concerned.

~~(g)~~(h) *Release.* Except as otherwise provided in R.C.M. 305, a person may be released from pretrial restraint by a person authorized to impose it. Pretrial restraint shall terminate when a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed.

~~(h)~~(i) *Administrative restraint.* Nothing in this rule prohibits limitations on a service member imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons.

(j) R.C.M. 305 is amended as follows:

(a) *In general.* Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

(b) *Who may be confined.* Any person who is subject to trial by court-martial may be confined if the requirements of this rule are met.

(c) *Who may order confinement.* See R.C.M. 304(b).

(d) *When a person may be confined.* No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

- (1) An offense triable by court-martial has been committed;
- (2) The person confined committed it; and
- (3) Confinement is required by the circumstances.

(e) *Advice to the accused upon confinement.* Each person confined shall be promptly informed of:

- (1) The nature of the offenses for which held;
- (2) The right to remain silent and that any statement made by the person may be used against the person;
- (3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and
- (4) The procedures by which pretrial confinement will be reviewed.

(f) Notification to Special Trial Counsel. If a person who is alleged to have committed a covered offense is ordered into pretrial confinement, the individual ordering confinement shall immediately notify a special trial counsel in accordance with regulations prescribed by the Secretary concerned.

~~(g)~~(g) *Military counsel.* If requested by the confinee and such request is made known to military authorities, military counsel shall be provided to the confinee before the initial review under subsection ~~(i)~~ (j) of this rule or within 72 hours of such a request being first communicated to military authorities, whichever occurs first. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the confinee shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a confinee does not have a right under this rule to have military counsel of the confinee's own selection.

~~(g)~~(h) *Who may direct release from confinement.* Any commander of a confinee, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection ~~(i) or (j)~~ (j) or (k) of this rule, or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred, may direct release from pretrial confinement. For purposes of this subsection, "any commander" includes the immediate or higher commander of the confinee and the commander of the installation on which the confinement facility is located.

~~(h)~~(i) *Notification and action by commander.*

(1) *Report.* Unless the commander of the confinee ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer into whose charge the confinee was committed shall, within 24 hours after that commitment, cause a report to be made to the commander that shall contain the name of the confinee, the offenses charged against the confinee, and the name of the person who ordered or authorized confinement.

(2) *Action by commander.*

(A) *Decision.* Not later than 72 hours after the commander's ordering of a confinee into pretrial confinement or, after receipt of a report that a member of the commander's unit or organization has been

confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue. A commander's compliance with this subparagraph may also satisfy the 48-hour probable cause determination of paragraph ~~(h)~~(j)(1) of this rule, provided the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control. Nothing in subsection (d), paragraph ~~(h)~~(j)(1), or this subparagraph prevents a neutral and detached commander from completing the 48-hour probable cause determination and the 72-hour commander's decision immediately after an accused is ordered into pretrial confinement.

(B) *Requirements for confinement.* The commander shall direct the confinee's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

- (i) An offense triable by a court-martial has been committed;
- (ii) The confinee committed it;
- (iii) Confinement is necessary because it is foreseeable that:
 - (a) The confinee will not appear at trial, pretrial hearing, or preliminary hearing, or
 - (b) The confinee will engage in serious criminal misconduct; and
- (iv) Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

(C) *72-hour memorandum.* If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subparagraph ~~(h)~~(i)(2)(B) of this rule have been met. This memorandum may include hearsay and may

incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the 7-day reviewing officer under paragraph (i)(2) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time.

~~(i)~~ (i) *Procedures for review of pretrial confinement.*

(1) *48-hour probable cause determination.* Review of the adequacy of probable cause to continue pretrial confinement shall be made by a neutral and detached officer within 48 hours of imposition of confinement under military control. If the confinee is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the confinee under military control in a timely fashion.

(2) *7-day review of pretrial confinement.* Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement under military control shall count as one day and the date of the review shall also count as one day.

(A) *Nature of the 7-day review.*

(i) *Matters considered.* The review under this subsection shall include a review of the memorandum submitted by the confinee's commander under subparagraph (i)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the confinee. The confinee and the confinee's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable. A representative of the command may also appear before the reviewing officer to make a statement.

(ii) *Rules of evidence.* Except for Mil. R. Evid., Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.

(iii) *Standard of proof.* The requirements for confinement under subparagraph (h)(2)(B) of this rule must be proved by a preponderance of the evidence.

(iv) *Victim's right to be reasonably heard.* A victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the 7-day review; the right to confer with the representative of the command and counsel for the ~~g~~Government, if any; and the right to be reasonably heard during the review. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel and the right to be reasonably protected from the confinee during the 7-day review. The victim of an alleged offense shall be notified of these rights in accordance with regulations of the Secretary concerned.

(B) *Extension of time limit.* The 7-day reviewing officer may, for good cause, extend the time limit for completion of the review to 10 days after the imposition of pretrial confinement.

(C) *Action by 7-day reviewing officer.* Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release. If the reviewing officer orders immediate release, a victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the release, unless such notice may endanger the safety of any person.

(D) *Memorandum.* The 7-day reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. The memorandum shall also state whether the victim was notified of the review, was given the opportunity to confer with the representative of the command or counsel for the ~~g~~Government, and was given a reasonable opportunity to be heard. A copy of the memorandum and all documents considered by the 7-day reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(E) *Reconsideration of approval of continued confinement.* The 7-day reviewing officer shall upon request, and after notice to the parties, reconsider the decision to confine the confinee based upon any significant information not previously considered.

~~(j)~~(k) *Review by military judge.* Once the charges for which the accused has been confined are referred to trial, or in a pre-referral proceeding conducted in accordance with R.C.M. 309, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) *Release.* The military judge shall order release from pretrial confinement only if:

(A) The 7-day reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subparagraph ~~(h)~~(i)(2)(B) of this rule;

(B) Information not presented to the 7-day reviewing officer establishes that the confinee should be released under subparagraph ~~(h)~~(i)(2)(B) of this rule; or

(C) The provisions of paragraph ~~(i)~~(j)(1) or (2) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subparagraph ~~(h)~~(i)(2)(B) of this rule.

(2) *Credit.* Upon sentencing, the military judge shall order administrative credit under subsection ~~(k)~~(l) of this rule for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions of subsections ~~(f)~~(g), ~~(h)~~(i), or ~~(i)~~(j) of this rule.

~~(h)~~(l) *Remedy.* The remedy for noncompliance with subsections ~~(f)~~(g), ~~(h)~~(i), ~~(i)~~(j), or ~~(j)~~(k) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied against hard labor without confinement using the conversion formula under R.C.M. 1003(b)(6), restriction using the conversion formula under R.C.M. 1003(b)(5), fine, and forfeiture of pay,

in that order. For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

~~(f)~~ (m) *Confinement after release.* No person whose release from pretrial confinement has been directed by a person authorized in subsection ~~(g)~~ (h) of this rule may be confined again before completion of trial except upon discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

~~(m)~~ (n) *Exceptions.*

(1) *Operational necessity.* The Secretary of Defense may suspend application of paragraphs (e)(3), (e)(4), subsection ~~(f)~~ (g), subparagraphs ~~(h)~~ (i)(2)(A) and (C), and subsection ~~(i)~~ (j) of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) *At sea.* Paragraphs (e)(3) and (e)(4), subsection ~~(f)~~ (g), subparagraph ~~(h)~~ (i)(2)(C), and subsection ~~(i)~~ (j) of this rule shall not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subparagraph ~~(h)~~ (i)(2)(C) of this rule shall be transmitted to the reviewing officer under subsection ~~(i)~~ (j) of this rule and shall include an explanation of any delay in the transfer.

~~(n)~~ (o) *Notice to victim of escaped confinee.* A victim of an alleged offense committed by the confinee for which the confinee has been placed in pretrial confinement has the right to reasonable, accurate, and timely notice of the escape of the prisoner, unless such notice may endanger the safety of any person.

(k) R.C.M. 306 is amended as follows:

Rule 306. Initial disposition for offenses over which special trial counsel does not exercise authority

(a) *Who may dispose of offenses.*

(1) Except for offenses over which a special trial counsel has exercised authority and has not deferred, Each commander has discretion to dispose of offenses by members of that command in accordance with this rule.

(2) Ordinarily the immediate commander of a person accused or suspected of committing an such offenses triable by court martial initially determines how to dispose of ~~that~~ those offenses. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

(b) *Policy.* Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.

(c) ~~How offenses may be disposed of~~ Disposition of offenses. Within the limits of the commander's authority and subject to R.C.M. 306A, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense.

(1) *No action.* A commander may decide to take no action ~~on an offense. If charges have been preferred, they may be dismissed.~~

(2) *Administrative action.* A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned. Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.

(3) *Nonjudicial punishment.* A commander may take consider the matter ~~action~~ pursuant to Article 15, nonjudicial punishment. *See Part V.*

(4) *Disposition of charges.* Charges may be disposed of in accordance with R.C.M. 401.

(5) *Forwarding for disposition.* A commander may forward ~~a matter concerning an~~ report of a suspected offense, or charges, to a superior or subordinate authority for disposition.

(d) *National security matters.* If a commander not authorized to convene general courts-martial finds that an offense warrants trial by court-martial, but believes that trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the general court-martial convening authority for action under R.C.M. 407(b).

(e) *Sex-related offenses*

(1) For purposes of this subsection, a “sex-related offense” means any allegation of a violation of Article 120, 120b, 120c, or 130, or any attempt thereof under Article 80, UCMJ, occurring on or before December 27, 2023.

(2) Under such regulations as the Secretary concerned may prescribe, for alleged sex-related offenses committed in the United States, the victim of the sex-related offense shall be provided an opportunity to express views as to whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense. The commander and if charges are preferred, the convening authority, shall consider such views as to the victim’s preference for jurisdiction, if available, prior to making an initial disposition decision. For purposes of this rule, “victim” is defined as an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an alleged sex-related offense as defined in paragraph (e)(1) of this rule.

(3) Under such regulations as the Secretary concerned may prescribe, if the victim of an alleged sex-related offense expresses a preference for prosecution of the offense in a civilian court, the commander, and if charges are preferred, the convening authority, shall ensure that the civilian authority with jurisdiction over the offense is notified of the victim’s preference for civilian prosecution. If the commander and, if charges are preferred, the convening authority learns of any decision by the civilian authority to prosecute or not prosecute the offense in civilian court, the commander or convening authority shall ensure the victim is notified.

(I) R.C.M. 306A is added as follows:

Rule 306A. Initial disposition for offenses over which special trial counsel exercises authority

(a) Disposition of offenses that are not the subject of preferred charges. For each offense over which a special trial counsel has exercised authority, a special trial counsel shall:

(1) Prefer, or cause to be preferred, a charge; or

(2) Defer the offense by electing not to prefer a charge. If a special trial counsel defers the offense, special trial counsel shall promptly forward the offense to a commander or convening authority for disposition, and the commander or convening authority shall dispose of the offense pursuant to R.C.M. 306.

(b) Disposition of a preferred specification. Special trial counsel shall dispose of each preferred specification in accordance with R.C.M. 401A.

(c) National security matters. If a commander believes trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the Secretary concerned for action.

(d) Sex-related offenses.

(1) For purposes of this subsection, a “sex-related offense” means any allegation of a violation of Article 120, 120b, 120c, or 130, or any attempt thereof under Article 80, UCMJ.

(2) Under such regulations as the Secretary concerned may prescribe, for alleged sex-related offenses committed in the United States, the victim of the sex-related offense shall be provided an opportunity to express views as to whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense. Special trial counsel shall consider such views as to the victim’s preference for jurisdiction, if available, prior to making an initial disposition decision. For purposes of this rule, “victim” is defined as an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an alleged sex-related offense as defined in paragraph (d)(1) of this rule.

(3) Under such regulations as the Secretary concerned may prescribe, if the victim of an alleged sex-related offense expresses a preference for prosecution of the offense in a civilian court, special trial counsel shall ensure that the civilian authority with jurisdiction over the offense is notified of the victim’s preference for civilian prosecution. If special trial counsel learns of any decision by the civilian authority to prosecute or not prosecute the offense in civilian court, special trial counsel shall ensure the victim is notified.

(m) R.C.M. 307 is amended as follows:

Rule 307. Preferral of charges

(a) ~~Who may prefer charges~~ In general. In accordance with R.C.M. 307(b), preferral is the act by which a person subject to the UCMJ formally accuses another person subject to the UCMJ of an offense. Any person subject to the UCMJ may prefer charges.

(b) *How charges are preferred; oath.* In preferring charges and specifications —

(1) The person preferring the charges and specifications must sign them under oath before a commissioned officer of the armed forces authorized to administer oaths; and

(2) The writing under paragraph (1) must state that—

(A) the signer has personal knowledge of, or has investigated, the matters set forth in the charges and specifications; and

(B) the matters set forth in the charges and specifications are true to the best of the knowledge and belief of the signer.

(3) Any procedure, including those by remote means, which appeals to the conscience of the person to whom the oath is administered and which binds that person to properly perform that person's duties under this rule, is sufficient.

(c) *How to allege offenses.*

(1) *In general.* The format of charge and specification is used to allege violations of the UCMJ.

(2) *Charge.* A charge states the article of the UCMJ, law of war, or local penal law of an occupied territory which the accused is alleged to have violated.

(3) *Specification.* A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication; however, specifications under Article 134 must expressly allege the terminal element. Except for aggravating factors under R.C.M. 1003(d) and R.C.M. 1004, facts

that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required.

(4) *Multiple offenses.* Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.

(5) *Multiple offenders.* A specification may name more than one person as an accused if each person so named is believed by the accuser to be a principal in the offense which is the subject of the specification.

(d) *Harmless error in citation.* Error in or omission of the designation of the article of the UCMJ or other statute, law of war, or regulation violated shall not be ground for dismissal of a charge or reversal of a conviction if the error or omission did not prejudicially mislead the accused.

(n) R.C.M. 308 is amended as follows:

Rule 308. Notification to accused of charges and required disclosures

(a) *Immediate commander.* The immediate commander of the accused shall cause the accused to be informed of the charges preferred against the accused, and the name of the person who preferred the charges and of any person who ordered the charges to be preferred, if known, as soon as practicable.

(b) *Commanders at higher echelons.* When the accused has not been informed of the charges, commanders at higher echelons to whom the preferred charges are forwarded shall cause the accused to be informed of the matters required under subsection (a) of this rule as soon as practicable.

(c) *Disclosures generally.* Except as otherwise provided in subparagraph (d) of this rule and as soon as practicable after notification to the accused of preferred charges, counsel for the Government shall provide the defense with copies of the charges and any books, papers, documents, data, photographs, or tangible objects that accompanied the charges when they were preferred. If extraordinary circumstances make it impracticable to provide copies, Government counsel shall permit the defense to inspect these items.

(d) *Information not subject to disclosure.*

(1) Military Rules of Evidence. Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence.

(2) Work Product. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives.

(3) Contraband. If items covered by subsection (d) of this rule are contraband, the disclosure required under this rule is a reasonable opportunity to inspect said contraband prior to the preliminary hearing.

(4) Privilege. If items covered by subsection (d) of this rule are privileged, classified, or otherwise protected under Section V of Part III, the Military Rules of Evidence, no disclosure of those items is required under this rule. However, counsel for the Government may disclose privileged, classified, or otherwise protected information covered by subsection (a) of this rule if authorized by the holder of the privilege, or in the case of Mil. R. Evid. 505 or 506, if authorized by a competent authority.

(5) Protective order if privileged information is disclosed. If the Government agrees to disclose to the accused information to which the protections afforded by Section V of Part III may apply, the convening authority, special trial counsel, or other person designated by regulation of the Secretary concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(2)–(6) or 506(g)(2)–(5).

~~(e)~~(e) *Remedy.* The sole remedy for violation of this rule is a continuance or recess of sufficient length to permit the accused to adequately prepare a defense, and no relief shall be granted upon a failure to comply with this rule unless the accused demonstrates that the accused has been hindered in the preparation of a defense.

(o) R.C.M. 309 is amended as follows:

(a) *In general.*

(1) A military judge detailed under regulations of the Secretary concerned may conduct proceedings under Article 30a before referral of charges and specifications to court-martial for trial, and may issue such rulings and orders as necessary to further the purpose of the proceedings. A military judge may issue such orders and rulings only when the matters would be subject to consideration by a military judge in a general or special court-martial.

(2) The matters that may be considered and ruled upon by a military judge ~~in proceeding~~ under this rule are limited to those matters specified in subsection (b).

(3) If any matter in a proceeding under this rule becomes a subject at issue with respect to charges that have been referred to a general or special court-martial, the matter, to include any motions, related papers, and the record of the hearing, if any, shall be provided to the military judge detailed to the court-martial.

(b) *Pre-referral matters.*

(1) *Pre-referral investigative subpoenas.* A military judge may, upon application by the Government, consider whether to issue a pre-referral investigative subpoena under R.C.M. 703(g)(3)(C). The proceeding may be conducted *ex parte* and may be conducted *in camera*.

(2) *Pre-referral warrants or orders for wire or electronic communications.* A military judge may, upon written application by a federal law enforcement officer or authorized counsel for the Government in connection with an ongoing investigation of an offense or offenses under the UCMJ, consider whether to issue a warrant or order for wire or electronic communications and related information as provided under R.C.M. 703A. The proceeding may be conducted *ex parte* and may be conducted *in camera*.

(3) *Pre-referral depositions.* A military judge may, upon application by a party, consider whether to order a pre-referral deposition under R.C.M. 702(b)(2).

~~(3)~~(4) *Requests for relief from subpoena or other process.* A person in receipt of a pre-referral investigative subpoena under R.C.M. 703(g)(3)(C), a victim named in a specification whose personal and confidential information has been subpoenaed under R.C.M. 703(g)(3)(C)(ii), ~~or~~ a service provider in receipt of a warrant or court order to disclose information about wire or electronic communications under

R.C.M. 703A(b) or (c), or a person ordered for a deposition under R.C.M. 702(b)(2) may request relief on grounds that compliance with the subpoena, warrant, ~~or~~ order, or deposition is unreasonable, oppressive or prohibited by law. The military judge shall review the request and shall either order the person or service provider to comply with the subpoena, warrant, ~~or~~ order, or deposition, or modify or quash the subpoena, warrant, ~~or~~ order, or deposition as appropriate. In a proceeding under this paragraph, the United States shall be represented by an authorized counsel for the Government.

~~(4)~~(5) *Pre-referral matters referred by an appellate court.* When a Court of Criminal Appeals or the Court of Appeals for the Armed Forces, in the course of exercising the jurisdiction of such court, remands the case for a pre-referral judicial proceeding, a military judge may conduct such a proceeding under this rule. This includes matters referred by a Court of Criminal Appeals under subsection (e) of Article 6b.

~~(5)~~(6) *Pre-referral matters under subsection (c) of Article 6b.* The military judge may designate a suitable person to assume the rights of a victim who is under 18 years of age (but who is not a member of the armed forces), or who is incompetent, incapacitated, or deceased.

~~(6)~~(7) *Pretrial confinement of an accused.* After action by the 7-day reviewing officer under R.C.M. 305(i)(2)(C), a military judge may, upon application of an accused for appropriate relief, review the propriety of pretrial confinement. A military judge may order release from pretrial confinement under the provisions of R.C.M. 305(j)(1).

~~(7)~~(8) *The mental capacity or mental responsibility of an accused.*

(A) A military judge may, under the provisions of R.C.M. 706(b)(1), order an inquiry into the mental capacity or mental responsibility of an accused before referral of charges. The proceeding may be conducted ex parte and may be conducted in camera.

(B) A military judge may, under the provisions of R.C.M. 909, conduct a hearing to determine the mental capacity of the accused.

~~(8)~~(9) A request for individual military counsel. When an accused requests individual military counsel prior to charges being referred to a general or special court-martial, a military judge may review the request subject to the provisions of R.C.M. 506(b).

~~(9)~~(10) Appointment of individuals to assume rights for certain victims. A military judge may appoint a suitable individual to assume the rights of a victim prior to referral of charges. Upon appointment by the military judge, the legal guardian of the victim, the representative of the victim's estate, a family member, or any other person designated as suitable by the military judge, may assume the rights of the victim. Under no circumstances may the military judge designate the accused to assume the rights of the victim.

~~(10)~~(11) Victim's petition for relief.

(A) A victim of an offense under the UCMJ, as defined in Article 6b(b), may file a motion pre-referral requesting that a military judge require a preliminary hearing officer conducting a preliminary hearing under R.C.M. 405 to comply with:

(i) Articles 6b or 32, UCMJ;

(ii) R.C.M. 405; or

(iii) Mil. R. Evid. 412, 513, 514, or 615.

(B) The military judge may grant or deny such a motion. The ruling is subject to further review pursuant to Article 6b(e), UCMJ.

(c) Procedure for submissions. The Secretary concerned shall prescribe the procedures for receiving requests for proceedings under this rule and for detailing military judges to such proceedings.

(d) Hearings. Any hearing conducted under this rule shall be conducted in accordance with the procedures generally applicable to sessions conducted under Article 39(a) and R.C.M. 803.

(e) Record. A separate record of any proceeding under this rule shall be prepared and forwarded to the convening authority, special trial counsel, commander, or any combination thereof, with authority to dispose of the charges or offenses in the case. If charges are referred to trial in the case, such record shall be included in the record of trial.

(f) *Military magistrate.* If authorized under regulations of the Secretary concerned, a military judge detailed to a proceeding under this rule, other than a proceeding under paragraph (b)(2), (b)(7)(B), or (b)(8), may designate a military magistrate to preside and exercise the authority of the military judge over the proceeding.

(p) R.C.M. 401 is amended as follows:

(a) *Who may dispose of charges.* Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Article 15 may dispose of charges, except for those charges over which a special trial counsel has exercised authority and which must be disposed of in accordance with R.C.M. 401A. A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.

(b) *Prompt determination.* When a commander with authority to dispose of charges receives charges, that commander shall promptly determine what disposition will be made in the interest of justice and discipline.

(c) *How charges may be disposed of.* Unless the authority to do so has been limited or withheld by superior competent authority, a commander may dispose of charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial which the commander is empowered to convene. Charges should be disposed of in accordance with the policy in R.C.M. 306(b).

(1) *Dismissal.* When a commander dismisses charges further disposition under R.C.M. 306(c) of the offenses is not barred.

(2) *Forwarding charges.*

(A) *Forwarding to a superior commander.* When charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.

(B) *Other cases.* When charges are forwarded to a commander who is not a superior of the forwarding commander, no recommendation as to disposition may be made.

(3) *Referral of charges.* See R.C.M. 403, 404, 407, [and](#) 601.

(d) *National security matters.* If a commander who is not a general court-martial convening authority finds that the charges warrant trial by court-martial but believes that trial would probably be detrimental to the prosecution of a war or harmful to national security, the charges shall be forwarded to the officer exercising general court-martial convening authority.

(q) R.C.M. 401A is added as follows:

Rule 401A. Disposition of charges over which a special trial counsel exercises authority and has not deferred

(a) *Who may dispose of preferred specifications.* Regardless of who preferred a specification, only a special trial counsel may dispose of a specification alleging a covered offense or another offense over which a special trial counsel has exercised authority and has not deferred. A superior competent authority may withhold the authority of a subordinate special trial counsel to dispose of offenses charged in individual cases, types of cases, or generally.

(b) *Prompt determination.* Special trial counsel shall promptly determine what disposition will be made in the interest of justice and discipline.

(c) *Disposition of preferred specifications.*

(1) *Referral.* For those offenses over which a special trial counsel has exercised authority and not deferred, a special trial counsel may refer a charge and any specification thereunder to a special or general court-martial. If a preliminary hearing in accordance with Article 32, UCMJ, and R.C.M. 405 is required, special trial counsel shall request a hearing officer and a hearing officer shall be provided by the convening authority.

(2) *Dismissal.* For those offenses over which a special trial counsel has exercised authority and not deferred, a special trial counsel may dismiss any charge or specification thereunder. Further disposition in

accordance with this rule is not barred. A dismissal may be accompanied by a deferral as defined in this rule.

(3) Deferral.

(A) Pre-referral. Special trial counsel may defer a charged offense by electing not to refer the charged offense to a special or general court-martial. Upon such determination, special trial counsel shall promptly forward the matter to the commander or convening authority for disposition. The commander or convening authority shall dispose of the offense pursuant to R.C.M. 306 or the charged offense pursuant to R.C.M. 401, as applicable, including dismissing charges preferred by special trial counsel. However, a convening authority may not refer a covered offense to a special or general court-martial.

(B) Post-referral. After referral, a charged offense must be withdrawn by special trial counsel before it may be deferred.

(r) R.C.M. 402 is amended as follows:

Except for charges over which special trial counsel has exercised authority and has not deferred, when ~~When~~ in receipt of charges a commander authorized to administer nonjudicial punishment but not authorized to convene courts-martial may:

- (1) Dismiss any charges; or
- (2) Forward ~~them~~ any charge to a superior commander for disposition.

(s) R.C.M. 403 is amended as follows:

(a) *Recording receipt.* Immediately upon receipt of sworn charges, an officer exercising summary court-martial jurisdiction over the command shall cause the hour and date of receipt to be entered on the charge sheet. After recording receipt of charges over which special trial counsel has exercised authority and has not deferred, the charge sheet shall be returned to special trial counsel.

(b) *Disposition.* Except for charges over which special trial counsel has exercised authority and has not deferred, when ~~When~~ in receipt of charges a commander exercising summary court-martial jurisdiction may:

- (1) Dismiss any charges;

(2) Forward any charges, (or, after dismissing a charges, the matter) to a subordinate commander for disposition;

(3) Forward any charges to a superior commander for disposition;

(4) Subject to R.C.M. 601(d) and 1301(c), refer any charges to a summary court-martial for trial; or

(5) Unless otherwise prescribed by the Secretary concerned, direct a preliminary hearing under R.C.M. 405, and, if appropriate, forward the report of preliminary hearing with the charges to a superior commander for disposition.

(t) R.C.M. 404 is amended as follows:

Except for covered offenses and other charges over which special trial counsel has exercised authority and has not deferred, when~~When~~ in receipt of charges, a commander exercising special court-martial jurisdiction may:

(1) Dismiss any charges;

(2) Forward any charges (or, after dismissing a charges, the matter) to a subordinate commander for disposition;

(3) Forward any charges to a superior commander for disposition;

(4) Subject to R.C.M. 201(f)(2)(D) and (E), 601(d), and 1301(c), refer any charges to a summary court-martial or to a special court-martial for trial; or

(5) Unless otherwise prescribed by the Secretary concerned, direct a preliminary hearing under R.C.M. 405, and, if appropriate, forward the report of preliminary hearing with the charges to a superior commander for disposition.

(u) R.C.M. 404A is amended as follows:

Rule 404A. Initial Disclosures [DELETED]

See R.C.M. 308 and R.C.M. 405(d).

~~(a) Generally. Except as otherwise provided in subsections (b)–(d), counsel for the Government shall provide the following information, matters, and disclosures to the defense:~~

~~(1) *After preferral of charges.* As soon as practicable after notification to the accused of preferred charges under R.C.M. 308, counsel for the Government shall provide the defense with copies of, or if impracticable, permit the defense to inspect the charges and any matters that accompanied the charges when they were preferred.~~

~~(2) *After direction of a preliminary hearing.* As soon as practicable but no later than five days after direction of an Article 32 preliminary hearing, counsel for the Government shall provide the defense with copies of, or if impracticable, permit the defense to inspect:~~

~~—(A) the order directing the Article 32 preliminary hearing pursuant to R.C.M. 405;~~

~~—(B) statements, within the control of military authorities, of witnesses that counsel for the Government intends to call at the preliminary hearing;~~

~~—(C) evidence counsel for the Government intends to present at the preliminary hearing; and~~

~~—(D) any matters provided to the convening authority when deciding to direct the preliminary hearing.~~

~~(b) *Contraband.* If items covered by subsection (a) of this rule are contraband, the disclosure required under this rule is a reasonable opportunity to inspect said contraband prior to the preliminary hearing.~~

~~(c) *Privilege.* If items covered by subsection (a) of this rule are privileged, classified, or otherwise protected under Section V of Part III, the Military Rules of Evidence, no disclosure of those items is required under this rule. However, counsel for the Government may disclose privileged, confidential, or otherwise protected information covered by subsection (a) of this rule if authorized by the holder of the privilege, or in the case of Mil. R. Evid. 505 or 506, if authorized by competent authority.~~

~~(d) *Protective order if privileged information is disclosed.* If the Government agrees to disclose to the accused information to which the protections afforded by Section V of Part III may apply, the convening authority, or other person designated by regulation of the Secretary concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as~~

~~authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(2)-(6) or 506(g)(2)-(5).~~

(v) R.C.M. 405 is amended as follows:

(a) *In general.* Except as provided in subsection ~~(m)~~(n), no charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing in substantial compliance with this rule. The issues for determination at a preliminary hearing are limited to the following: whether each specification alleges an offense; whether there is probable cause to believe that the accused committed the offense or offenses charged; whether the convening authority has court-martial jurisdiction over the accused and over the offense; and to recommend the disposition that should be made of the case. Failure to comply with this rule shall have no effect on the disposition of any charge if the charge is not referred to a general court-martial.

(b) *Earlier preliminary hearing.* If a preliminary hearing on the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the preliminary hearing and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further preliminary hearing is required.

(c) *Who may direct a preliminary hearing.*

(1) Subject to subparagraph (2), ~~Unless~~ unless prohibited by regulations of the Secretary concerned, a preliminary hearing may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(2) For charges and specifications over which a special trial counsel has exercised authority, special trial counsel shall determine whether a preliminary hearing is required. If special trial counsel determines that a hearing is required, special trial counsel shall request that a convening authority provide a preliminary hearing officer. Upon such request, the convening authority shall provide a preliminary hearing officer and direct a preliminary hearing in accordance with this rule. If a special trial counsel determines a previous

preliminary hearing is required to be reopened, the convening authority shall direct the preliminary hearing to be reopened.

(d) Disclosures after direction of a preliminary hearing.

(1) As soon as practicable but no later than five days after direction of an Article 32 preliminary hearing, counsel for the Government shall provide the defense with copies of, or if impracticable, permit the defense to inspect:

(A) the order directing the Article 32 preliminary hearing pursuant to R.C.M. 405;

(B) statements, within the control of military authorities, of witnesses that counsel for the Government intends to call at the preliminary hearing;

(C) evidence counsel for the Government intends to present at the preliminary hearing; and

(D) any matters provided to the convening authority when deciding to direct the preliminary hearing.

(2) Contraband. If items covered by subsection (d)(1) of this rule are contraband, the disclosure required under this rule is a reasonable opportunity to inspect said contraband prior to the preliminary hearing.

(3) Privilege. If items covered by subsection (d)(1) of this rule are privileged, classified, or otherwise protected under Section V of Part III, the Military Rules of Evidence, no disclosure of those items is required under this rule. However, counsel for the Government may disclose privileged, classified, or otherwise protected information covered by subsection (a) of this rule if authorized by the holder of the privilege, or in the case of Mil. R. Evid. 505 or 506, if authorized by a competent authority.

(4) Protective order if privileged information is disclosed. If the Government agrees to disclose to the accused information to which the protections afforded by Section V of Part III may apply, the convening authority, or other person designated by regulation of the Secretary concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as

authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(2)–(6) or 506(g)(2)–(5).

~~(d)~~(e) *Personnel.*

(1) *Preliminary hearing officer.*

(A) The convening authority directing the preliminary hearing shall detail an impartial judge advocate, not the accuser, who is certified under Article 27(b)(2) to conduct the hearing. When it is impracticable to appoint a judge advocate certified under Article 27(b)(2) due to exceptional circumstances:

(i) The convening authority may detail an impartial commissioned officer as the preliminary hearing officer, and

(ii) An impartial judge advocate certified under Article 27(b)(2) shall be available to provide legal advice to the detailed preliminary hearing officer.

(B) Whenever practicable, the preliminary hearing officer shall be equal or senior in grade to the military counsel detailed to represent the accused and the Government at the preliminary hearing.

(C) The Secretary concerned may prescribe additional limitations on the detailing of preliminary hearing officers.

(D) The preliminary hearing officer shall not depart from an impartial role and become an advocate for either side. The preliminary hearing officer is disqualified to act later in the same case in any other capacity.

(2) *Counsel for the Government.* A judge advocate, ~~not the accuser~~, shall serve as counsel to represent the Government. For preliminary hearings requested by special trial counsel, special trial counsel shall detail counsel for the Government consistent with regulations prescribed by the Secretary concerned.

(3) *Defense counsel.*

(A) *Detailed counsel.* Military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) *Individual military counsel.* The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b).

(C) *Civilian counsel.* The accused may be represented by civilian counsel at no expense to the Government. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the preliminary hearing. However, the preliminary hearing shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subparagraphs (A) and (B).

(4) *Others.* The convening authority who directed the preliminary hearing may also detail or request an appropriate authority to detail a reporter, an interpreter, or both.

~~(e)~~(f) *Scope of preliminary hearing.*

(1) The preliminary hearing officer shall limit the inquiry to the examination of evidence, including witnesses, relevant to the issues for determination under subsection (a).

(2) If evidence adduced during the preliminary hearing indicates that the accused committed any uncharged offense, the preliminary hearing officer may examine evidence and hear witnesses presented by the parties relating to the subject matter of such offense and make the determinations specified in subsection (a) regarding such offense without the accused first having been charged with the offense. The rights of the accused under subsection ~~(f)~~(g), and, where it would not cause undue delay to the proceedings, the procedure applicable for production of witnesses and other evidence under subsection ~~(h)~~(i), are the same with regard to both charged and uncharged offenses. When considering uncharged offenses identified during the preliminary hearing, the preliminary hearing officer shall inform the accused of the general nature of each uncharged offense considered, and otherwise afford the accused the same opportunity for representation, cross-examination, and presentation afforded during the preliminary hearing of any charged offense.

(3) If evidence adduced during the preliminary hearing indicates the accused committed any uncharged covered offense and the preliminary hearing was not requested by special trial counsel, the preliminary hearing officer shall provide prompt notice to the convening authority and shall submit a copy of the preliminary hearing report to a special trial counsel.

~~(g)~~(g) *Rights of the accused.* At any preliminary hearing under this rule the accused shall have the right to:

- (1) Be advised of the charges and uncharged misconduct under consideration;
- (2) Be represented by counsel;
- (3) Be informed of the purpose of the preliminary hearing;
- (4) Be informed of the right against self-incrimination under Article 31;
- (5) In accordance with the terms of R.C.M. 405~~(k)~~(4), be present throughout the preliminary

hearing;

- (6) Cross-examine witnesses on matters relevant to the issues for determination under subsection (a);
- (7) Present matters relevant to the issues for determination under subsection (a); and
- (8) Make a sworn or unsworn statement relevant to the issues for determination under subsection (a).

~~(g)~~(h) *Notice to and presence of victim.*

(1) For the purposes of this rule, a “victim” is an individual who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ.

(2) A victim of an offense under the UCMJ has the right to reasonable, accurate, and timely notice of a preliminary hearing relating to the alleged offense and the reasonable right to confer with counsel for the Government.

(3) A victim has the right not to be excluded from any public proceeding of the preliminary hearing, except to the extent a similarly situated victim would be excluded at trial.

~~(h)~~(i) *Notice, Production of Witnesses, and Production of Other Evidence.*

(1) *Notice.* Prior to any preliminary hearing under this rule the parties shall, in accordance with timelines set by the preliminary hearing officer, provide to the preliminary hearing officer and the opposing party the following notices:

(A) Notice of the name and contact information for each witness the party intends to call at the preliminary hearing; and

(B) Notice of any other evidence that the party intends to offer at the preliminary hearing; and

(C) Notice of any additional information the party intends to submit under subsection ~~(k)~~(l).

(2) *Production of Witnesses.*

(A) *Military Witnesses.*

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government the names of proposed military witnesses whom the accused requests that the Government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the Government shall respond that either (1) the Government agrees that the witness' testimony is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and will seek to secure the witness' testimony for the hearing; or (2) the Government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(ii) If the Government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary to a determination of the issues under subsection (a).

(iii) If the Government does not object to the proposed defense military witness or the preliminary hearing officer determines that the military witness is relevant, not cumulative, and necessary, counsel for the Government shall request that the commanding officer of the proposed military witness make that person available to provide testimony. The commanding officer shall determine whether the individual is available, and if so, whether the witness will testify in person, by video teleconference, by telephone, or by similar means of remote testimony, based on operational necessity or mission requirements. If the commanding officer determines that the military witness is available, counsel for the Government shall

make arrangements for that individual's testimony. The commanding officer's determination of unavailability due to operational necessity or mission requirements is final.

(iv) 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.

(B) *Civilian Witnesses.*

(i) Defense counsel shall provide to counsel for the Government the names of proposed civilian witnesses whom the accused requests that the Government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the Government shall respond that either (1) the Government agrees that the witness' testimony is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and will seek to secure the witness' testimony for the hearing; or (2) the Government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(ii) If the Government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary to a determination of the issues under subsection (a).

(3) *Production of other evidence.*

(A) *Evidence under the control of the Government.*

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government a list of evidence under the control of the Government the accused requests the Government produce to the defense for introduction at the preliminary hearing. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government shall respond that either (1) the Government agrees that the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and shall make reasonable efforts to obtain the evidence; or (2) the Government

objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(ii) If the Government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. The preliminary hearing officer shall determine whether the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a). If the preliminary hearing officer determines that the evidence shall be produced, counsel for the Government shall make reasonable efforts to obtain the evidence.

(iii) The preliminary hearing officer may not order the production of any privileged matters, however, when a party offers evidence that an opposing party claims is privileged, the preliminary hearing officer may rule on whether a privilege applies.

(B) Evidence not under the control of the Government.

(i) 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)(C).

(ii) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government a list of evidence not under the control of the Government that the accused requests the Government obtain. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government shall respond that either (1) the Government agrees that the evidence is relevant, not cumulative, and necessary to a determination of the issues under subsection (a) and shall issue a pre-referral investigative subpoena for the evidence; or (2) the Government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary to a determination of the issues under subsection (a).

(iii) If the Government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. If the preliminary hearing officer determines that the evidence is relevant, not cumulative, and necessary to a determination of the

issues under subsection (a) and that the issuance of a pre-referral investigative subpoena would not cause undue delay to the preliminary hearing, the preliminary hearing officer shall direct counsel for the Government to issue a pre-referral investigative subpoena for the defense-requested evidence from a military judge in accordance with R.C.M. 309 or authorization from the general court-martial convening authority to issue an investigative subpoena. If counsel for the Government refuses or is unable to obtain an investigative subpoena, the counsel shall set forth the reasons why the investigative subpoena was not obtained in a written statement that shall be included in the preliminary hearing report under subsection ~~(m)~~(m).

(iv) The preliminary hearing officer may not order the production of any privileged matters; however, when a party offers evidence that an opposing party claims is privileged, the preliminary hearing officer may rule on whether a privilege applies.

~~(j)~~(j) *Military Rules of Evidence.*

(1) *In general.*

(A) Only the following Military Rules of Evidence apply to preliminary hearings:

(i) Mil. R. Evid. 301–303 and 305.

(ii) Mil. R. Evid. 412(a), except as provided in paragraph (2) of this subsection.

(iii) Mil. R. Evid., Section V, Privileges, except that Mil. R. Evid. 505(f)-(h) and (j); 506(f)-(h), (j), (k), and (m); and 514(d)(6) shall not apply.

(B) In applying the rules to a preliminary hearing in accordance with subparagraph (A), the term “military judge,” as used in such rules, means the preliminary hearing officer, who shall assume the military judge’s authority to exclude evidence from the preliminary hearing, and who shall, in discharging this duty, follow the procedures set forth in such rules. Evidence offered in violation of the procedural requirements of the rules in subparagraph (A) shall be excluded from the preliminary hearing, unless good cause is shown.

(2) *Sex-offense cases.*

(A) *Inadmissibility of certain evidence.* In a case of an alleged sexual offense, as defined under Mil. R. Evid. 412(d), evidence offered to prove that ~~any~~ the alleged victim engaged in other sexual behavior or evidence offered to prove any alleged victim's sexual predisposition is not admissible at a preliminary hearing unless—

(i) the evidence would be admissible at trial under Mil. R. Evid. ~~412(b)(1)(A) or (B)~~ 412(b)(1) or (2); and

(ii) the evidence ~~is relevant~~, not cumulative, and is necessary to a determination of the issues under subsection (a) of this rule.

(B) *Initial procedure to determine admissibility.* A party intending to offer evidence under subparagraph (A) shall, no later than five days before the preliminary hearing begins, submit a written motion specifically describing the evidence and stating why the evidence is admissible. The preliminary hearing officer may permit a different filing time, but any motion shall be filed prior to the beginning of the preliminary hearing. The moving party shall serve the motion on the opposing party, who shall have the opportunity to respond in writing. Counsel for the Government shall cause the motion and any written responses to be served on the victim, or victim's counsel, if any, or, when appropriate, the victim's guardian or representative. After reviewing the motion and any written responses, the preliminary hearing officer shall either—

(i) deny the motion on the grounds that the evidence does not meet the criteria specified in clauses ~~(i)~~ (i)(2)(A)(i) or (ii); or

(ii) conduct a hearing to determine the admissibility of the evidence.

(C) *Admissibility hearing.* If the preliminary hearing officer conducts a hearing to determine the admissibility of the evidence, the admissibility hearing shall be closed and should ordinarily be conducted at the end of the preliminary hearing, after all other evidence offered by the parties has been admitted. At the admissibility hearing, the parties may call witnesses and offer relevant evidence. The victim shall be afforded a reasonable opportunity to attend and be heard, to include being heard through counsel. If the

preliminary hearing officer determines that the evidence should be admitted, the victim may directly petition the Court of Criminal Appeals for a writ of mandamus pursuant to Article 6b.

(D) *Sealing*. The motions, related papers, and the record of an admissibility hearing shall be sealed and remain under seal in accordance with R.C.M. 1113.

~~(j)~~(k) *Preliminary hearing procedure*.

(1) *Generally*. The preliminary hearing shall begin with the preliminary hearing officer informing the accused of the accused's rights under subsection ~~(j)~~(g). Counsel for the Government will then present evidence. Upon the conclusion of counsel for the Government's presentation of evidence, defense counsel may present matters. Both counsel for the Government and defense counsel shall be afforded an opportunity to cross-examine adverse witnesses. The preliminary hearing officer may also question witnesses called by the parties. If the preliminary hearing officer determines that additional evidence is necessary for a determination of the issues under subsection (a), the preliminary hearing officer may provide the parties an opportunity to present additional testimony or evidence. Except as provided in subparagraph ~~(j)~~(m)(2)(J), the preliminary hearing officer shall not consider evidence not presented at the preliminary hearing in making the determinations under subsection (a). The preliminary hearing officer shall not call witnesses ~~sua sponte~~sua sponte.

(2) *Presentation of evidence*.

(A) *Testimony*. Witness testimony may be provided in person, by video teleconference, by telephone, or by similar means of remote testimony. All testimony shall be taken under oath, except that the accused may make an unsworn statement. The preliminary hearing officer shall only consider testimony that is relevant to the issues for determination under subsection (a).

(B) *Other evidence*. If relevant to the issues for determination under subsection (a) and not cumulative, a preliminary hearing officer may consider other evidence offered by either counsel for the Government or defense counsel, in addition to or in lieu of witness testimony, including statements, tangible evidence, or

reproductions thereof, that the preliminary hearing officer determines is reliable. This other evidence need not be sworn.

(3) *Access by spectators.* Preliminary hearings are public proceedings and should remain open to the public whenever possible, whether conducted in person or via remote means. If there is an overriding interest that outweighs the value of an open preliminary hearing, the convening authority or the preliminary hearing officer may restrict or foreclose access by spectators to all or part of the proceedings. Any restriction or closure must be narrowly tailored to protect the overriding interest involved. Before ordering any restriction or closure, a convening authority or preliminary hearing officer 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. The convening authority or preliminary hearing officer shall make specific findings of fact in writing that support the restriction or closure. The written findings of fact shall be included in the preliminary hearing report.

(4) *Presence of accused.* The accused shall be present for the preliminary hearing.

(A) Remote presence of the accused. The convening authority that directed the preliminary hearing may authorize the use of audio-visual technology between the parties and the preliminary hearing officer. In such circumstances the “presence” requirement of the accused is met only when the accused has a defense counsel physically present at his or her location or when the accused consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding. Such technology may include two or more remote sites as long as all parties can see and hear each other.

(B) The accused shall be considered to have waived the right to be present at the preliminary hearing if the accused:

- (i) After being notified of the time and place of the proceeding is voluntarily absent; or
- (ii) After being warned by the preliminary hearing officer that disruptive conduct will cause removal from the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

(5) *Recording of the preliminary hearing.* Counsel for the Government shall ensure that the preliminary hearing is recorded by a suitable recording device. A victim named in one of the specifications under consideration may request access to, or a copy of, the recording of the proceedings. Upon request, counsel for the Government shall provide the requested access to, or a copy of, the recording or, at the Government's discretion, a transcript, to the victim not later than a reasonable time following dismissal of the charges, unless charges are dismissed for the purpose of rereferral, or court-martial adjournment. This rule does not entitle the victim to classified information or sealed materials consistent with an order issued in accordance with R.C.M. 1113(a).

(6) *Recording and broadcasting prohibited.* Video and audio recording, broadcasting, and the taking of photographs—except as required in paragraph ~~(k)~~(k) (5) of this rule—are prohibited. The convening authority may, as a matter of discretion permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under paragraph ~~(k)~~(k) (4) of this rule or by spectators when the facilities are inadequate to accommodate a reasonable number of spectators.

(7) *Objections.* Any objection alleging a failure to comply with this rule, other than an objection under subsection (l), shall be made to the preliminary hearing officer promptly upon discovery of the alleged error. The preliminary hearing officer is not required to rule on any objection. An objection shall be noted in the preliminary hearing report if the person objecting so requests. The preliminary hearing officer may require a party to file any objection in writing.

(8) *Sealed exhibits and proceedings.* The preliminary hearing officer has the authority to order exhibits, recordings of proceedings, or other matters sealed as described in R.C.M. 1113.

~~(k)~~(l) *Supplementary information for the convening authority.*

(1) No later than 24 hours from the closure of the preliminary hearing, counsel for the Government, defense counsel, and any victim named in one of the specifications under consideration (or, if applicable, counsel for such a victim) may submit to the preliminary hearing officer, counsel for the Government, and

defense counsel additional information that the submitter deems relevant to the ~~convening authority's~~ disposition of the charges and specifications.

(2) Defense counsel may submit additional matters that rebut the submissions of counsel for the Government or any victim provided under paragraph ~~(k)(1)~~(1). Such matters must be provided to the preliminary hearing officer and to the counsel for the Government within 5 days of the closure of the preliminary hearing.

(3) The preliminary hearing officer shall examine all supplementary information submitted under subsection ~~(k)(1)~~ and shall seal, in accordance with R.C.M. 1113, any matters the preliminary hearing officer deems privileged or otherwise not subject to disclosure.

(A) The preliminary hearing officer shall provide a written summary and an analysis of the supplementary information submitted under subsection ~~(k)(1)~~ that is not sealed and is relevant to disposition for inclusion in the report to the convening authority or special trial counsel, as applicable, under subsection ~~(k)(m)~~.

(B) If the preliminary hearing officer seals any supplementary information submitted under subsection ~~(k)(1)~~, the preliminary hearing officer shall provide an analysis of those materials. The analysis of the sealed materials shall be sealed. Additionally, the preliminary hearing officer shall generally describe those matters and detail the basis for sealing them in a separate cover sheet. This cover sheet shall accompany the sealed matters and shall not contain privileged information or be sealed.

(4) The supplementary information and any summary and analysis provided by the preliminary hearing officer, and any sealed matters and cover sheets, as applicable, shall be forwarded to the convening authority or special trial counsel, as applicable, for consideration in making a disposition determination.

(5) Submissions under subsection ~~(k)(1)~~ shall be maintained as an attachment to the preliminary hearing report provided under subsection ~~(k)(m)~~.

~~(k)(m)~~ *Preliminary hearing report.*

(1) *In general.* The preliminary hearing officer shall make a timely written report of the preliminary hearing to the convening authority and, for hearings requested by a special trial counsel, to special trial counsel. This report is advisory and does not bind the ~~staff judge advocate or convening authority staff judge advocate, convening authority, or special trial counsel, as applicable.~~

(2) *Contents.* The preliminary hearing report shall include:

(A) A statement of names and organizations or addresses of counsel for the 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 under paragraph ~~(j)~~(k)(5);

(C) For each specification, the preliminary hearing officer's reasoning and conclusions with respect to the issues for determination under subsection (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 in the preliminary hearing;

(F) A notation if counsel for the Government refused to issue a pre-referral investigative subpoena that was directed by the preliminary hearing officer 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 the preliminary hearing officer examined evidence or heard witnesses relating to any uncharged offenses in accordance with paragraph ~~(e)~~(f)(2), and, for each such offense, the preliminary hearing officer's reasoning and conclusions as to whether there is probable cause to believe that the accused committed the offense and whether the convening authority would have court-martial jurisdiction over the offense if it were charged;

(I) A notation of any objections if required under paragraph ~~(j)~~(k)(7);

(J) The recommendation of the preliminary hearing officer as to the disposition that should be made of the charges and specifications in the interest of justice and discipline. In making this disposition recommendation, the preliminary hearing officer may consider any evidence admitted during the preliminary hearing and matters submitted under subsection ~~(k)(1); and~~

(K) The written summary and analysis required by subparagraph ~~(k)(1)(3)(A); and~~

(L) A notation as to whether the parties or the preliminary hearing officer considered any offense to be a covered offense.

(3) *Sealed exhibits and proceedings.* If the preliminary hearing report contains exhibits, proceedings, or other matters ordered sealed by the preliminary hearing officer in accordance with R.C.M. 1113, counsel for the Government shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure.

(4) *Distribution of preliminary hearing report.* The preliminary hearing officer shall promptly cause the preliminary hearing report to be delivered to the convening authority and, for hearings requested by a special trial counsel, to the special trial counsel. Government counsel ~~That convening authority~~ shall promptly cause a copy of the report to be delivered to each accused. The convening authority or, for hearings requested by a special trial counsel, the special trial counsel ~~and, in accordance with R.C.M. 401(b),~~ shall promptly determine what disposition will be made in the interest of justice and discipline in accordance with R.C.M. 401 or R.C.M. 401A. ~~If applicable, the convening authority shall promptly forward the report, together with the charges, to a superior commander for disposition.~~

(5) *Objections to the preliminary hearing officer's report.* Upon receipt of the report, the parties shall have five days to submit objections to the preliminary hearing officer. Any objection to the preliminary hearing report shall be made to the convening authority who directed the preliminary hearing, via the preliminary hearing officer. The objection shall be served upon the opposing party and notification of the objection shall be made to any named victim. ~~Upon receipt of the report, the accused has 5 days to submit objections to the preliminary hearing officer.~~ The preliminary hearing officer will forward the objections to the

convening authority as soon as practicable. The convening authority who receives an objection may direct that the preliminary hearing be reopened or take other action, as appropriate. This paragraph does not prohibit a convening authority or special trial counsel from referring any charge or taking other action within the ~~5~~-five day period. Failure to make a timely objection under this rule shall constitute forfeiture of the objection. Relief may be granted by the convening authority who directed the preliminary hearing, a superior convening authority, or the military judge, as appropriate, for good cause shown.

~~(m)~~(n) *Waiver.* The accused may waive a preliminary hearing. However, ~~the convening authority authorized to direct~~ the preliminary hearing may still direct that a preliminary hearing be conducted notwithstanding the waiver. ~~Failure to make a timely objection under this rule, including an objection to the report, shall constitute forfeiture of the objection.~~ Relief from the waiver ~~or forfeiture~~ may be granted by the convening authority who directed or who would have directed the preliminary hearing, a superior convening authority, or the military judge, as appropriate, for good cause shown.

(w) R.C.M. 406 is amended as follows:

Rule 406. Pretrial advice and special trial counsel determinations

(a) ~~In general~~ Pretrial Advice by the Staff Judge Advocate.

(1) General court-martial. Subject to subparagraph (b), ~~B~~before any charge may be referred for trial by a general court-martial, it shall be ~~referred~~ submitted to the staff judge advocate of the convening authority for consideration and advice. The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

(A) Conclusion with respect to whether each specification alleges an offense under the UCMJ;

(B) Conclusion with respect to whether there is probable cause to believe that the accused committed the offense charged in the specification;

(C) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

(D) Recommendation as to the disposition that should be made of the charges and specifications by the convening authority in the interest of justice and discipline.

(2) Special-court martial. Subject to subparagraph (b), before any charge may be referred for trial by a special court-martial, the convening authority shall consult a judge advocate on relevant legal issues. Such issues may include:

(A) Whether each specification alleges an offense under the UCMJ;

(B) Whether there is probable cause to believe the accused committed the offense(s) charged;

(C) Whether a court-martial would have jurisdiction over the accused and the offense;

(D) The form of the charges and specifications and any necessary modifications; and

(E) Any other factors relating to disposition of the charges and specifications in the interest of justice and discipline.

(b) Special trial counsel determinations. For all charges alleging covered offenses, and other charges over which special trial counsel has exercised authority and has not deferred, referral to a special or general court-martial may only be made by special trial counsel and the referral must be accompanied by special trial counsel's written determination that:

(1) each specification under a charge alleges an offense under this chapter;

(2) there is probable cause to believe that the accused committed the offense charged; and

(3) a court-martial would have jurisdiction over the accused and the offense.

(c) Distribution.

(1) Subject to subparagraph (c)(2), a ~~A~~ copy of the written advice of the staff judge advocate shall be provided to the defense if charges are referred to trial by general court-martial.

(2) For those cases over which special trial counsel exercises exclusive authority, a copy of the written determination by special trial counsel shall be provided to the defense if charges are referred to trial by general or special court-martial.

(x) R.C.M. 406A is amended as follows:

Rule 406A. Pretrial advice before referral to special court-martial DELETED

See R.C.M. 406(a)(2).

~~(a) In general. Before any charge may be referred for trial by special court-martial, the convening authority shall consult a judge advocate on relevant legal issues. Such issues may include:~~

~~(1) Whether each specification alleges an offense under the UCMJ;~~

~~(2) Whether there is probable cause to believe the accused committed the offense(s) charged;~~

~~(3) Whether a court-martial would have jurisdiction over the accused and the offense; and~~

~~(4) Any other factors related to disposition of the charges and specifications in the interest of justice and discipline.~~

(y) R.C.M. 407 is amended as follows:

(a) *Disposition.* Except for covered offenses and any other charges over which special trial counsel has exercised authority and has not deferred. ~~When in receipt of charges,~~ a commander exercising general court-martial jurisdiction, when in receipt of charges, may:

(1) Dismiss any charges;

(2) Forward any charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

(3) Forward any charges to a superior commander for disposition;

(4) Subject to R.C.M. 201(f)(2)(D) and (E), 601(d), and 1301(c), refer any charges to a summary court-martial or to a special court-martial for trial;

(5) Unless otherwise prescribed by the Secretary concerned, direct a preliminary hearing under R.C.M. 405, after which additional action under this rule may be taken;

(6) Subject to R.C.M. 601(d), refer any charges to a general court-martial.

(b) *National security matters.* When in receipt of charges the trial of which the commander exercising general court-martial jurisdiction finds would probably be ~~inimical~~ detrimental to the prosecution of a war or harmful to national security, that commander, unless otherwise prescribed by regulations of the

Secretary concerned, shall determine whether trial is warranted and, if so, whether the security considerations involved are paramount to trial. As the commander finds appropriate, the commander may dismiss the charges, authorize trial of them, or forward them to a superior authority.

(z) R.C.M. 502 is amended as follows:

(a) Members.

(1) *Qualifications.* The members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. Each member shall be on active duty with the armed forces and shall be:

(A) A commissioned officer;

(B) A warrant officer, except when the accused is a commissioned officer; or

(C) An enlisted person, except when the accused is either a commissioned or warrant officer.

(2) Duties.

(A) *Members.* The members of a court-martial shall determine whether the accused is proved guilty and, in a capital case in which the accused is found guilty of a capital offense, ~~or in a noncapital case when the accused elects sentencing by members in accordance with R.C.M. 1002,~~ the members shall make a determination in accordance with Article 53(c)(1)(A). ~~an appropriate sentence, based on the evidence and in accordance with the instructions of the military judge.~~ Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material.

(B) *Alternate members.* Members impaneled as alternate members shall have the same duties as members under subparagraph (A). However, an alternate member shall not vote or participate in deliberations on findings or sentencing unless the alternate member has become a member by replacing a member who was excused after impanelment under R.C.M. 912B.

(b) *President.*

(1) *Qualifications.* The president of a court-martial shall be the detailed member senior in rank then serving.

(2) *Duties.* The president shall have the same duties as the other members and shall also:

(A) Preside over closed sessions of the members of the court-martial during their deliberations; and

(B) Speak for the members of the court-martial when announcing the decision of the members or requesting instructions from the military judge

(c) *Qualifications of military judge and military magistrate.*

(1) *Military judge.* A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a federal court or a member of the bar of the highest court of a State and who is certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial.

(2) *Military magistrate.* The Secretary concerned may establish a military magistrate program. A military magistrate shall be a commissioned officer of the armed forces who is a member of the bar of a federal court or a member of the bar of highest court of a State and who is certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military magistrate by the Judge Advocate General of the armed force of which such military magistrate is a member.

(3) *Minimum tour lengths.* A person assigned for duty as a military judge shall serve as a military judge for a term of not less than three years, subject to such provisions for reassignment as may be prescribed in regulations issued by the Secretary concerned.

(d) *Counsel.*

(1) *Qualifications of trial counsel.*

(A) *General courts-martial.* Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as trial counsel in general courts-martial.

(B) *Trial counsel in special courts-martial and assistant trial counsel in general or special courts-martial.* Any commissioned officer may be detailed as trial counsel in special courts-martial, or as assistant trial counsel in general or special courts-martial if that person—

(i) is determined to be competent to perform such duties by the Judge Advocate General; and

(ii) takes an oath in accordance with Article 42(a), certifies to the court that the person has read and is familiar with the applicable rules of procedure, evidence, and professional responsibility, and meets any additional qualifications the Secretary concerned may establish.

(C) *Cases referred by special trial counsel.* A special trial counsel shall be detailed as trial counsel to all cases referred by a special trial counsel. To the extent permitted by and in accordance with regulations prescribed by the Secretary concerned, a special trial counsel may detail other trial counsel who are judge advocates.

(D). *Special trial counsel.* Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as a special trial counsel in general and special courts-martial. A special trial counsel shall be a commissioned officer who is a member of the bar of a Federal court or a member of the bar of the highest court of a State; and is certified to be qualified, by reason of education, training, experience, and temperament, for duty as a special trial counsel by the Judge Advocate General of the armed force of which the officer is a member or, in the case of the Marine Corps, the Staff Judge Advocate to the Commandant of the Marine Corps, and according to policies prescribed by the Secretary concerned

to ensure that special trial counsel shall be well-trained, experienced, highly skilled, and competent in handling cases involving covered offenses.

(2) *Qualifications of defense counsel.*

(A) *Detailed military counsel.* Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel, assistant defense counsel, or associate defense counsel in general or special courts-martial.

(B) *Individual military counsel and civilian defense counsel.* Individual military or civilian defense counsel who represents an accused in accordance with Article 38(b) in a court-martial shall be:

(i) a member of the bar of a federal court or of the bar of the highest court of a State; or

(ii) if not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial.

(C) *Counsel in capital cases.*

(i) *In general.* In any capital case, to the greatest extent practicable, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.

(ii) *Qualifications.* A counsel learned in the law applicable to capital cases is an attorney whose background, knowledge, or experience would enable him or her to competently represent an accused in a capital case, with due consideration of the seriousness of the possible penalty and the unique and complex nature of the litigation.

(3) *Disqualifications.* No person shall act as trial counsel or assistant trial counsel or, except when expressly requested by the accused, as defense counsel or associate or assistant defense counsel in any case in which that person is or has been:

(A) The accuser, except that any determination by a special trial counsel to prefer or refer charges shall not disqualify special trial counsel;

(B) An investigating or preliminary hearing officer;

(C) A military judge or appellate military judge; or

(D) A member.

(4) *Duties of trial and assistant trial counsel.* Trial counsel shall prosecute cases on behalf of the United States. Under the supervision of trial counsel an assistant trial counsel may perform any act or duty which trial counsel may perform under law, regulation, or custom of the Service.

(5) *Duties of defense and associate or assistant defense counsel.* Defense counsel shall represent the accused in matters under the UCMJ and these rules arising from the offenses of which the accused is then suspected or charged. Under the supervision of defense counsel an associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the Service.

(e) *Interpreters, reporters, escorts, bailiffs, clerks, guards, and orderlies.*

(1) *Qualifications.* The qualifications of interpreters and reporters may be prescribed by the Secretary concerned. Any person who is not disqualified under paragraph (e)(2) of this rule may serve as escort, bailiff, clerk, guard, or orderly, subject to removal by the military judge.

(2) *Disqualifications.* In addition to any disqualifications which may be prescribed by the Secretary concerned, no person shall act as interpreter, reporter, escort, bailiff, clerk, guard, or orderly in any case in which that person is or has been in the same case:

(A) The accuser;

(B) A witness;

(C) An investigating or preliminary hearing officer;

(D) Counsel for any party; or

(E) A member of the court-martial or of any earlier court-martial of which the trial is a rehearing or new or other trial.

(3) *Duties.* In addition to such other duties as the Secretary concerned may prescribe, the following persons may perform the following duties.

(A) *Interpreters.* Interpreters shall interpret for the court-martial or for an accused who does not speak or understand English.

(B) *Reporters.* Reporters shall record the proceedings and testimony and shall transcribe them so as to comply with the requirements for the record of trial as prescribed in these rules.

(C) *Others.* Other personnel detailed for the assistance of the court-martial shall have such duties as may be imposed by the military judge.

(4) *Payment of reporters, interpreters.* The Secretary concerned may prescribe regulations for the payment of allowances, expenses, per diem, and compensation of reporters and interpreters.

(f) *Action upon discovery of disqualification or lack of qualifications.* Any person who discovers that a person detailed to a court-martial is disqualified or lacks the qualifications specified by this rule shall cause a report of the matter to be made before the court-martial is first in session to the convening authority or, if discovered later, to the military judge.

(aa) R.C.M. 503 is amended as follows:

(a) *Members.*

(1) *In general.* The convening authority shall—

(A) detail qualified persons as members for courts-martial in accordance with the criteria described in Article 25, UCMJ;

(B) ~~detail not fewer than the number of members required under R.C.M. 501(a), as applicable; and~~

~~(C) state whether the military judge is—~~

(i) authorized to impanel a specified number of alternate members; or

(ii) authorized to impanel alternate members only if, after the exercise of all challenges, excess members remain; and

(C) provide a list of the detailed members to the military judge to randomize in accordance with R.C.M.

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(2) *Member election by enlisted accused.* An enlisted accused may, before assembly, request orally on the record or in writing that the membership of the court-martial to which that accused's case has been referred be comprised entirely of officers or of at least one-third enlisted members. If such a request is made, the court-martial membership must be consistent with the accused's request unless eligible members cannot be obtained because of physical conditions or military exigencies. If the appropriate number of members cannot be obtained, the court-martial may be assembled and the members impaneled, and the trial may proceed without them, but the convening authority shall make a detailed written explanation why such members could not be obtained which must be appended to the record of trial.

(3) *Members from another command or armed force.* A convening authority may detail as members of general and special courts-martial persons under that convening authority's command or made available by their commander, even if those persons are members of an armed force different from that of the convening authority or accused.

(4) This subsection does not apply to charges referred to a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

(b) *Military judge.*

(1) *By whom detailed.* The military judge shall be detailed, in accordance with regulations of the Secretary concerned, by a person assigned as a military judge and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The authority to detail military judges may be delegated to persons assigned as military judges. If authority to detail military judges has been delegated to a military judge, that military judge may detail himself or herself as military judge for a court-martial.

(2) *Record of detail.* The order detailing a military judge shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the military judge was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) *Military judge from a different armed force.* A military judge from one armed force may be detailed to a court-martial convened in a different armed force, a combatant command or joint command when permitted by the Judge Advocate General of the armed force of which the military judge is a member. The Judge Advocate General may delegate authority to make military judges available for this purpose.

(4) *Military magistrate.* If authorized under regulations of the Secretary concerned, a detailed military judge may designate a military magistrate to perform pre-referral duties under R.C.M. 309, and, with the consent of the parties, to preside over a special court-martial consisting of a military judge alone under Article 16(c)(2)(A).

(c) *Counsel.*

(1) *By whom detailed.* Trial and defense counsel, assistant trial and defense counsel, and associate defense counsel shall be detailed in accordance with [R.C.M. 502\(d\)\(1\)\(C\)](#) and regulations of the Secretary concerned. If authority to detail counsel has been delegated to a person that person may detail himself or herself as counsel for a court-martial. In a capital case, counsel learned in the law applicable to such cases under R.C.M. 502(d)(2)(C) shall be assigned in accordance with regulations of the Secretary concerned.

(2) *Record of detail.* The order detailing a counsel shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the counsel was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) *Counsel from a different armed force.* A person from one armed force may be detailed to serve as counsel in a court-martial in a different armed force, a combatant command or joint command when

permitted by the Judge Advocate General of the armed force of which the counsel is a member. The Judge Advocate General may delegate authority to make persons available for this purpose.

(bb) R.C.M. 504 is amended as follows:

(a) *In general.* A court-martial is created by a convening order of the convening authority.

(b) *Who may convene courts-martial.*

(1) *General courts-martial.* Unless otherwise limited by superior competent authority, general courts-martial may be convened by persons occupying positions designated in Article 22(a) and by any commander designated by the Secretary concerned or empowered by the President.

(2) *Special courts-martial.* Unless otherwise limited by superior competent authority, special courts-martial may be convened by persons occupying positions designated in Article 23(a) and by commanders designated by the Secretary concerned.

(A) *Definition.* For purposes of Articles 23 and 24, a command or unit is “separate or detached” when isolated or removed from the immediate disciplinary control of a superior in such manner as to make its commander the person held by superior commanders primarily responsible for discipline. “Separate or detached” is used in a disciplinary sense and not necessarily in a tactical or physical sense. A subordinate joint command or joint task force is ordinarily considered to be “separate or detached.”

(B) *Determination.* If a commander is in doubt whether the command is separate or detached, the matter shall be determined:

(i) In the Army, Air Force, or Space Force, by the officer exercising general court-martial jurisdiction over the command; or

(ii) In the Naval Service or Coast Guard, by the flag or general officer in command or the senior officer present who designated the detachment; or

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

(3) *Summary courts-martial.* See R.C.M. 1302(a).

(4) *Delegation prohibited.* The power to convene courts-martial may not be delegated.

(c) *Disqualification.*

(1) *Accuser.* An accuser may not convene a general or special court-martial for the trial of the person accused. A commanding officer shall not be considered an accuser solely due to the role of the commanding officer in convening a special or general court-martial to which charges and specifications were referred by a special trial counsel.

(2) *Other.* A convening authority junior in rank to an accuser may not convene a general or special court-martial for the trial of the accused unless that convening authority is superior in command to the accuser. A convening authority junior in command to an accuser may not convene a general or special court-martial for the trial of the accused.

(3) *Action when disqualified.* When a commander who would otherwise convene a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another convening authority who is superior in rank to the accuser, or, if in the same chain of command, who is superior in command to the accuser.

(d) *Convening orders.*

(1) *General and special courts-martial.*

(A) A convening order for a general or special court-martial shall—

(i) designate the type of court-martial; and

(ii) detail the members, if any, in accordance with R.C.M. 503(a);

(B) A convening order may designate where the court-martial will meet.

(C) If the convening authority has been designated by the Secretary concerned, the convening order shall so state.

(2) *Summary courts-martial.* A convening order for a summary court-martial shall designate that it is a summary court-martial and detail the summary court-martial, and may designate where the court-martial

will meet. If the convening authority has been designated by the Secretary concerned, the convening order shall so state.

(3) *Additional matters.* Additional matters to be included in convening orders may be prescribed by the Secretary concerned.

(e) *Place.* The convening authority shall ensure that an appropriate location and facilities for courts-martial are provided.

(cc) R.C.M. 505 is amended as follows:

(a) *In general.* Subject to this rule, the members, military judge, military magistrate, and counsel may be changed by an authority competent to detail or designate such persons. Members also may be excused as provided in clause (c)(1)(B)(ii) and subparagraph (c)(2)(A).

(b) *Procedure.* When new persons are added as members or counsel or when substitutions are made as to any members or counsel or the military judge or military magistrate, such persons shall be detailed or designated in accordance with R.C.M. 503. An order changing the members of the court-martial, except one which excuses members without replacement, shall be reduced to writing before certification of the record of trial.

(c) *Changes of members.*

(1) *Before assembly.*

(A) *By convening authority.* Before the court-martial is assembled, the convening authority may change the members ~~of~~ detailed to the court-martial without showing cause. New members shall be detailed in accordance with R.C.M. 503(a).

(B) *By convening authority's delegate.*

(i) *Delegation.* The convening authority may delegate, under regulations of the Secretary concerned, authority to excuse individual members to the staff judge advocate or legal officer or other principal assistant to the convening authority.

(ii) *Limitations.* Before the court-martial is assembled, the convening authority's delegate may excuse members without cause shown; however, no more than one-third of the total number of members detailed by the convening authority may be excused by the convening authority's delegate in any one court-martial. After assembly the convening authority's delegate may not excuse members.

(2) *After assembly.*

(A) *Excusal.* After assembly no member may be excused, except:

(i) By the convening authority for good cause shown on the record;

(ii) By the military judge for good cause shown on the record;

(iii) As a result of challenge under R.C.M. 912; or

(iv) By the military judge when the number of members is in excess of the number of members required for impanelment.

(B) *New members.* In accordance with R.C.M. 503(a), ~~N~~ew members may be detailed after assembly only when, as a result of excusals under subparagraph (c)(2)(A), the number of members of the court-martial is reduced below the number of members required under R.C.M. 501(a), or the number of enlisted members, when the accused has made a timely written request for enlisted members, is reduced below one-third of the total membership.

(d) *Changes of detailed counsel.*

(1) *Trial counsel.* An authority competent to detail trial counsel may change trial counsel and any assistant trial counsel at any time without showing cause.

(2) *Defense counsel.*

(A) *Before formation of attorney-client relationship.* Before an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail defense counsel may excuse or change such counsel without showing cause.

(B) *After formation of attorney-client relationship.* After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:

(i) Under R.C.M. 506(b)(3);

(ii) Upon request of the accused or application for withdrawal by such counsel under R.C.M. 506(c);

or

(iii) For other good cause shown on the record

(e) *Change of military judge or military magistrate*

(1) *Before assembly.* Before the court-martial is assembled, the military judge or military magistrate may be changed by an authority competent to detail the military judge or to designate the military magistrate, without cause shown on the record.

(2) *After assembly.* After the court-martial is assembled, the military judge or military magistrate may be changed by an authority competent to detail the military judge or to designate the military magistrate only when, as a result of disqualification under R.C.M. 902 or for good cause shown, the previously detailed military judge or previously designated military magistrate is unable to proceed.

(f) *Good cause.* For purposes of this rule, “good cause” includes physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge or military magistrate unable to proceed with the court-martial within a reasonable time. “Good cause” does not include temporary inconveniences which are incident to normal conditions of military life.

(dd) R.C.M. 601 is amended as follows:

(a) *In general.* Referral is the order of a convening authority or a special trial counsel that charges and specifications against an accused will be tried by a specified court-martial.

(b) *Who may refer.*

(1) Except as provided in subparagraph (2), any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor, unless the power to do so has been withheld by superior competent authority.

(2) For charges over which special trial counsel has exercised authority and has not deferred, only a special trial counsel may refer charges to a court-martial.

(c) *Disqualification.*

(1) Except as provided in subparagraph (2), ~~A~~an accuser may not refer charges to a general or special court-martial.

(2) A special trial counsel shall not be disqualified from referring charges to a general or special court-martial as a result of having preferred charges or having directed charges to be preferred.

(d) *When charges may be referred.*

(1) *Basis for referral.*

(A) Except as provided in subparagraph (B), if the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general or special court-martial except in compliance with paragraph (d)(2) or (d)(3) of this rule. The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

(B) For offenses over which special trial counsel has exercised authority and has not deferred, if special trial counsel makes a written determination that each specification under a charge alleges an offense under the UCMJ, there is probable cause to believe that the accused committed the offense charged, and the court-martial would have jurisdiction over the accused and the offense, a special trial counsel may refer

it. The finding may be based on hearsay in whole or in part. Special trial counsel may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with paragraph (d)(2) or (d)(3) of this rule. Special trial counsel shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

(2) *General courts-martial.* Charges may not be referred to a general court-martial unless there has been substantial compliance with the preliminary hearing requirements of R.C.M. 405 and: —

(A) ~~There has been substantial compliance with the preliminary hearing requirements of R.C.M. 405~~

The convening authority has received the advice of the staff judge advocate required under R.C.M. 406(a)(1) and Article 34(a); or

(B) Special trial counsel has made a written determination as required under R.C.M. 406(b) and Article 34(c).

(3) *Special courts-martial.* Charges may not be referred to a special court-martial unless: —

(A) ~~The convening authority may not refer charges and specifications to a special court-martial unless the~~ convening authority has consulted with a judge advocate as required under R.C.M. 406(a)(2)~~A~~ and Article 34(b)~~;~~; or

(B) Special trial counsel has made a written determination as required under R.C.M. 406(b) and Article 34(c).

(e) *How charges shall be referred.*

(1) *Order, instructions.* Referral shall be by the personal order of the convening authority or a special trial counsel.

(A) *Capital cases.* If a case is to be tried as a capital case, the convening authority or a special trial counsel shall so indicate by including a special instruction on the charge sheet in accordance with R.C.M. 1004(b)(1).

(B) *Special court-martial consisting of a military judge alone.* If a case is to be tried as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A), the convening authority shall so indicate by including a special instruction on the charge sheet prior to arraignment.

(C) *Other instructions.* The convening authority or a special trial counsel may include any other additional instructions in the order as may be required.

(2) *Joinder of offenses.* In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

(3) *Joinder of accused.* Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such accused may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

(f) *Superior convening authorities.* Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to the authority for further consideration, including, if appropriate, referral.

(g) *Parallel convening authorities.*

(1) Except as provided in subparagraph (2), if it is impracticable for the original convening authority to continue exercising authority over the charges, the convening authority may cause the charges, even if referred, to be transmitted to a parallel convening authority. This transmittal must be in writing and in

accordance with such regulations as the Secretary concerned may prescribe. Subsequent actions taken by the parallel convening authority are within the sole discretion of that convening authority.

(2) For offenses over which special trial counsel has exercised authority and has not deferred, a convening authority seeking to transfer charges to a parallel convening authority may do so in accordance with these rules and such regulations prescribed by the Secretary concerned.

(ee) R.C.M. 603 is amended as follows:

(a) *In general.* Any person forwarding, acting upon, or prosecuting charges on behalf of the United States except a preliminary hearing officer appointed under R.C.M. 405 may make major and minor changes to charges or specifications in accordance with this rule. For charges over which special trial counsel has exercised authority and has not deferred, only a special trial counsel may make or cause to be made major and minor changes to charges or specifications in accordance with this rule.

(b) *Major and minor changes defined.*

(1) *Major changes.* A major change is one that adds a party, an offense, or a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged.

(2) *Minor changes.* A minor change in a charge or specification is any change other than a major change.

(c) *Major and minor changes before referral.* Before referral, subject to paragraph (d)(2), a major or minor change may be made to any charge or specification.

(d) *Major changes after referral or preliminary hearing.*

(1) After referral, a major change may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew.

(2) In the case of a general court-martial, a major change made to a charge or specification after the preliminary hearing may require reopening the preliminary hearing in accordance with R.C.M. 405.

(e) *Minor changes after referral.* Minor changes may be made to the charges and specifications after referral and before arraignment. After arraignment, the military judge may, upon motion, permit minor changes in

the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced.

(ff) R.C.M. 604 is amended as follows:

(a) *Withdrawal.*

(1) Except as provided in subparagraph (2), the convening authority or a superior competent authority may for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced.

(2) For charges over which special trial counsel has exercised authority and has not deferred, only a special trial counsel may withdraw or cause to be withdrawn any charge or specification from the court-martial at any time before findings are announced.

(b) *Referral of withdrawn charges.* Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason. Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.

(gg) R.C.M. 701 is amended as follows:

(a) *Disclosure by trial counsel.* Except as otherwise provided in subsection (f) and paragraph (g)(2) of this rule, and unless previously disclosed to the defense ~~in accordance with R.C.M. 404A~~, trial counsel shall provide the following to the defense:

(1) *Papers accompanying charges; convening orders; statements.* As soon as practicable after service of charges under R.C.M. 602, trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

(A) All papers that accompanied the charges ~~when they were~~ presented to the convening authority referred to the court-martial;

(B) Any written determination made by special trial counsel pursuant to Article 34, UCMJ;

(C) Any written recommendation from a commander as to disposition;

~~(D)~~ ~~including~~ Any papers sent with charges upon a rehearing or new trial;

~~(B)~~(E) The convening order and any amending orders; and

~~(C)~~(F) Any sworn or signed statement relating to an offense charged in the case that is in the possession of trial counsel.

(2) *Documents, tangible objects, reports.*

(A) After service of charges, upon request of the defense, the Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody, or control of military authorities and—

- (i) the item is relevant to defense preparation;
- (ii) the ~~g~~Government intends to use the item in the case-in-chief at trial;
- (iii) the ~~g~~Government anticipates using the item in rebuttal; or
- (iv) the item was obtained from or belongs to the accused.

(B) After service of charges, upon request of the defense, the Government shall permit the defense to inspect the results or reports of physical or mental examinations, and of any scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to trial counsel if

- (i) the item is relevant to defense preparation;
- (ii) the ~~g~~Government intends to use the item in the case-in-chief at trial; or
- (iii) the ~~g~~Government anticipates using the item in rebuttal.

(3) *Witnesses.* Before the beginning of trial on the merits, trial counsel shall notify the defense of the names and contact information of the witnesses trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under paragraphs (b)(1) or (2) of this rule.

(4) *Prior convictions of accused offered on the merits.* Before arraignment, trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which trial counsel is aware and which trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in trial counsel's possession.

(5) *Information to be offered at sentencing.* Upon request of the defense, trial counsel shall:

(A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and

(B) Notify the defense of the names and contact information of the witnesses trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) *Evidence favorable to the defense.* Trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to trial counsel which reasonably tends to—

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged;

(C) Reduce the punishment; or

(D) Adversely affect the credibility of any prosecution witness or evidence.

(b) *Disclosure by the defense.* Except as otherwise provided in subsection (f) and paragraph (g)(2) of this rule, the defense shall provide the following information to trial counsel:

(1) *Names of witnesses and statements.*

(A) Before the beginning of the trial on the merits, the defense shall notify trial counsel in writing of the names and contact information of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of trial counsel, the defense shall also—

(i) Provide trial counsel with the names and contact information of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(d); and

(ii) Permit trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

(2) *Notice of certain defenses.* The defense shall notify trial counsel in writing before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

(3) *Documents and tangible items.* If the defense requests disclosure under subparagraph (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall permit trial counsel to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, or copies or portions of any of these items, or, in the case of buildings or places or portions thereof, inspect or photograph, if—

(A) the item is within the possession, custody, or control of the defense; and

(B) the defense intends to use the item in the defense case-in-chief at trial.

(4) *Reports of examination and tests.* If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall (except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil. R. Evid. 513) permit trial counsel to inspect the results or reports, or copies thereof, of any physical or mental examinations and of any scientific tests or experiments made in connection with the particular case, ~~or copies thereof~~, if the item is within the possession, custody, or control of the defense; and —

(A) the defense intends to use the item in the defense case-in-chief at trial; or

(B) the item was prepared by a witness who the defense intends to call at trial and the results or reports relate to that witness' testimony.

(5) *Inadmissibility of withdrawn defense.* If an intention to rely upon a defense under paragraph (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention.

(c) *Failure to call witness.* The fact that a witness' name is on a list of expected or intended witnesses provided to an opposing party, whether required by this rule or not, shall not be ground for comment upon a failure to call the witness.

(d) *Continuing duty to disclose.* If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material.

(e) *Access to witnesses and evidence.* Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence, subject to the limitations in paragraph (e)(1) of this rule. No party may unreasonably impede the access of another party to a witness or evidence.

(1) *Counsel for the Accused Interview of Victim of Alleged Offense.*

(A) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense whom counsel for the Government intends to call as a witness at a proceeding, counsel for the accused, or that lawyer's representative, as defined in Mil. R. Evid. 502(b) (3), shall make any request to interview that victim through the special victims' counsel or other counsel for the victim, if applicable.

(B) If requested by an alleged victim who is subject to a request for interview under subparagraph (e)(1)(A) of this rule, any interview of the victim by counsel for the accused, or that lawyer's representative,

as defined in Mil. R. Evid. 502(b)(3), shall take place only in the presence of counsel for the Government, counsel for the victim, or if applicable, a victim advocate.

(2) [Reserved]

(f) *Information not subject to disclosure.* Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives.

(g) *Regulation of discovery.*

(1) *Time, place, and manner.* The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.

(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. Subject to limitations in Part III of the Manual for Courts-Martial, 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, the entirety of any materials examined by the military judge shall be attached to the record of trial as an appellate exhibit. The military judge shall seal any materials examined in camera and not disclosed and may seal other materials as appropriate. Such material may only be examined by reviewing or appellate authorities in accordance with R.C.M. 1113.

(3) *Failure to comply.* If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(A) Order the party to permit discovery;

(B) Grant a continuance;

(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed;
and

(D) Enter such other order as is just under the circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

(h) *Inspect*. As used in this rule "inspect" includes the right to photograph and copy.

(hh) R.C.M. 702 is amended as follows:

(a) *In general*.

(1) A deposition may be ordered at the request of any party if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at trial.

(2) "Exceptional circumstances" under this rule includes circumstances under which the deponent is likely to be unavailable to testify at the time of trial.

(3) A victim's declination to testify at a preliminary hearing or a victim's declination to submit to pretrial interviews shall not, by themselves, be considered "exceptional circumstances" under this rule.

(4) A request for a written deposition may not be approved without the consent of the opposing party except when the deposition is ordered solely in lieu of producing a witness for sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be adequately served by a written deposition.

(5) A request for an oral deposition may be approved without the consent of the opposing party.

(b) *Who may order*. Upon request of a party: ~~A convening authority who has the charges for disposition or, after referral, the convening authority or the military judge, may order that a deposition be taken on request of a party.~~

(1) Subject to subsection (2), before referral, a convening authority, or, after referral, the convening authority or the military judge, may order a deposition.

(2) For offenses over which special trial counsel exercises authority:

(i) Before referral, only a military judge may order a deposition, pursuant to R.C.M. 309(b)(3).

(ii) After referral, only a military judge may order a deposition.

(c) *Request to take deposition.* A party requesting a deposition shall do so in writing, and shall include in such written request—

(1) The name and contact information of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(2) A statement of the matters on which the person is to be examined;

(3) A statement of the reasons for needing to preserve the testimony of the prospective witness; and

(4) Whether an oral or written deposition is requested.

(d) *Action on request.*

(1) *Prompt notification.* The authority under subsection (b) who acts on a request for deposition shall promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for denial.

(2) *Action when request is denied.* If a request for deposition is denied by the convening authority, the requesting party may seek review of the decision by the military judge after referral.

(3) *Action when request is approved.*

(A) *Detail of deposition officer.* When a request for a deposition is approved, the convening authority shall detail a judge advocate certified under Article 27(b) to serve as deposition officer. In exceptional circumstances, when the appointment of a judge advocate as deposition officer is not practicable, the convening authority may detail an impartial commissioned officer or appropriate civil officer authorized to administer oaths, other than the accuser, to serve as deposition officer. If the deposition officer is not a judge advocate certified under Article 27(b), an impartial judge advocate so certified shall be made available to provide legal advice to the deposition officer.

(B) *Assignment of counsel.* If charges have not yet been referred to a court-martial when a request to take a deposition is approved, the convening authority shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party.

(C) *Instructions.* The convening authority may give instructions not inconsistent with this rule to the deposition officer.

(D) *Notice to other parties.* The requesting party shall give to every other party reasonable written notice of the time and place for the deposition and the name and address of each person to be examined. On motion of a party upon whom the notice is served, the deposition officer may for cause shown extend or shorten the time or change the place for taking the deposition, consistent with any instructions from the convening authority.

(e) *Duties of the deposition officer.* In accordance with this rule, and subject to any instructions under subparagraph (d)(3)(C), the deposition officer shall—

(1) Arrange a time and place for taking the deposition and, in the case of an oral deposition, notify the party who requested the deposition accordingly;

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance with the procedures for production of witnesses and evidence under R.C.M. 703;

(3) Maintain order during the deposition and protect the parties and witnesses from annoyance, embarrassment, or oppression;

(4) Administer the oath to each witness, the reporter, and interpreter, if any;

(5) In the case of a written deposition, ask the questions submitted by counsel to the witness;

(6) Cause the proceedings to be recorded so that a verbatim transcript may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Certify the record of the deposition and forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.

(f) *Rights of accused.*

(1) *Oral depositions.*

(A) At an oral deposition, the accused shall have the following rights:

- (i) Except as provided in subparagraph (B), the right to be present.
- (ii) The right to be represented by counsel as provided in R.C.M. 506.

(B) At an oral deposition, the accused shall not have the right to be present when—

- (i) the accused, absent good cause shown, fails to appear after notice of time and place of the deposition;
- (ii) the accused is disruptive within the meaning of R.C.M. 804(c)(2); or
- (iii) the deposition is ordered in lieu of production of a witness on sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused.

(2) *Written depositions.* The accused shall have the right to be represented by counsel as provided in R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at a summary court-martial unless otherwise provided by the Secretary concerned.

(g) *Procedure.*

(1) *Oral depositions.*

(A) *Examination of witnesses.* Each witness giving an oral deposition shall be examined under oath. The scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The Government shall make available to each accused for examination and use at the taking of the deposition any statement of the witness which is in the possession of the United States and to which the accused would be entitled at the trial.

(B) *How recorded.* In the discretion of the authority who ordered the deposition, a deposition may be recorded by a reporter or by other means including video and audio recording.

(2) *Written depositions.*

(A) *Presence of parties.* No party has a right to be present at a written deposition.

(B) *Submission of interrogatories to opponent.* The party requesting a written deposition shall submit to opposing counsel a list of written questions to be asked of the witness. Opposing counsel may examine the questions and shall be allowed a reasonable time to prepare cross-interrogatories and objections, if any.

(C) *Examination of witnesses.* The deposition officer shall swear the witness, read each question presented by the parties to the witness, and record each response. The testimony of the witness shall be recorded on videotape, audiotape, or similar material or shall be transcribed. When the testimony is transcribed, the deposition shall, except when impracticable, be submitted to the witness for examination. The deposition officer may enter additional matters then stated by the witness under oath. The deposition shall be signed by the witness if the witness is available. If the deposition is not signed by the witness, the deposition officer shall record the reason. The certificate of authentication shall then be executed.

(h) *Objections.*

(1) *In general.* A failure to object prior to the deposition to the taking of the deposition on grounds which may be corrected if the objection is made prior to the deposition forfeits such objection unless the objection is affirmatively waived.

(2) *Oral depositions.* Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection shall be stated at the time of taking such deposition. If an objection relates to a matter which could have been corrected if the objection had been made during the deposition, the objection is forfeited if not made at the deposition.

(3) *Written depositions.* Objections to any question in written interrogatories shall be served on the party who proposed the question before the interrogatories are sent to the deposition officer or the objection is forfeited. Objections to answers in a written deposition may be made at trial.

(i) *Admissibility and use as evidence.*

(1) *In general.*

(A) The ordering of a deposition under paragraph (a)(1) does not control the admissibility of the deposition at court-martial. Except as provided in paragraph (2), a party may use all or part of a deposition as provided by the rules of evidence.

(B) In the discretion of the military judge, audio or video recorded depositions may be played for the court-martial or may be transcribed and read to the court-martial.

(2) *Capital cases.* Testimony by deposition may be presented in capital cases only by the defense.

(j) *Deposition by agreement not precluded.*

(1) *Taking deposition.* Nothing in this rule shall preclude the taking of a deposition without cost to the United States, orally or upon written questions, by agreement of the parties.

(2) *Use of deposition.* Subject to Article 49, nothing in this rule shall preclude the use of a deposition at the court-martial by agreement of the parties unless the military judge forbids its use for good cause.

(ii) R.C.M. 703 is amended as follows:

(a) *In general.* The prosecution, ~~and~~ defense, ~~and the~~ court-martial shall have equal opportunity to obtain witnesses and evidence, subject to the limitations set forth in R.C.M. 701, including the benefit of compulsory process.

(b) *Right to witnesses.*

(1) *On the merits or on interlocutory questions.* Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. With the consent of both the accused and Government, the military judge may authorize any witness to testify via remote means. Over a party's objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness' personal appearance (although such testimony will not be admissible over the accused's objection as evidence on the ultimate issue of guilt). Factors to be considered include, but are not limited to: the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the interlocutory proceeding that may be

caused by the production of the witness; the willingness of the witness to testify in person; the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training; and, for child witnesses, the traumatic effect of providing in-court testimony

(2) *On sentencing.* Each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(f).

(3) *Unavailable witness.* Notwithstanding paragraphs (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

(c) *Determining which witnesses will be produced.*

(1) *Witnesses for the prosecution.* Trial counsel shall obtain the presence of witnesses whose testimony trial counsel considers relevant and necessary for the prosecution.

(2) *Witnesses for the defense.*

(A) *Request.* The defense shall submit to trial counsel a written list of witnesses whose production by the Government the defense requests.

(B) *Contents of request.*

(i) *Witnesses on merits or interlocutory questions.* A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

(ii) *Witnesses on sentencing.* A list of witnesses wanted for presentencing proceedings shall include the name, telephone number, if known, and address or location of the witness such that the witness can be

found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the reasons why the witness' personal appearance will be necessary under the standards set forth in R.C.M. 1001(f).

(C) *Time of request.* A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness' presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

(D) *Determination.* Trial counsel shall arrange for the presence of any witness listed by the defense unless trial counsel contends that the witness' production is not required under this rule. If trial counsel contends that the witness' production is not required by this rule, the matter may be submitted to the military judge. If the military judge grants a motion for a witness, trial counsel shall produce the witness or the proceedings shall be abated.

(d) *Employment of expert witnesses and consultants.*

(1) ~~*In general.* When the employment at Government expense of an expert witness or consultant is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment.~~ *Funding Experts for the prosecution.* When the employment of a prosecution expert witness or consultant is considered necessary, counsel for the gGovernment shall, in advance of employment of the expert, and with notice to the defense, submit a request for funding of the expert in accordance with regulations prescribed by the Secretary concerned.

(2) *Review by military judge.*

(A) ~~A request for an expert witness or consultant denied by the convening authority may be renewed after referral of the charges before the military judge who shall determine—~~

~~(i) in the case of an expert witness, whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute; or~~

~~(ii) in the case of an expert consultant, whether the assistance of the expert is necessary for an adequate defense.~~

~~(B) If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which they are entitled under subparagraph (g)(3)(E).~~

(2) *Funding Experts for the defense.* When the employment of a defense expert witness or consultant is considered necessary, the defense shall may submit a request for funding of the expert in accordance with regulations prescribed by the Secretary concerned.

(A) After referral of charges, a denied defense request for an expert witness or consultant may be raised before the military judge. Motions for expert consultants may be raised *ex parte*. The military judge shall determine

(i) in the case of an expert witness, whether the testimony is relevant and necessary;

(ii) in the case of an expert consultant, whether the assistance is necessary for an adequate defense.

(B) If the military judge grants a motion for employment of a defense expert witness or consultant, the expert witness or consultant, or an adequate substitute, shall be provided in accordance with regulations prescribed by the Secretary concerned. In the absence of advance approval by an official authorized to grant such approval under the regulations prescribed by the Secretary concerned, expert witnesses and consultants may not be paid fees other than those to which they are entitled under subparagraph (g)(3)(E).

(3) *Notice of expert witnesses.*

(A) *Expert witnesses.*

(i) Government. In addition to the requirements of R.C.M. 701(a)(3), the Government shall provide the defense a written summary of the expected testimony from the expert witness.

(ii) Defense. After referral of charges, in addition to the requirements of R.C.M. 701(b)(1), the defense shall provide the Government a written summary of the expected testimony from the expert witness.

(B) Timing. The military judge shall set a date upon which notices under R.C.M. 703(d)(3)(A) are due to the opposing party.

(C) Failure to comply. If at any time it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(i) Order the required notice;

(ii) Order the party to permit discovery;

(iii) Grant a continuance;

(iv) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and

(v) Enter such other order as is just under the circumstances.

(e) *Right to evidence.*

(1) *In general.* Each party is entitled to the production of evidence which is relevant and necessary.

(2) *Unavailable evidence.* Notwithstanding paragraph (e)(1), a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

(f) *Determining what evidence will be produced.* The procedures in subsection (c) shall apply to a determination of what evidence will be produced, except that any defense request for the production of evidence shall list the items of evidence to be produced and shall include a description of each item

sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence.

(g) *Procedures for production of witnesses and evidence.*

(1) *Military witnesses.* The attendance of a military witness may be obtained by notifying the commander of the witness of the time, place, and date the presence of the witness is required and requesting the commander to issue any necessary orders to the witness.

(2) *Evidence under the control of the Government.* Evidence under the control of the Government may be obtained by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence.

(3) *Civilian witnesses and evidence not under the control of the Government—subpoenas.*

(A) *In general.* The presence of witnesses not on active duty and evidence not under control of the Government may be obtained by subpoena.

(B) *Contents.* A subpoena shall state the command by which the proceeding or investigation is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein, or to produce evidence—including books, papers, documents, data, writings, or other objects or electronically stored information designated therein at the proceeding or at an earlier time for inspection by the parties. A subpoena shall not command any person to attend or give testimony at an Article 32 preliminary hearing.

(C) *Investigative subpoenas.*

(i) *In general.* In the case of a subpoena issued before referral for the production of evidence for use in an investigation, the subpoena shall command each person to whom it is directed to produce the evidence requested for inspection by the Government counsel who issued the subpoena or for inspection in accordance with an order issued by the military judge under R.C.M. 309(b).

(ii) *Subpoenas for personal or confidential information about a victim.* After referral, a subpoena requiring the production of personal or confidential information about a victim named in a specification

may be served on an individual or organization by those authorized to issue a subpoena under subparagraph (D) or with the consent of the victim. Before issuing a subpoena under this subparagraph and unless there are exceptional circumstances, the victim must be given notice so that the victim can move for relief under subparagraph (g)(3)(G) or otherwise object.

(D) Ex parte request by defense. Upon ex parte request by the defense after referral, the military judge shall issue a subpoena to compel the production of a witness if the witness's testimony is determined to be relevant and necessary.

~~(D)~~(E) *Who may issue.* A subpoena may be issued by:

(i) the military judge, after referral;

~~(ii)~~(ii) the summary court-martial;

~~(iii)~~(iii) the trial counsel of a general or special court-martial;

~~(iv)~~(iv) the president of a court of inquiry;

~~(v)~~(v) an officer detailed to take a deposition; or

~~(vi)~~(vi) in the case of a pre-referral investigative subpoena, a military judge or, when issuance of the subpoena is authorized by a general court-martial convening authority, the detailed trial counsel or counsel for the Government.

(F) Notice. Notice shall be given to all parties for any subpoena issued for a witness post-referral unless, for good cause, the military judge issues a protective order.

~~(E)~~(G) *Service.* A subpoena may be served by the person authorized by this rule to issue it, a United States Marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named and, in the case of a subpoena of an individual to provide testimony, by providing to the person named travel orders and a means for reimbursement for fees and mileage as may be prescribed by the Secretary concerned, or in the case of hardship resulting in the subpoenaed witness' inability to comply with the subpoena absent initial Government payment, by

providing to the person named travel orders, fees, and mileage sufficient to comply with the subpoena in rules prescribed by the Secretary concerned.

~~(F)~~(H) *Place of service.*

(i) *In general.* A subpoena may be served at any place within the United States, its Territories, Commonwealths, or possessions.

(ii) *Foreign territory.* In foreign territory, the attendance of civilian witnesses and evidence not under the control of the Government may be obtained in accordance with existing agreements or, in the absence of agreements, with principles of international law.

(iii) *Occupied territory.* In occupied enemy territory, the appropriate commander may compel the attendance of civilian witnesses located within the occupied territory.

~~(G)~~(I) *Relief.* If either a person subpoenaed or a victim named in a specification whose personal and confidential information has been subpoenaed under subparagraph (g)(3)(C)(ii) requests relief on grounds that compliance is unreasonable, oppressive, or prohibited by law, the military judge or, if before referral, a military judge detailed under Article 30a shall review the request and shall—

- (i) order that the subpoena be modified or quashed, as appropriate, or
- (ii) order the person to comply with the subpoena.

~~(H)~~(J) *Neglect or refusal to appear or produce evidence.*

(i) *Issuance of warrant of attachment.* If the person subpoenaed neglects or refuses to appear or produce evidence, the military judge or, if before referral, a military judge detailed under Article 30a or a general court-martial convening authority, may issue a warrant of attachment to compel the attendance of a witness or the production of evidence, as appropriate.

(ii) *Requirements.* A warrant of attachment may be issued only upon probable cause to believe that the witness or evidence custodian was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that a means of reimbursement of fees and mileage, if applicable, was provided to the witness or advanced to the witness in cases of hardship, that the witness or evidence is material, that

the witness or evidence custodian refused or willfully neglected to appear or produce the subpoenaed evidence at the time and place specified on the subpoena, and that no valid excuse is reasonably apparent for the witness' failure to appear or produce the subpoenaed evidence.

(iii) *Form.* A warrant of attachment shall be written. All documents in support of the warrant of attachment shall be attached to the warrant, together with any charge sheets and convening orders, if applicable.

(iv) *Execution.* A warrant of attachment may be executed by a United States Marshal or such other person who is not less than 18 years of age as the authority issuing the warrant may direct. Only such non-deadly force as may be necessary to bring the witness before the court-martial or other proceeding or to compel production of the subpoenaed evidence may be used to execute the warrant. A witness attached under this rule shall be brought before the court-martial or proceeding without delay and shall testify or provide the subpoenaed evidence as soon as practicable and be released.

(v) *Definition.* For purposes of clause (g)(3)(H)(i) "military judge" does not include a summary court-martial.

(4) *Preservation requests.* In the case of evidence under control of the Government as well as evidence not under control of the Government, the person seeking production of the evidence may include with any request for evidence or subpoena a request that the custodian of the evidence take all necessary steps to preserve specifically described records and other evidence in its possession until such time as they may be produced or inspected by the parties.

(jj) R.C.M. 704 is amended as follows:

(a) *Types of immunity.* Two types of immunity may be granted under this rule.

(1) *Transactional immunity.* A person may be granted transactional immunity from trial by court-martial for one or more offenses under the UCMJ.

(2) *Testimonial immunity.* A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.

(b) *Scope.* Nothing in this rule bars:

(1) A later court-martial for perjury, false swearing, making a false official statement, or failure to comply with an order to testify; or

(2) Use in a court-martial under paragraph (b)(1) of this rule of testimony or statements derived from such testimony or statements.

(c) *Authority to grant immunity*

(1) Except as provided in subparagraph (2), a general court-martial convening authority, or designee, may grant immunity, and may do so only in accordance with this rule.

(2) For offenses over which special trial counsel has exercised authority and has not deferred, special trial counsel designated by the Secretary concerned, or that designated special trial counsel's designee, may grant immunity, and may do so only in accordance with this rule.

~~(1)(3)~~ (3) Persons subject to the UCMJ. A general court-martial convening authority, special trial counsel designated by the Secretary concerned, or their designees, may grant immunity to a person subject to the UCMJ. However, ~~they a general court-martial convening authority, or designee,~~ may grant immunity to a person subject to the UCMJ 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 chapter 601 of title 18 of the U.S. Code.

~~(2)(4)~~ (4) Persons not subject to the UCMJ. A general court-martial convening authority, special trial counsel designated by the Secretary concerned, or their designees, may grant immunity to persons not subject to the UCMJ only when specifically authorized to do so by the Attorney General of the United States or other authority designated chapter 601 of title 18 of the U.S. Code.

~~(3)(5)~~ Other limitations Limitations on delegation.

(A) Subject to Service regulations, the authority to grant immunity under this rule may 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 immunity or delegate the authority to grant immunity may be limited by superior authority;

(B) Subject to Service regulations, the authority to grant immunity under this rule may be delegated at the discretion of special trial counsel designated by the Secretary concerned to a subordinate special trial counsel. The authority to grant immunity or delegate the authority to grant immunity may be limited by superior authority. Any delegation shall be in writing.

(d) *Procedure.*

(1) A grant of immunity shall be written and signed by the individual convening authority who issues it. The grant shall include a statement of the authority under which it is made and shall identify the matters to which it extends.

(2) Subject to Service regulations, the convening authority shall order a person subject to the UCMJ who has received a grant of immunity, to answer questions by investigators or to testify or answer questions by counsel pursuant to that grant of immunity.

(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, special trial counsel designated by the Secretary concerned, as applicable, or their designees. 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 or special trial counsel designated by the Secretary concerned, as applicable, 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.

(kk) R.C.M. 705 is amended as follows:

(a) *In general.* Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority or the accused and special trial counsel, as applicable, may enter into a plea agreement in accordance with this rule. In cases over which special trial counsel has exercised authority and has not deferred, an agreement may only be entered into between special trial counsel and accused, however any such agreement may bind convening authorities and other commanders subject to such limitations as prescribed by the Secretary concerned.

(b) *Nature of agreement.* A plea agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions that may be included in the agreement and that are not prohibited under this rule; and

(2) A promise by the convening authority or special trial counsel, as applicable, to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

(D) Have trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Limit the sentence that may be adjudged by the court-martial for one or more charges and specifications in accordance with subsection (d);- or

(3) A promise by either the convening authority or special trial counsel to take other action within their authority.

(c) *Terms and conditions.*

(1) *Prohibited terms and conditions.*

(A) *Not voluntary.* A term or condition in a plea agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) *Deprivation of certain rights.* A term or condition in a plea agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete presentencing proceedings; or the complete and effective exercise of post-trial and appellate rights.

(2) *Permissible terms and conditions.* ~~Subject to s~~ Subparagraph (1)(A); and subparagraph (1)(B) ~~does~~ not prohibit ~~either party~~ the convening authority, special trial counsel, or the accused from proposing the following additional conditions:

(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority in a summary court-martial or before entry of judgment in a general or special court-martial as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1108 must be complied with before an alleged violation of such terms may relieve the ~~convening authority~~ Government of the obligation to fulfill the agreement;

(E) A promise to waive procedural requirements such as the Article 32 preliminary hearing, the right to trial by court-martial composed of members, the right to request trial by military judge alone, the right

to elect sentencing by members if applicable, or the opportunity to obtain the personal appearance of witnesses at presentencing proceedings;

(F) When applicable, a provision requiring that the sentences to confinement adjudged by the military judge for two or more charges or specifications be served concurrently or consecutively. Such an agreement shall identify the charges or specifications that will be served concurrently or consecutively; and

(G) Any other term or condition that is not contrary to or inconsistent with this rule.

(d) *Sentence limitations.*

(1) *In general.* Subject to such limitations as the Secretary concerned may prescribe pursuant to R.C.M. 705(a), a plea agreement that limits the sentence that can be imposed by the court-martial for one or more charges and specifications may contain:

(A) a limitation on the maximum punishment that can be imposed by the court-martial;

(B) a limitation on the minimum punishment that can be imposed by the court-martial;

(C) limitations on the maximum and minimum punishments that can be imposed by the court-martial;

or,

(D) a specified sentence or portion of a sentence that shall be imposed by the court-martial.

(2) *Confinement and fines.*

(A) *General or special courts-martial.*

(i) In a plea agreement in which the accused waives the right to elect sentencing by members and agrees to a limitation on the confinement or the amount of a fine that may be imposed by the military judge for more than one charge or specification under paragraph (1), the agreement shall include separate limitations, as applicable, for each charge or specification.

(ii) In a plea agreement in which the convening authority and accused agree to sentencing by members, limitations on the sentence that may be adjudged shall be expressed as limitations on the total punishment that may be imposed by the members.

(B) *Summary court-martial.* A plea agreement involving limitations on the sentence that may be adjudged shall be expressed as limitations on the total punishment that may be imposed by the court-martial.

(3) *Other punishments.* A plea agreement may include a limitation as to other authorized punishments as set forth in R.C.M. 1003.

(4) *Capital cases.* A sentence limitation under paragraph (1) may not include the possibility of a sentence of death.

(5) *Mandatory minimum punishments for certain offenses.* A sentence limitation under paragraph (1) may not provide for a sentence less than the applicable mandatory minimum sentence for an offense referred to in Article 56(b)(2), except as follows:

(A) If the accused pleads guilty to the offense, the agreement may have the effect of reducing a mandatory dishonorable discharge to a bad-conduct discharge.

(B) Upon recommendation of trial counsel, in exchange for substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, a plea agreement may provide for a sentence that is less than the mandatory minimum sentence for the offense charged.

(e) *Procedure.*

(1) *Negotiation.* Plea agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the Government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) *Formal submission.* After negotiation, if any, under paragraph (1), if the accused elects to propose a plea agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any.

(3) *Acceptance by the convening authority or special trial counsel.*

(A) *In general.* The convening authority or special trial counsel, as applicable, may either accept or reject an offer of the accused to enter into a plea agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority or special trial counsel, as applicable. When the convening authority has accepted a plea agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign. When special trial counsel has accepted a plea agreement, the agreement shall be signed by special trial counsel.

(B) *Victim consultation.* ~~Whenever practicable, p~~Prior to the convening authority or special trial counsel, as applicable, accepting a plea agreement, the convening authority or special trial counsel shall make the convening authority's or special trial counsel's best efforts to provide the victim ~~shall be provided~~ an opportunity to submit views concerning the plea agreement terms and conditions in accordance with regulations prescribed by the Secretary concerned. The convening authority or special trial counsel, as applicable, shall consider any such views provided prior to accepting a plea agreement. For purposes of this rule, a "victim" is an individual who is alleged to have suffered 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.

(4) *Withdrawal.*

(A) *By accused.* The accused may withdraw from a plea agreement at any time prior to the sentence being announced. If the accused elects to withdraw from the plea agreement after the acceptance of the plea agreement but before the sentence is announced, the military judge shall permit the accused to withdraw only for good cause shown. Additionally, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a plea agreement only as provided in R.C.M. 910(h) or 811(d).

(B) *By convening authority* or special trial counsel. The convening authority or special trial counsel, as applicable, may withdraw from a plea agreement at any time:

(i) before substantial performance by the accused of promises contained in the agreement;

(ii) upon the failure by the accused to fulfill any material promise or condition in the agreement;

(iii) when inquiry by the military judge discloses a disagreement as to a material term in the agreement;

or

(iv) if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

(f) *Nondisclosure of existence of a plea agreement.* No court-martial member shall be informed of the existence of a plea agreement, except upon request of the accused or when the military judge finds that disclosure of the existence of the plea agreement is manifestly necessary in the interest of justice because of circumstances arising during the proceeding. In addition, except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a plea agreement, and any statements made by an accused in connection therewith, whether during negotiations or during a providence inquiry, shall not be otherwise disclosed to the members.

(II) R.C.M. 706 is amended as follows:

(a) *Initial action.* If it appears to any commander who considers the disposition of charges, or to any preliminary hearing officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

(b) *Ordering an inquiry.*

(1) *Before referral.* Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by ~~the~~ any applicable convening authority ~~before whom the charges are pending for disposition~~, or by a military judge or magistrate in a proceeding conducted in accordance with R.C.M. 309.

(2) *After referral.* After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by ~~the convening~~ any authority.

(c) *Inquiry.*

(1) *By whom conducted.* When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused.

(2) *Matters in inquiry.* When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term “severe mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(B) What is the clinical psychiatric diagnosis?

(C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?

Other appropriate questions may also be included.

(3) *Directions to board.* In addition to the requirements specified in paragraph (c)(2) of this rule, the order to the board shall specify:

(A) That upon completion of the board's investigation, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused's commanding officer, the preliminary hearing officer, if any, appointed pursuant to Article 32 and to all ~~g~~Government and defense counsel in the case, the convening authority, and, after referral, to the military judge.

(B) That the full report of the board may be released by the board or other medical personnel only to other medical personnel for medical purposes, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense and, upon request, to the commanding officer of the accused; and

(C) That neither the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge.

(4) *Additional examinations.* Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require.

(5) *Disclosure to trial counsel.* No person, other than defense counsel, the accused, or, after referral of charges, the military judge may disclose to trial counsel any statement made by the accused to the board or any evidence derived from such statement.

(mm) R.C.M. 707 is amended as follows:

(a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:

- (1) Preferral of charges;
- (2) The imposition of restraint under R.C.M. 304(a)(2)–(4); or
- (3) Entry on active duty under R.C.M. 204.

(b) *Accountability.*

(1) *In general.* The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304(a)(2)-(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.

(2) *Multiple Charges.* When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.

(3) *Events which affect time periods.*

(A) *Dismissal or mistrial.* In the event of dismissal of charges or mistrial, a new 120-day period begins as follows:

(i) For an accused under pretrial restraint under R.C.M. 304(a)(2)-(4) at the time of the dismissal or mistrial, a new 120-day period begins on the date of the dismissal or mistrial.

(ii) For an accused not under pretrial restraint at the time of dismissal or mistrial, a new 120-day period begins on the earliest of:

(I) the date on which charges are preferred anew;

(II) the date of imposition of restraint under R.C.M. 304(a)(2)-(4); or

(III) in the case of a mistrial in which charges are not dismissed or preferred anew, the date of the mistrial.

(iii) In a case in which it is determined that charges were dismissed for an improper purpose or for subterfuge, the time period determined under subsection (a) shall continue to run.

(B) *Release from restraint.* If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of

(i) the date of preferral of charges;

(ii) the date on which restraint under R.C.M. 304(a) (2)-(4) is reimposed; or

(iii) date of entry on active duty under R.C.M. 204.

(C) *Government appeals.* If notice of appeal under R.C.M. 908 is filed, a new 120-day time period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Criminal Appeals under R.C.M. 908, if there is a further appeal to the Court of Appeals for the Armed Forces or, subsequently, to the Supreme Court, a new 120-day time period under this rule shall begin on the date the parties are notified of the final decision of the Court of Appeals for the Armed Forces, or, if appropriate, the Supreme Court.

(D) *Rehearings.* If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority or, for charges and specifications referred by special trial counsel, the special trial counsel receives the record of trial and the opinion authorizing or directing a rehearing. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.C.M. 803.

(E) *Commitment of the incompetent accused.* If the accused is committed to the custody of the Attorney General for hospitalization as provided in R.C.M. 909(f), all periods of such commitment shall be excluded when determining whether the period in subsection (a) of this rule has run. If, at the end of the period of commitment, the accused is returned to the custody of the general court-martial convening authority, a new 120-day time period under this rule shall begin on the date of such return to custody.

(c) *Excludable delay.* All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.

(1) *Procedure.* Prior to referral, all requests for pretrial delay, together with supporting reasons and with notice to the defense, will be submitted to ~~the~~ a convening authority with authority over the accused ~~or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution for resolution.~~ The convening authority may delegate this authority to an Article 32 preliminary hearing officer. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

(2) *Motions.* Upon accused's timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made a part of the appellate record.

(d) *Remedy.* A failure to comply with this rule will result in dismissal of the affected charges, or, in a sentence-only rehearing, sentence relief as appropriate.

(1) *Dismissal.* Dismissal will be with or without prejudice to the ~~g~~Government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

(2) *Sentence relief.* In determining whether or how much sentence relief is appropriate, the military judge shall consider, among others, each of the following factors: the length of the delay, the reasons for the delay, the accused's demand for speedy trial, and any prejudice to the accused from the delay. Any sentence relief granted will be applied against the sentence approved by the convening authority.

(e) ~~Forfeiture.~~ Waiver. Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty forfeits any speedy trial issue as to that offense, ~~unless affirmatively waived.~~

(f) *Priority.* When considering the disposition of charges and the ordering of trials, a convening authority or special trial counsel shall give priority to cases in which the accused is held under those forms of pretrial

restraint defined by R.C.M. 304(a)(3)-(4). Trial of or other disposition of charges against any accused held in arrest or confinement pending trial shall be given priority.

(nn) R.C.M. 805 is amended as follows:

(a) *Military judge.* No court-martial proceeding, except the deliberations of the members, may take place in the absence of the military judge. ~~For purposes of Article 39(a) sessions solely, the presence of the military judge may be satisfied by the use of audiovisual technology, such as video teleconferencing technology.~~

(b) *Members.* Unless the accused is tried or sentenced by military judge alone, no court-martial proceeding may take place in the absence of any detailed member except: ~~a~~Article 39(a) sessions under R.C.M. 803; examination of members under R.C.M. 912(d); when the member has been excused under R.C.M. 505, 912(f), or 912A; or as otherwise provided in R.C.M. 1104(d)(1).

(c) *Counsel.* As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a court-martial session. In the case of a court-martial requiring the detailing of a special trial counsel, the presence of a special trial counsel is required unless a special trial counsel determines otherwise and another trial counsel, who is qualified according to R.C.M. 502(d), is also present. An assistant counsel who lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified counsel. ~~For purposes of Article 39(a) sessions, other than presentencing proceedings under R.C.M. 1001, the presence of counsel may be satisfied by the use of audiovisual technology, such as video teleconferencing technology.~~

(d) *Effect of replacement of member or military judge.*

(1) *Members.* When after presentation of evidence on the merits has begun, a new member is impaneled under R.C.M. 912A, trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to or played for the new member in the presence of the military judge, the accused, and counsel for both sides, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

(2) *Military judge*. When, after the presentation of evidence on the merits has begun in trial before military judge alone, a new military judge is detailed under R.C.M. 505(e)(2) trial may not proceed unless the accused requests, and the military judge approves, trial by military judge alone, and a verbatim record of the testimony and evidence or a stipulation thereof is read to or played for the military judge in the presence of the accused and counsel for both sides, or the trial proceeds as if no evidence had been presented.

(oo) R.C.M. 810 is amended as follows:

(a) *In general*.

(1) *Rehearings in full and new or other trials*. In rehearings which require findings on all charges and specifications referred to a court-martial and in new or other trials, the procedure shall be the same as in an original trial except as otherwise provided in this rule.

(2) *Rehearings on sentence only*. In a rehearing on sentence only, the procedure shall be the same as in an original trial, except that the portion of the procedure which ordinarily occurs after challenges and through and including the findings is omitted, and except as otherwise provided in this rule.

(A) *Contents of the record*. The contents of the record of the original trial consisting of evidence properly admitted on the merits relating to each offense of which the accused stands convicted but not sentenced may be established by any party whether or not testimony so read is otherwise admissible under Mil. R. Evid. 804(b)(1) and whether or not it was given through an interpreter.

(B) *Plea*. The accused at a rehearing only on sentence may not withdraw any plea of guilty upon which findings of guilty are based.

(3) *Combined rehearings*. When a rehearing on sentence is combined with a trial on the merits of one or more specifications referred to the court-martial, whether or not such specifications are being tried for the first time or reheard, the trial will proceed first on the merits. Reference to the offenses being reheard on sentence is permissible only as provided for by the Military Rules of Evidence. The presentencing proceedings procedure shall be the same as at an original trial, except as otherwise provided in this rule.

(4) *Additional charges.* A convening authority or special trial counsel, as applicable, may refer additional charges for trial together with charges as to which a rehearing has been directed.

(5) *Rehearing impracticable.* If a rehearing was authorized on one or more findings, the convening authority, or in cases referred by a special trial counsel, a special trial counsel, may dismiss the affected charges if the convening authority or special trial counsel, as applicable, determines that a rehearing is impracticable. If the convening authority or special trial counsel, as applicable, dismisses such charges, a rehearing may proceed on any remaining charges not dismissed by the convening authority or special trial counsel, as applicable.

(6) *Forwarding.* When a rehearing, new trial, other trial, or remand is ordered, a military judge shall be detailed to the proceeding, and the matter forwarded to the military judge. In the case of a summary court-martial, when any proceeding is ordered, a new summary court-martial officer shall be detailed.

(b) *Composition.*

(1) *Members.* No member of the court-martial which previously heard the case may sit as a member of the court-martial at any rehearing, new trial, or other trial of the same case.

(2) *Military judge.* The military judge at a rehearing may be the same military judge who presided over a previous trial of the same case. The existence or absence of a request for trial by military judge alone at a previous hearing shall have no effect on the composition of a court-martial on rehearing.

(3) *Accused's election.* The accused at a rehearing or new or other trial shall have the same right to request enlisted members, an all-officer panel, or trial by military judge alone as the accused would have at an original trial.

(c) *Examination of record of former proceedings.* No member may, upon a rehearing or upon a new or other trial, examine the record of any former proceedings in the same case except when permitted to do so by the military judge after such matters have been received in evidence.

(d) *Sentence limitations.*

(1) *In general.* Sentences at rehearings, new trials, or other trials shall be adjudged within the limitations set forth in R.C.M. 1003. Except as otherwise provided in paragraph (d)(2), the new adjudged sentence for offenses on which a rehearing, new trial, or other trial has been ordered shall not exceed or be more severe than the original sentence as set forth in the judgment under R.C.M. 1111. When a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be imposed shall be the maximum punishment under R.C.M. 1003 for the offenses being reheard as limited in this rule, plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty.

(2) *Exceptions.* A rehearing, new trial, or other trial may adjudge any lawful sentence, without regard to the sentence of the previous hearing or trial when, as to any offense—

(A) the sentence prescribed for the offense is mandatory;

(B) in the case of an “other trial,” the original trial was invalid because a summary or special court-martial tried an offense involving mandatory punishment, an offense for which only a general court-martial has jurisdiction, or one otherwise considered capital;

(C) the rehearing was ordered or authorized for any charge or specification for which a plea of guilty was entered at the first hearing or trial and a plea of not guilty was entered at the second hearing or trial to that same charge or specification;

(D) the rehearing was ordered or authorized for any charge or specification for which the sentence announced or adjudged by the first court-martial was in accordance with a plea agreement and, at the rehearing, the accused does not comply with the terms of the agreement; or

(E) the rehearing was ordered or authorized after an appeal by the Government under R.C.M. 1117.

(e) *Definition.* “Other trial” means another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense. The authority ordering an “other trial” shall state in the action the basis for declaring the proceedings invalid.

(f) *Remands.*

(1) *In general.* A Court of Criminal Appeals may order a remand for additional fact finding, or for other reasons, in order to address a substantial issue on appeal. A remand under this subsection is generally not appropriate to determine facts or investigate matters which could, through a party's exercise of reasonable diligence, have been investigated or considered at trial. Such orders shall be directed to the Chief Trial Judge. The Judge Advocate General, or his or her delegate, shall designate a general court-martial convening authority who shall provide support for the hearing. In cases which were referred by a special trial counsel, a special trial counsel designated under regulations prescribed by the Secretary concerned shall be notified of any remand.

(2) *Detailing of military judge.* When the Court of Criminal Appeals orders a remand, the Chief Trial Judge shall detail an appropriate military judge to the matter and shall notify the commanding officer exercising general court-martial convening authority over the accused of the remand.

(3) *Remand impracticable.* If the general court-martial convening authority designated under paragraph (1) or in cases which were referred by special trial counsel, special trial counsel determines that the remand is ~~impractical~~ impracticable due to military exigencies or other reasons, a Government appellate attorney shall so notify the Court of Criminal Appeals. Upon receipt of such notification, the Court of Criminal Appeals may take any action authorized by law that does not materially prejudice the substantial rights of the accused.

(pp) R.C.M. 813 is amended as follows:

(a) *Opening sessions.* Except as noted in subsection (d), ~~W~~hen the court-martial is called to order for the first time in a case, the military judge shall ensure that the following is announced:

- (1) The order, including any amendment, by which the court is convened;
- (2) The name, rank, and unit or address of the accused;
- (3) The name and rank of the military judge presiding;
- (4) The names and ranks of the members, if any, who are present;
- (5) The names and ranks of members who are absent, if presence of members is required

- (6) The names and ranks (if any) of counsel who are present;
- (7) The names and ranks (if any) of counsel who are absent; and
- (8) The name and rank (if any) of any detailed court reporter.

(b) *Later proceedings.* When the court-martial is called to order after a recess or adjournment or after it has been closed for any reason, the military judge shall ensure that the record reflects whether all parties and members who were present at the time of the adjournment or recess, or at the time the court-martial closed, are present.

(c) *Additions, replacement, and absences of personnel.* Whenever there is a replacement of the military judge, any member, or counsel, either through the appearance of new personnel or personnel previously absent or through the absence of personnel previously present, the military judge shall ensure the record reflects the change and the reason for it.

(d) Under R.C.M. 813(a)(1), the name, rank, or position of the convening authority, with the exception of the Secretary concerned, the Secretary of Defense, or the President, shall be omitted from announcement during the opening session of the court-martial.

(qq) R.C.M. 901 is amended as follows:

(a) *In general.* Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

(b) *Specific grounds.* A military judge shall also disqualify himself or herself in the following circumstances:

(1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

(2) Where the military judge has acted as counsel, preliminary hearing officer, investigating officer, legal officer, staff judge advocate, or convening authority, as to any offense charged or in the same case generally.

(3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded

charges in the case with a personal recommendation as to disposition, has referred charges in the case, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

(4) Where the military judge is not eligible to act because the military judge is not qualified under R.C.M. 502(c) or not detailed under R.C.M. 503(b).

(5) Where the military judge, the military judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person:

(A) Is a party to the proceeding;

(B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or

(C) Is to the military judge's knowledge likely to be a material witness in the proceeding.

(c) *Definitions.* For the purposes of this rule the following words or phrases shall have the meaning indicated—

(1) "Proceeding" includes pretrial (to include pre-referral), trial, post-trial, appellate review, or other stages of litigation.

(2) The "degree of relationship" is calculated according to the civil law system.

(d) *Procedure.*

(1) The military judge shall, upon motion of any party or *sua sponte*, decide whether the military judge is disqualified.

(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

(3) Except as provided under subsection (e) of this rule, if the military judge rules that the military judge is disqualified, the military judge shall recuse himself or herself.

(e) *Waiver.* No military judge shall accept from the parties to the proceeding a waiver of any ground for

disqualification enumerated in subsection (b) of this rule. Where the ground for disqualification arises only under subsection (a) of this rule, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(rr) R.C.M. 902A is amended as follows:

Rule 902A. Application of Sentencing Rules REMOVED

See R.C.M. 925.

~~(a) Generally. Only one sentencing system applies in a court martial. The accused at a single court martial with specifications alleging offenses committed before 1 January 2019 and on or after 1 January 2019 will not be sentenced under separate sets of rules. Accordingly, if an accused is facing court martial for several specifications alleging offenses, at least one of which was committed before 1 January 2019 and at least one of which was committed on or after 1 January 2019, the convening authority may refer these offenses to either —~~

~~(1) a single court martial where the applicable sentencing rules are the sentencing rules in effect prior to 1 January 2019 and these apply to all offenses regardless of the date of the alleged offense, unless the accused makes an election under subsection (b); or,~~

~~(2) separate courts martial for the offenses alleged to have been committed before 1 January 2019 and the offenses alleged to have been committed on or after 1 January 2019.~~

~~(b) Election of sentencing rules applicable at a single trial. If the convening authority has referred specifications alleging offenses committed before 1 January 2019 and on or after 1 January 2019 to a single court martial pursuant to paragraph (a)(1), before the accused is arraigned, the military judge shall ascertain, as applicable, whether the accused elects to be sentenced under the sentencing rules in effect on 1 January 2019, which shall apply to all offenses regardless of the date of the alleged offense.~~

~~(c) Form of election. The accused's election under subsection (b) shall be in writing and signed by the accused or shall be made orally on the record. The military judge shall ascertain whether the accused has~~

~~consulted with defense counsel and has been informed of the right to make the election of the applicable sentencing rules under subsection (b).~~

~~(d) Irrevocable Election. Unless the military judge allows the accused to withdraw the election for good cause shown, the accused's election of the applicable sentencing rules under subsection (b) is irrevocable once made on the record and accepted by the military judge.~~

(ss) R.C.M. 905 is amended as follows:

(a) *Definitions and form.* A motion is an application to the military judge for particular relief. Motions may be oral or, at the discretion of the military judge, written. A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of a motion, not its form or designation, shall control.

(b) *Pretrial motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial. The following must be raised before a plea is entered:

(1) Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, or referral of charges, or in the preliminary hearing;

(2) Defenses or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge an offense, which objections shall be resolved by the military judge at any time during the pendency of the proceedings);

(3) Motions to suppress evidence;

(4) Motions for discovery under R.C.M. 701 or for production of witnesses or evidence;

(5) Motions for severance of charges or accused; or

(6) Objections based on denial of request for individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

(c) *Burden of proof.*

(1) *Standard.* Unless otherwise provided in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.

(2) *Assignment.*

(A) Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party.

(B) In the case of a motion to dismiss for lack of jurisdiction, denial of the right to speedy trial under R.C.M. 707, or the running of the statute of limitations, the burden of persuasion shall be upon the prosecution.

(d) *Ruling on motions.* A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

(e) *Effect of failure to raise defenses or objections.*

(1) Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule forfeits the defenses or objections absent an affirmative waiver. The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) of this rule.

(2) Other motions, requests, defenses, or objections, except lack of jurisdiction ~~or failure of a charge to allege an offense~~, must be raised before the court-martial is adjourned for that case. Failure to raise such other motions, requests, defenses, or objections, shall constitute forfeiture, absent an affirmative waiver.

(f) *Reconsideration.* On request of any party or *sua sponte*, the military judge may, prior to entry of judgment, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

(g) *Effect of final determinations.* Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused, except that, when the offenses charged at one court-martial did not arise out of the same transaction as those charged at the court-martial at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a federal governmental unit were parties.

(h) *Written motions.* Written motions may be submitted to the military judge after referral and when appropriate they may be supported by affidavits, with service and opportunity to reply to the opposing party. Such motions may be disposed of before arraignment and without a session. Either party may request an Article 39(a) session to present oral argument or have an evidentiary hearing concerning the disposition of written motions.

(i) *Service.* Written motions shall be served on all other parties. Unless otherwise directed by the military judge, the service shall be made upon counsel for each party.

(j) *Application to convening authority.* Except as otherwise provided in this Manual, **any** matters which may be resolved upon motion without trial of the general issue of guilt may be submitted by a party to the convening authority before trial for decision. Submission of such matter to the convening authority is not, except as otherwise provided in this Manual, required, and is, in any event, without prejudice to the renewal of the issue by timely motion before the military judge.

(k) *Production of statements on motion to suppress.* Except as provided in this subsection, R.C.M. 914 shall apply at a hearing on a motion to suppress evidence under paragraph (b)(3) of this rule. For purposes of this subsection, a law enforcement officer shall be deemed a witness called by the Government, and upon a claim of privilege the military judge shall excise portions of the statement containing privileged matter.

(tt) R.C.M. 906 is amended as follows:

(a) *In general.* A motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting its case.

(b) *Grounds for appropriate relief.* The following may be requested by motion for appropriate relief. This list is not exclusive.

(1) *Continuances.* A continuance may be granted only by the military judge.

(2) *Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel granted.* If a request for military counsel was denied, which denial was upheld on appeal (if available) or if a request to retain detailed counsel was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge shall ensure that a record of the matter is included in the record of trial, and may make findings. Trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not dismiss the charges or otherwise effectively prevent further proceedings based on this issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of unavailability is in the process of review in administrative channels.

(3) *Corrections.* Correction of defects in the Article 32 preliminary hearing, ~~or~~ pretrial advice, or a written determination by special trial counsel.

(4) *Amendment of charges or specifications.* After referral, a charge or specification may not be amended over the accused's objection except pursuant to R.C.M. 603(d) and (e).

(5) *Severance of specifications.* Severance of a duplicitous specification into two or more specifications.

(6) *Bill of particulars.* A bill of particulars may be amended at any time, subject to such conditions as justice permits.

(7) *Discovery and Production.* Discovery and production of evidence and witnesses.

(8) *Relief from pretrial confinement.* Upon a motion for release from pretrial confinement, a victim of an alleged offense committed by the accused has the right to reasonable, accurate, and timely notice of the motion and any hearing, the right to confer with counsel, and the right to be reasonably heard. Inability to reasonably afford a victim these rights shall not delay the proceedings. The right to be heard under this rule includes the right to be heard through counsel.

(9) *Severance of multiple accused.* ~~Severance of multiple accused, i~~ If it appears that an accused or the Government is prejudiced by a joint or common trial. In a common trial, a severance shall be granted whenever any accused, other than the moving accused, faces charges unrelated to those charged against the moving accused.

(10) *Severance of offenses.*

(A) *In general.* Offenses may be severed, but only to prevent manifest injustice.

(B) *Capital cases.* In a capital case, if the joinder of unrelated noncapital offenses appears to prejudice the accused, the military judge may sever the noncapital offenses from the capital offenses.

(11) *Change of place of trial.* The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby.

(12) *Unreasonable multiplication of charges.* The military judge may provide a remedy, as described in this rule, if he or she finds there has been an unreasonable multiplication of charges as applied to findings or sentence.

(A) *As applied to findings.* Charges that arise from substantially the same transaction, while not legally multiplicitous, may still be unreasonably multiplied as applied to findings. When the military judge finds, in his or her discretion, that the offenses have been unreasonably multiplied, the appropriate remedy shall be dismissal of the lesser offenses or merger of the offenses into one specification.

(B) *As applied to sentence.* Where the military judge finds that the unreasonable multiplication of charges requires a remedy that focuses more appropriately on punishment than on findings, he or she may find that there is an unreasonable multiplication of charges as applied to sentence. ~~If the military judge makes such a finding and sentencing is by members, the maximum punishment for those offenses determined to be unreasonably multiplied shall be the maximum authorized punishment of the offense carrying the greatest maximum punishment.~~ If the military judge makes such a finding ~~and sentencing is by military judge,~~ the remedy shall be as set forth in R.C.M. 1002(d)(2). A ruling on this motion ordinarily should be deferred until after findings are entered.

(13) Admissibility. Preliminary ruling on admissibility of evidence.

(14) Mental capacity or responsibility. Motions relating to mental capacity or responsibility of the accused.

(uu) R.C.M. 908 is amended as follows:

(a) *In general.* The United States may appeal an order or ruling by a military judge that terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material in the proceedings, or directs the disclosure of classified information, or that imposes sanctions for nondisclosure of classified information. The United States may also appeal a refusal by the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information or to enforce such an order that has previously been issued by the appropriate authority. The United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification except when the military judge enters a finding of not guilty with respect to a charge or specification following the return of a finding of guilty by the members.

(b) *Procedure.*

(1) *Delay.* After an order or ruling which may be subject to an appeal by the United States, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if trial counsel requests a

delay to determine whether to file notice of appeal under this rule. Trial counsel is entitled to no more than 72 hours under this subsection.

(2) *Decision to appeal.* The decision whether to file notice of appeal under this rule shall be made within 72 hours of the ruling or order to be appealed. If the Secretary concerned so prescribes, trial counsel shall not file notice of appeal unless authorized to do so by a person designated by the Secretary concerned.

(3) *Notice of appeal.* If the United States elects to appeal, trial counsel shall provide the military judge with written notice to this effect not later than 72 hours after the ruling or order. Such notice shall identify the ruling or order to be appealed and the charges and specifications affected. Trial counsel shall certify that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(4) *Effect on the court-martial.* Upon written notice to the military judge under paragraph (b)(3) of this rule, the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Criminal Appeals of the appeal, except that solely as to charges and specifications not affected by the ruling or order:

(A) Motions may be litigated, in the discretion of the military judge, at any point in the proceedings;

(B) When trial on the merits has not begun,

(i) a severance may be granted upon request of all the parties;

(ii) a severance may be granted upon request of the accused and when appropriate under R.C.M.

906(b)(10); or

(C) When trial on the merits has begun but has not been completed, a party may, on that party's request and in the discretion of the military judge, present further evidence on the merits.

(5) *Record.* Upon written notice to the military judge under paragraph (b)(3), trial counsel shall cause a record of the proceedings to be prepared. Such record shall be verbatim and complete to the extent necessary to resolve the issues appealed. The record shall be certified in accordance with R.C.M. 1112, and shall be

reduced to a written transcript if required under R.C.M. 1114. The military judge or the Court of Criminal Appeals may direct that additional parts of the proceeding be included in the record.

(6) *Forwarding.* Upon written notice to the military judge under paragraph (b)(3) of this rule, trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by the Judge Advocate General. The matter forwarded shall include: a statement of the issues appealed; the record of the proceedings or, if preparation of the record has not been completed, a summary of the evidence; and such other matters as the Secretary concerned may prescribe. ~~The person designated by the Judge Advocate General shall promptly decide whether to file the appeal with the Court of Criminal Appeals and notify trial counsel of that decision.~~

(7) *Appeal filed.* ~~If the United States elects to file an appeal, it shall be filed directly with the Court of Criminal Appeals, in accordance with the rules of that court.~~

(A) In cases over which a special trial counsel exercises authority, the decision to appeal shall be made by:

(i) within the Department of Defense, a Lead Special Trial Counsel; or
(ii) within the Coast Guard, when it is not operating as a service in the Department of the Navy, a special trial counsel designated under regulations by the Secretary concerned.

(B) For all other cases, the person designated by the Judge Advocate General shall promptly decide whether to file the appeal with the Court of Criminal Appeals and notify trial counsel of that decision.

(C) If the United States elects to file an appeal, it shall be filed directly with the Court of Criminal Appeals, in accordance with the rules of that court.

(D) In all cases, a representative of the Government designated by the Judge Advocate General will be responsible for the substance and content of submissions to the Court of Criminal Appeals. For appeals in cases over which a special trial counsel exercises authority, the designated representative of the

Government will consult with the special trial counsel who authorized the appeal or that special trial counsel's designee concerning the substance and content of appellate filings.

(8) *Appeal not filed.* If the United States elects not to file an appeal, trial counsel promptly shall notify the military judge and the other parties.

(9) *Pretrial confinement of accused pending appeal.* If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal under paragraph (b)(3) of this rule, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).

(c) *Appellate proceedings.*

(1) *Appellate counsel.* The parties shall be represented before appellate courts in proceedings under this rule as provided in R.C.M. 1202. Appellate Government counsel shall diligently prosecute an appeal under this rule.

(2) *Court of Criminal Appeals.* An appeal under Article 62 shall, whenever practicable, have priority over all other proceedings before the Court of Criminal Appeals. In determining an appeal under Article 62, the Court of Criminal Appeals may take action only with respect to matters of law.

(3) *Action following decision of Court of Criminal Appeals.* After the Court of Criminal Appeals has decided any appeal under Article 62, the accused may petition for review by the Court of Appeals for the Armed Forces, or the Judge Advocate General may certify a ~~question~~ case to the Court of Appeals for the Armed Forces. The parties shall be notified of the decision of the Court of Criminal Appeals promptly. If the decision is adverse to the accused, the accused shall be notified of the decision and of the right to petition the Court of Appeals for the Armed Forces for review within 60 days orally on the record at the court-martial or in accordance with R.C.M. 1203(d). If the accused is notified orally on the record, trial counsel shall forward by expeditious means a certificate that the accused was so notified to the Judge Advocate

General, who shall forward a copy to the clerk of the Court of Appeals for the Armed Forces when required by the Court. If the decision by the Court of Criminal Appeals permits it, the court-martial may proceed as to the affected charges and specifications pending further review by the Court of Appeals for the Armed Forces or the Supreme Court, unless either court orders the proceedings stayed. Unless the case is reviewed by the Court of Appeals for the Armed Forces, it shall be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court of Criminal Appeals. If the case is reviewed by the Court of Appeals for the Armed Forces, R.C.M. 1204 and 1205 shall apply.

(vv) R.C.M. 909 is amended as follows:

(a) *In general.* No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case.

(b) *Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary is established.

(c) *Determination before referral.*

(1) For offenses over which special trial counsel has not exercised authority or has deferred, if an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, he or she shall forward the charges to the general court-martial convening authority. If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.

(2) For offenses over which special trial counsel has exercised authority and has not deferred, if an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the general court-martial convening authority may disagree with the conclusion and notify special trial counsel who may take any action authorized under R.C.M. 401A, including referral of charges. If the general court-martial convening authority concurs with the conclusion, he or she shall notify special trial counsel and commit the accused to the custody of the Attorney General.

~~(2)~~(3) Upon request of the ~~g~~Government or the accused, a military judge may conduct a hearing to determine the mental capacity of the accused in accordance with R.C.M. 309 and subsection (e) of this rule at any time prior to referral.

(d) *Determination after referral.* After referral, the military judge may conduct a hearing to determine the mental capacity of the accused, either *sua sponte* or upon request of either party. If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge shall conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with subsection (e) of this rule.

(e) *Incompetence determination hearing.*

(1) *Nature of issue.* The mental capacity of the accused is an interlocutory question of fact.

(2) *Standard.* Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges.

(3) If the military judge finds the accused is incompetent to stand trial, the judge shall report this finding to the general court-martial convening authority, who shall commit the accused to the custody of the Attorney General.

(f) *Hospitalization of the accused.* An accused who is found incompetent to stand trial under this rule shall be hospitalized by the Attorney General as provided in subsection 4241(d) of title 18, United States Code. If notified that the accused has recovered to such an extent that he or she is able to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case, then the general court-martial convening authority shall promptly take custody of the accused. If, at the end of the period of hospitalization, the accused's mental condition has not so improved, action shall be taken in accordance with section 4246 of title 18, United States Code.

(g) *Excludable delay.* All periods of commitment shall be excluded as provided by R.C.M. 707(c). The 120-day time period under R.C.M. 707 shall begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment. For offenses over which special trial counsel has exercised authority and not deferred, the general court-martial convening authority shall immediately notify a special trial counsel in accordance with regulations prescribed by the Secretary concerned.

(ww) R.C.M. 910 is amended as follows:

(a) ~~*Alternatives*~~ *Types of pleas.*

(1) *In general.* An accused may plead as follows:

(A) guilty;

(B) not guilty of an offense as charged, but guilty of a named lesser included offense;

(C) guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or

(D) not guilty.

~~A plea of guilty may not be received as to an offense for which a sentence of death is mandatory.~~

(2) *Conditional pleas.* With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, trial counsel may consent on behalf of the Government.

(b) *Refusal to plead; irregular plea.* If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

(c) *Advice to accused.* Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, the maximum possible penalty provided by law, and if applicable, the effect of any sentence limitation(s) provided for in a plea agreement on the minimum or maximum possible penalty that may be adjudged including the effect of any concurrent or consecutive sentence limitations;

(2) In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

(3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in paragraph (c)(3) of this rule;

(5) That if the accused pleads guilty, the military judge will question the accused about the offenses to

which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement; and

(6) That if an election by the accused to be tried by military judge alone has been approved, the accused will be sentenced by the military judge.

(d) *Ensuring that the plea is voluntary.* The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) *Determining accuracy of plea.* The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

(f) *Plea agreement inquiry.*

(1) *In general.* A plea agreement may not be accepted if it does not comply with R.C.M. 705.

(2) *Notice.* The parties shall inform the military judge if a plea agreement exists.

(3) *Disclosure.* If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted.

(4) *Inquiry.*

(A) The military judge shall inquire to ensure:

(i) that the accused understands the agreement; and

(ii) that the parties agree to the terms of the agreement.

(B) If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall:

- (i) conform, with the consent of the Government, the agreement to the accused's understanding; or
- (ii) permit the accused to withdraw the plea.

(5) *Sentence limitations in plea agreements.* If a plea agreement contains limitations on the punishment that may be imposed, the court-martial, subject to subparagraph (4)(B) and R.C.M. 705, shall sentence the accused in accordance with the agreement.

(6) *Accepted plea agreement.* After the plea agreement inquiry, the military judge shall announce on the record whether the plea and the plea agreement are accepted. Upon acceptance by the military judge, a plea agreement shall bind the parties and the court-martial.

(7) *Rejected plea agreement.* If the military judge does not accept a plea agreement, the military judge shall—

(A) issue a statement explaining the basis for the rejection;

(B) allow the accused to withdraw any plea; and

(C) inform the accused that if the plea is not withdrawn the court-martial may impose any lawful punishment.

(8) *Basis for rejecting a plea agreement.* The military judge of a general or special court-martial shall reject a plea agreement that—

(A) contains a provision that has not been accepted by both parties;

(B) contains a provision that is not understood by the accused;

(C) except as provided in Article 53a(c), contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense referred to in Article 56(b)(2);

(D) is prohibited by law; or

(E) is contrary to, or is inconsistent with, these rules with respect to the terms, conditions, or other aspects of plea agreements.

(g) *Findings.* Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless the plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged.

(h) *Later action.*

(1) *Withdrawal by the accused.* If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge shall permit the accused to do so only for good cause shown.

(2) *Statements by accused inconsistent with plea.* If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

(i) [Reserved]

(j) *Waiver.* Except as provided in paragraph (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, as to the factual issue of guilt of the offense(s) to which the plea was made and any non-jurisdictional defect as to the offense(s) to which the plea was made that occurred prior to the plea.

(xx) R.C.M. 911 is amended as follows:

Rule 911. ~~Assembly of the court-martial~~ Randomization and assembly of the court-martial panel

(a) Prior to assembly of the court-martial, at an open session of the court-martial, the military judge, or a designee thereof, shall randomly assign numbers to the members detailed by the convening authority.

(b) The military judge shall determine, after accounting for any excusals by the convening authority or designee, how many members detailed by the convening authority must be present at the initial session for

which members are required. The required number of members shall be present, according to the randomly assigned order determined in subparagraph (a) of this rule. The military judge may temporarily excuse any member who has been detailed but is not present.

(c) At the initial session for which members are required, the military judge shall cause the members who are present to be sworn, account on the record for any members who are temporarily excused, and then announce assembly of the court-martial.

(d) The military judge shall ensure any additional member is sworn at the first court session at which the member is present.

~~The military judge shall announce the assembly of the court-martial.~~

(yy) R.C.M. 912 is amended as follows:

(a) *Pretrial matters.*

(1) *Questionnaires.* Before trial, trial counsel may, and shall upon request of defense counsel, submit to each member written questions requesting the following information:

(A) Date of birth;

(B) Sex;

(C) Race;

(D) Marital status and sex, age, and number of dependents;

(E) Home of record;

(F) Civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received;

(G) Current unit to which assigned;

(H) Past duty assignments;

(I) Awards and decorations received;

(J) Date of rank; and

(K) Whether the member has acted as accuser, counsel, preliminary hearing officer, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

Additional information may be requested with the approval of the military judge. Each member's responses to the questions shall be written and signed by the member. For purposes of this rule, the term "members" includes any alternate members.

(2) *Other materials.* A copy of any written materials considered by the convening authority in selecting the members detailed to the court-martial shall be provided to any party upon request, except that such materials pertaining solely to persons who were not selected for detail as members need not be provided unless the military judge, for good cause, so directs.

(b) *Challenge of selection of members.*

(1) *Motion.* Before the examination of members under subsection (d) of this rule begins, or at the next session after a party discovered or could have discovered by the exercise of diligence, the grounds therefor, whichever is earlier, that party may move to stay the proceedings on the ground that members were selected improperly.

(2) *Procedure.* Upon a motion under paragraph (b)(1) of this rule containing an offer of proof of matters which, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence, including any written materials considered by the convening authority in selecting the members. Any other party may also present evidence on the matter. If the military judge determines that the members have been selected improperly, the military judge shall stay any proceedings requiring the presence of members until members are properly selected.

(3) *Forfeiture.* Failure to make a timely motion under this subsection shall forfeit the improper selection unless it constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2).

(c) *Stating grounds for challenge.* Trial counsel shall state any ground for challenge for cause against any member of which trial counsel is aware.

(d) *Examination of members.* The military judge may permit the parties to conduct examination of members or may personally conduct examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.

(e) *Evidence.* Any party may present evidence relating to whether grounds for challenge exist against a member.

(f) *Challenges and removal for cause.*

(1) *Grounds.* A member shall be excused for cause whenever it appears that the member:

(A) Is not competent to serve as a member under Article 25(a), (b), or (c);

(B) Has not been properly detailed as a member of the court-martial;

(C) Is an accuser as to any offense charged;

(D) Will be a witness in the court-martial;

(E) Has acted as counsel for any party as to any offense charged;

(F) Has been a preliminary hearing officer as to any offense charged;

(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;

(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;

(I) Has forwarded charges in the case with a personal recommendation as to disposition;

(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;

(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;

(L) Is in arrest or confinement;

(M) Has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

(2) *When made.*

(A) *Upon completion of examination.* Upon completion of any examination under subsection (d) of this rule and the presentation of evidence, if any, on the matter, each party shall state any challenges for cause it elects to make.

(B) *Other times.* A challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.

(3) *Procedure.* Each party shall be permitted to make challenges outside the presence of the members. The party making a challenge shall state the grounds for it. Ordinarily trial counsel shall enter any challenges for cause before defense counsel. The military judge shall rule finally on each challenge. The burden of establishing that grounds for a challenge exist is upon the party making the challenge. A member successfully challenged shall be excused.

(4) *Waiver.* The grounds for challenge in subparagraph (f)(1)(A) of this rule may not be waived. Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie. When a challenge for cause has been denied, 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, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review.

(5) Following the exercise of challenges for cause, if any, and prior to the exercise of peremptory challenges under subsection (g) of this rule, the military judge, or a designee thereof, shall randomly assign numbers to the remaining members for purposes of impaneling members in accordance with R.C.M. 912A.

(g) Peremptory challenges.

(1) *Procedure.* Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily trial counsel shall enter any peremptory challenge before the defense. No member may be impaneled without being subject to peremptory challenge.

(2) *Waiver.* Failure to exercise a peremptory challenge when properly called upon to do so shall waive the right to make such a challenge. The military judge may, for good cause shown, grant relief from the waiver, but a peremptory challenge may not be made after the presentation of evidence before the members has begun. However, nothing in this subsection shall bar the exercise of a previously unexercised peremptory challenge against a member newly detailed under R.C.M. 505(c)(2)(B), even if presentation of evidence on the merits has begun.

(h) Definitions.

(1) *Witness.* For purposes of this rule, “witness” includes one who testifies at a court-martial and anyone whose declaration is received in evidence for any purpose, including written declarations made by affidavit or otherwise.

(2) *Preliminary hearing officer.* For purposes of this rule, “preliminary hearing officer” includes any person who has examined charges under R.C.M. 405 and any person who was counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.

(zz) R.C.M. 912A is amended as follows:

(a) *In general.* After challenges for cause and peremptory challenges are exercised, the military judge of a general or special court-martial with members shall impanel the members based on the order assigned in R.C.M. 911(a), and, if authorized by the convening authority, alternate members, in accordance with the following numerical requirements:

(1) *Capital cases.* In a general court-martial in which the charges were referred with a special instruction that the case be tried as a capital case, the number of members impaneled, subject to paragraph (4) of this subsection, shall be twelve.

(2) *General courts-martial.* In a general court-martial other than as described in paragraph (1) of this subsection, the number of members impaneled, subject to paragraph (4) of this subsection, shall be eight.

(3) *Special courts-martial.* In a special court-martial, the number of members impaneled, subject to paragraph (4) of this subsection, shall be four.

(4) *Alternate members.* A convening authority may authorize the military judge to impanel alternate members. When authorized by the convening authority, the military judge shall designate which of the impaneled members are alternate members in accordance with these rules and consistent with the instructions of the convening authority. Alternate members shall not be notified that they are alternate members until they are excused prior to deliberations on findings.

(A) If the convening authority authorizes the military judge to impanel a specific number of alternate members, the number of members impaneled shall be the number of members required under paragraphs (1), (2), or (3) of this subsection, as applicable, plus the number of alternate members specified by the

convening authority. The military judge shall not impanel the court-martial until the specified number of alternate members has been identified. New members may be detailed in order to impanel the specified number of alternate members.

(B) If the convening authority does not authorize the military judge to impanel a specific number of alternate members, and instead authorizes the military judge to impanel alternate members only if, after the exercise of all challenges, excess members remain, the number of members impaneled shall be the number of members required under paragraphs (a)(1), (2), or (3) of this rule and no more than three alternate members. New members shall not be detailed in order to impanel alternate members.

(b) *Enlisted accused.* In the case of an enlisted accused, the members shall be impaneled under subsection (a) of this rule in such numbers and proportion that—

(1) If the accused elected to be tried by a court-martial composed of at least one-third enlisted members, the membership of the panel includes at least one-third enlisted members; and

(2) If the accused elected to be tried by a court-martial composed of all officer members, the membership of the panel includes all officer members.

(c) *Number of members ~~detailed~~ insufficient.*

(1) If, after challenges or excusals, the number of detailed members directed to be present by the military judge in accordance with R.C.M. 911(b) is:

(A) fewer than the number of members required for the court-martial under subsection (a) of this rule, the military judge shall, according to the randomly assigned order determined in R.C.M. 911(a), determine how many additional detailed members are required and shall direct their presence for member examination in accordance with R.C.M. 912(d).

(B) fewer than the number of members required for the court-martial under subsection (b) of this rule, the military judge shall, according to the randomly assigned order determined in R.C.M. 911(a), determine how many additional detailed enlisted members are required and shall direct their presence for member examination in accordance with R.C.M. 912(d).

~~(2) If, after the exercise of all challenges,~~ after challenges or excusals, the number of detailed members remaining is fewer than the number of members required for the court-martial under subsections (a) and (b) of this rule, the convening authority shall detail new members under R.C.M. 503.

(d) ~~Excess~~ Impaneling members following the exercise of all challenges. ~~If the number of members remaining after the exercise of all challenges is greater than the number of members required for the court-martial under subsections (a) and (b) of this rule,~~ † The military judge shall use the following procedures to identify the members who will be impaneled—

(1) ~~Enlisted panel.~~ In a case in which the accused has elected to be tried by a panel consisting of at least one-third enlisted members under R.C.M. 503(a)(2), the military judge shall:—

(A) first identify the one-third enlisted members required under subsections (a) and (b) of this rule in numerical order beginning with the lowest random number assigned pursuant to R.C.M. ~~912(f)(5)~~ 911(a); and

(B) then identify the remaining members required for the court-martial under subsections (a) and (b) of this rule, in numerical order beginning with the lowest random number assigned pursuant to R.C.M. ~~912(f)(5)~~ 911(a).

(2) ~~Other panels.~~ For all other panels, the military judge shall identify the number of members required under subsections (a) and (b) of this rule in numerical order beginning with the lowest random number assigned pursuant to ~~912(f)(5)~~ 911(a).

(3) ~~Alternate Members.~~ If the convening authority:

(A) ~~If the convening authority~~ authorizes the military judge to impanel a specific number of alternate members, the specified number of alternate members shall be identified in numerical order beginning with the lowest remaining random number assigned pursuant to R.C.M. 911(a) ~~912(f)(5)~~, after first identifying members under paragraph (1) or (2) of this subsection.

(B) ~~If the convening authority~~ does not authorize the military judge to impanel a specific number of

alternate members, and instead authorizes the military judge to impanel alternate members only if, after the exercise of all challenges, excess members remain, alternate members shall be identified in numerical order beginning with the lowest remaining random number assigned pursuant to R.C.M. 911(a) 912(f)(5), after first identifying the members under paragraph (1) or (2) of this subsection. The military judge shall identify no more than three alternate members.

(C) In a case in which the accused has elected to be tried by a panel consisting of at least one-third enlisted members under R.C.M. 503(a)(2), the convening authority may instruct the military judge to prioritize impaneling a specific number of alternate enlisted members before impaneling alternate officer members. These members shall be identified in numerical order beginning with the lowest remaining random number assigned pursuant to R.C.M. 911(a) 912(f)(5), after first identifying members under paragraph (1) of this subsection.

(4) The military judge shall excuse any members not identified as members or alternate members, if any.

(e) *Lowest number.* The lowest number is the number with the lowest numerical value.

(f) *Announcement.* After identifying the members to be impaneled in accordance with this rule, and after excusing any excess members, the military judge shall announce that the members are impaneled.

(aaa) R.C.M. 912B is amended as follows:

(a) *In general.* Prior to the start of deliberations, A a member who has been excused after impanelment shall be replaced in accordance with this rule. Alternate members excused after impanelment shall not be replaced.

(b) *Alternate members* ~~available~~ impaneled. Prior to the start of deliberations, Aan excused member shall be replaced with an impaneled alternate member, ~~if an alternate member is available~~. The alternate member with the lowest random number assigned pursuant to R.C.M. 911(a) 912(f)(5) shall replace the excused member, unless in the case of an enlisted accused, the use of such member would be inconsistent with the

specific panel composition established under R.C.M. 903. Alternate members who have not replaced impaneled members prior to deliberations on findings shall be excused at the time the court closes for deliberations.

(c) *Alternate members not available.*

(1) *Detailing of new members not required.* In a general court-martial in which a sentence of death may not be adjudged, if, after impanelment, a court-martial member is excused and alternate members are not available, the court-martial may proceed if—

(A) There are at least six members; and

(B) In the case of an enlisted accused, the remaining panel composition is consistent with the specific panel composition established under R.C.M. 903.

(2) *Detailing of additional members required.* In all cases other than those described in paragraph (1), if an impaneled member is excused and no alternate member is available to replace the excused member, the court-martial may not proceed until the convening authority details sufficient additional new members.

(d) After the start of deliberations. Once the military judge has closed the court for deliberations, if the number of members is reduced below the requirements of Article 29, UCMJ, trial may not proceed and the military judge shall declare a mistrial.

(bbb) R.C.M. 914 is amended as follows:

(a) *Motion for production.* After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:

(1) In the case of a witness called by trial counsel, in the possession of the United States; or

(2) In the case of a witness called by the defense, in the possession of the accused or defense counsel.

(b) *Production of entire statement.* If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the military judge shall order that the statement be delivered to the moving party.

(c) *Production of excised statement.* If the party who called the witness claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the military judge shall order that it be delivered to the military judge. Upon inspection, the military judge shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of a statement that is withheld from an accused over objection shall be preserved by trial counsel, and, in the event of a conviction, shall be made available to the reviewing authorities for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) *Recess for examination of the statement.* Upon delivery of the statement to the moving party, the military judge may recess the trial for the examination of the statement and preparation for its use in the trial.

(e) *Remedy for failure to produce statement.*

(1) Party refusal to comply. If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is ~~trial counsel~~ the Government who elects not to comply, shall declare a mistrial if required in the interest of justice.

(2) Failure to comply in good faith. In the event that the other party cannot comply with this rule because the statement is lost, and can prove, by a preponderance of evidence, that the loss of the witness statement under subsections (a), (b), and (c) of this rule was not attributable to bad faith or gross negligence, the military judge may exercise the sanctions set forth in subsection (e)(1) of this rule only if—

(A) such evidence is of such central importance to an issue that it is essential to a fair trial, and

(B) there is no adequate substitute for such evidence.

(f) *Definition.* As used in this rule, a “statement” of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a recording or a transcription thereof; or

(3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a federal grand jury.

(ccc) R.C.M. 918 is amended as follows:

Rule 918. Findings

(a) *General findings.* The general findings of a court-martial state whether the accused is guilty of each charge and specification. If two or more accused are tried together, separate findings as to each shall be made.

(1) *As to a specification.* General findings as to a specification may be:

(A) guilty;

(B) not guilty of an offense as charged, but guilty of a **named** lesser included offense;

(C) guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any;

(D) not guilty only by reason of lack of mental responsibility; or

(E) not guilty.

Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.

(2) *As to a charge.* General findings as to a charge may be:

- (A) guilty;
- (B) not guilty, but guilty of a violation of Article _____;
- (C) not guilty only by reason of lack of mental responsibility; or
- (D) not guilty.

(b) *Special findings.* In a trial by court-martial composed of military judge alone, the military judge shall make special findings upon request by any party. Special findings may be requested only as to matters of fact reasonably in issue as to an offense and need be made only as to offenses of which the accused was found guilty. Special findings may be requested at any time before general findings are announced. Only one set of special findings may be requested by a party in a case. If the request is for findings on specific matters, the military judge may require that the request be written. Special findings may be entered orally on the record at the court-martial or in writing during or after the court-martial, but in any event shall be made before entry of judgment and included in the record of trial.

(c) *Basis of findings.* Findings may be based on direct or circumstantial evidence. Only matters properly before the court-martial on the merits of the case may be considered. A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt.

(ddd) R.C.M. 920 is amended as follows:

- (a) *In general.* The military judge shall give the members appropriate instructions on findings.
- (b) *When given.* Instructions on findings shall be given before or after arguments by counsel, or at both times, and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time.
- (c) *Request for instructions.* At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given

the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.

(d) *How given.* Instructions on findings shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.

(e) *Required instructions.* Instructions on findings shall include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

(2) A description of the elements of each lesser included offense in issue, unless trial of a lesser included offense is barred by the statute of limitations (Article 43) and the accused refuses to waive the bar;

(3) A description of any special defense under R.C.M. 916 in issue;

(4) A direction that only matters properly before the court-martial may be considered;

(5) A charge that—

(A) The accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt;

(B) In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

(C) If, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is not reasonable doubt; and

(D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add: The burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused. When the issue of mistake of fact under R.C.M. 916(j)(2) is raised, add: The accused has the burden of proving the defense of mistake of fact as to consent or age by a preponderance of the evidence.]

(6) Directions on the procedures under R.C.M. 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given.

(f) *Forfeiture and objections.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection. The parties shall be given the opportunity to be heard on any objection to or request for instructions outside the presence of the members. When a party objects to an instruction, the military judge may require the party objecting to specify in what respect the instructions given were improper.

(g) *Waiver.* Instructions on a lesser included offense shall not be given when both parties waive such an instruction. After receiving applicable notification of those lesser included offenses of which an accused may be convicted, the parties may waive ~~the reading of~~ a lesser included offense instruction. A written waiver is not required. The accused must affirmatively acknowledge that he or she understands the rights involved and affirmatively waive the instruction on the record. The accused's waiver must be made freely, knowingly, and intelligently. In the case of a joint or common trial, instructions on a lesser included offense shall not be given as to an individual accused when that accused and the ~~g~~Government agree to waive such an instruction.

(eee) R.C.M. 924 is amended as follows:

(a) *Time for reconsideration.* Members may reconsider any finding reached by them before such finding is announced in open session.

(b) *Procedure.* Any member may propose that a finding be reconsidered. If such a proposal is made in a timely manner, the question whether to reconsider shall be determined in closed session by secret written ballot. Any finding of not guilty shall be reconsidered if a majority vote for reconsideration. Any finding of guilty shall be reconsidered if more than one-fourth of the members vote for reconsideration. Any finding of not guilty only by reason of lack of mental responsibility shall be reconsidered on the issue of the finding

of guilty of the elements if more than one-fourth of the members vote for reconsideration, and on the issue of mental responsibility if a majority vote for reconsideration. If a vote to reconsider a finding succeeds, the procedures in R.C.M. 921 shall apply.

(c) *Military judge sitting alone.* In trial by military judge alone, the military judge may reconsider:

(1) any finding of guilty at any time before announcement of sentence; and

(2) the issue of the finding of guilty of the elements in a finding of not guilty only by reason of lack of mental responsibility at any time before announcement of sentence or, ~~in the case of a complete acquittal~~ where there are no findings of guilt, entry of judgment.

(fff) R.C.M. 925 is added as follows:

Rule 925. Application of sentencing rules

(a) Only one set of sentencing rules shall apply in a court-martial.

(b) If convicted of any offense in which death may be adjudged, the accused shall be sentenced in accordance with R.C.M. 1004.

(c) Except as provided in subsection (b) of this rule:

(1) If convicted of any offense committed on or before 27 December 2023, the accused shall be sentenced in accordance with the Rules for Courts-Martial in effect prior to 28 December 2023.

(2) If convicted of only offenses committed after 27 December 2023, the accused shall be sentenced by a military judge in accordance with R.C.M. 1002(a)(2).

(d) The military judge shall, if applicable, inquire into the accused's election of sentencing rules in subsection (c) after the announcement of findings and before any matter is presented in the presentencing phase.

(e) The accused's election under subsection (c) shall be made orally on the record or be in writing and signed by the accused. The military judge shall ascertain whether the accused has consulted with defense

counsel and has been informed of the right to make the election of the applicable sentencing rules under subsection (c).

(ggg) R.C.M. 1001 is amended as follows:

(a) *In general.*

(1) *Procedure.* After findings of guilty have been announced, ~~and the accused has had the opportunity to make a sentencing forum election under R.C.M. 1002(b),~~ the prosecution and defense may present matters pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matters shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

(i) service data relating to the accused taken from the charge sheet;

(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;

(iii) evidence of prior convictions, military or civilian;

(iv) evidence of aggravation; and

(v) evidence of rehabilitative potential.

(B) Crime victim's right to be reasonably heard.

(C) Presentation by the defense of evidence in extenuation or mitigation or both.

(D) Rebuttal.

(E) Argument by trial counsel on sentence.

(F) Argument by defense counsel on sentence.

(G) Rebuttal arguments in the discretion of the military judge.

(2) *Adjudging sentence.* A sentence shall be adjudged in all cases without unreasonable delay.

(3) *Advice and inquiry.*

(A) *Crime victim.* At the beginning of the presentencing proceeding, the military judge shall announce that any crime victim who is present at the presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. Prior to the conclusion of the presentencing proceeding, the military judge shall ensure that any such crime victim was afforded the opportunity to be reasonably heard.

(B) *Accused.* The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

(b) *Matters to be presented by the prosecution.*

(1) *Service data from the charge sheet.* Trial counsel shall inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pretrial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue. Objections not asserted are forfeited.

(2) *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15 [and summary courts-martial after review has been completed pursuant to Article 64](#). "Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible

under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are forfeited.

(3) *Evidence of prior convictions of the accused.*

(A) *In general.* Trial counsel may introduce evidence of prior military or civilian convictions of the accused. For purposes of this rule, there is a “conviction” in a court-martial case when a sentence has been adjudged. In a civilian case, a “conviction” includes any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere, regardless of the subsequent disposition, sentencing procedure, or final judgment. A “conviction” does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; foreign convictions; tribal court convictions; or convictions reversed, vacated, invalidated, or pardoned.

(B) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible ~~except that a finding of guilty by summary court martial may not be used for purposes of this rule until review has been completed pursuant to Article 64.~~ Evidence of the pendency of an appeal is admissible.

(C) *Method of proof.* Previous convictions may be proved by any evidence admissible under the Military Rules of Evidence.

(4) *Evidence in aggravation.* Trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused’s offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, sex (including pregnancy),

gender ([including gender identity](#)), disability, or sexual orientation of any person. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

(5) *Evidence of rehabilitative potential.* “Rehabilitative potential” refers to the accused’s potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society.

(A) *In general.* Trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence in the form of opinions concerning the accused’s previous performance as a service member and potential for rehabilitation.

(B) *Foundation for opinion.* The witness or deponent providing opinion evidence regarding the accused’s rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused’s character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.

(C) *Bases for opinion.* An opinion regarding the accused’s rehabilitative potential must be based upon relevant information and knowledge possessed by the witness or deponent, and must relate to the accused’s personal circumstances. The opinion of the witness or deponent regarding the severity or nature of the accused’s offense or offenses may not serve as the principal basis for an opinion of the accused’s rehabilitative potential.

(D) *Scope of opinion.* An opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused’s unit.

(E) *Cross-examination.* On cross-examination, inquiry is permitted into relevant and specific instances

of conduct.

(F) *Redirect*. Notwithstanding any other provision in this rule, the scope of opinion testimony permitted on redirect may be expanded, depending upon the nature and scope of the cross-examination.

(c) *Crime victim's right to be reasonably heard*.

(1) *In general*. After presentation by trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense. A crime victim who makes an unsworn statement under subsection (c)(5) is not considered a witness for the purposes of Article 42(b). If the crime victim exercises the right to be reasonably heard, the crime victim shall be called by the court-martial. The exercise of the right is independent of whether the crime victim testified during findings or is called to testify by the ~~e~~Government or defense under this rule.

(2) *Definitions*.

(A) *Crime victim*. For purposes of this subsection, a crime victim is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules.

(B) *Victim impact*. For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.

(C) *Mitigation*. For the purposes of this subsection, mitigation includes any matter that may lessen the punishment to be adjudged by the court-martial or furnish grounds for a recommendation of clemency.

(D) *Right to be reasonably heard*.

(i) *Capital cases*. In capital cases, for purposes of this subsection, the "right to be reasonably heard" means the right to make a sworn statement. The statement may not include a recommendation of a specific sentence.

(ii) *Noncapital cases.* In noncapital cases, for purposes of this subsection, the “right to be reasonably heard” means the right to make a sworn statement, an unsworn statement, or both. This right includes the right to be heard on any objection to any unsworn statement.

(3) *Contents of statement.* The content of statements made under paragraphs (4) and (5) may only include victim impact and matters in mitigation. ~~The statement may not include a recommendation of a specific sentence.~~

(4) *Sworn statement.* The crime victim may make a sworn statement and shall be subject to cross-examination concerning it by trial counsel and defense counsel or examination on it by the court-martial.

(5) *Unsworn statement.*

(A) *In general.* The crime victim may make an unsworn statement and may not be cross-examined by trial counsel or defense counsel, or examined upon it by the court-martial. The prosecution or defense may, however, rebut any statements of fact therein. The unsworn statement may be oral, written, or both, and may be made by the crime victim, by counsel representing the crime victim, or both.

(B) *Procedure.* After the announcement of findings, a crime victim who elects to present an unsworn statement shall provide a written proffer of the matters that will be addressed in the statement to trial counsel and defense counsel. The military judge may waive this requirement for good cause shown. Upon good cause shown, the military judge may permit the crime victim’s counsel, if any, to deliver all or part of the crime victim’s unsworn statement.

(C) *New factual matters in unsworn statement.* If during the presentencing proceeding a crime victim makes an unsworn statement containing factual matters not previously disclosed under subparagraph (5)(B), the military judge shall take appropriate action within the military judge’s discretion.

(d) *Matter to be presented by the defense.*

(1) *In general.* The defense may present matters in rebuttal of any material presented by the prosecution and the crime victim, if any, and may present matters in extenuation and mitigation regardless whether the

defense offered evidence before findings.

(A) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) *Matter in mitigation.* Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a service member.

(2) *Statement by the accused.*

(A) *In general.* The accused may testify, make an unsworn statement, or both in extenuation, in mitigation, to rebut matters presented by the prosecution, or to rebut statements of fact contained in any crime victim's sworn or unsworn statement, whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. The accused may make a request for a specific sentence. This subsection does not permit the filing of an affidavit of the accused.

(B) *Testimony of the accused.* The accused may give sworn oral testimony and shall be subject to cross-examination concerning it by trial counsel or examination on it by the court-martial, or both.

(C) *Unsworn statement.* The accused may make an unsworn statement and may not be cross-examined by trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

(3) *Rules of evidence relaxed.* The military judge may, with respect to matters in extenuation or mitigation

or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

(e) *Rebuttal and surrebuttal.* The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under paragraph (d)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

(f) *Production of witnesses.*

(1) *In general.* During the presentencing proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. During presentencing proceedings, a dispute as to the production of a witness at Government expense ~~Whether a witness shall be produced to testify during presentencing proceedings~~ is a matter within the discretion of the military judge to resolve subject to the limitations in paragraph (2).

(2) *Limitations.* A witness may be produced to testify during presentencing proceedings through a subpoena or travel orders at Government expense only if—

(A) the testimony of the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence;

(B) the weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) the other party refuses to enter into a stipulation ~~of fact~~ containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation ~~of fact~~ would be an insufficient substitute for the testimony;

(D) other forms of evidence, such as oral depositions, written interrogatories, former testimony, or testimony by remote means would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

(E) the significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(g) *Additional matters to be considered.* In addition to matters introduced under this rule, the court-martial may consider—

- (1) That a plea of guilty is a mitigating factor; and
- (2) Any evidence properly introduced on the merits before findings, including:
 - (A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and
 - (B) Evidence relating to any mental impairment or deficiency of the accused.

(h) *Argument.* After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any other higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than the court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to the sentencing considerations set forth in R.C.M. 1002(f). Failure to object to improper argument before the military judge begins deliberations, or before the military judge instructs the members on sentencing, shall constitute forfeiture of the objection.

(hhh) R.C.M. 1002 is amended as follows:

(a) *Generally.* Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial. A court-martial may adjudge any punishment authorized in this Manual in order to achieve the purposes of sentencing under subsection ~~(f)~~(d), including the maximum punishment or

any lesser punishment, or may adjudge a sentence of no punishment except as outlined below.

(1) Mandatory minimum. When a mandatory minimum sentence is prescribed by the ~~code~~ UCMJ, the sentence for an offense shall include any punishment that is made mandatory by law for that offense. The sentence for an offense may not be greater than the maximum sentence established by law or by the President for that offense. ~~;~~ ~~and~~

(2) Parameters and criteria.

(A) When an offense is subject to sentencing criteria, the military judge shall consider the applicable sentencing criteria in determining the sentence for that offense.

(B) When an offense is subject to sentencing parameters, the military judge shall sentence the accused for that offense within the applicable parameter, unless the military judge finds specific facts that warrant a sentence outside the applicable parameter. If the military judge imposes a sentence outside a sentencing parameter, the military judge shall include in the record a written statement of the factual basis for the sentence.

~~(2)~~(3) If the military judge accepts a plea agreement with a sentence limitation, the court-martial shall sentence the accused in accordance with the limits established by the plea agreement. Subject to Article 53a(c), the military judge shall accept a plea agreement submitted by the parties, except that:

(A) in the case of an offense with a sentencing parameter, the military judge may reject a plea agreement that proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable; and

(B) in the case of an offense for which there is no sentencing parameter, the military judge may reject a plea agreement that proposes a sentence if the military judge determines that the proposed sentence is plainly unreasonable.

~~(b) Sentencing forum election. In a general or special court martial consisting of a military judge and members, upon the announcement of findings and before any matter is presented in the presentencing phase,~~

~~the military judge shall inquire—~~

~~(1) In noncapital cases, whether the accused elects sentencing by members in lieu of sentencing by military judge for all charges and specifications for which the accused was found guilty; and~~

~~(2) In capital cases, whether the accused elects sentencing by members in lieu of sentencing by military judge for all charges and specifications for which the accused was found guilty and for which a sentence of may not be adjudged.~~

~~(c) *Form of election.* The accused's election under subsection (b), shall be in writing and signed by the accused or shall be made orally on the record. The military judge shall ascertain whether the accused has consulted with defense counsel and has been informed of the right to make a sentencing forum election under subsection (b).~~

~~(d) (b) *Noncapital cases.*~~

~~(1) *Sentencing by members.* In a general or special court martial in which the accused has elected sentencing by members in lieu of sentencing by military judge under paragraph (b)(1), the members shall determine a single sentence for all of the charges and specifications of which the accused was found guilty. The military judge announces the sentence determined by the members in accordance with R.C.M. 1007.~~

~~(2) *Sentencing by military judge.* Unless a timely election for sentencing by members is made by the accused under subsection (b), †The military judge shall determine the sentence of a general or special court-martial in accordance with this paragraph in all noncapital cases.~~

~~(A)(1) *Segmented sentencing for confinement and fines.* The military judge at a general or special court-martial shall determine an appropriate term of confinement and fine, if applicable, for each specification for which the accused was found guilty. Subject to subsection (a), such a determination may include a term of no confinement or no fine when appropriate for the offense.~~

~~(B)(2) *Concurrent or consecutive terms of confinement.* If a sentence includes more than one term of confinement, the military judge shall determine whether the terms of confinement will run concurrently or~~

consecutively. For each term of confinement, the military judge shall state whether the term of confinement is to run concurrently or consecutively with any other term or terms of confinement. The terms of confinement for two or more specifications shall run concurrently—

~~(i)~~(A) when each specification involves the same victim and the same act or transaction;

~~(ii)~~(B) when provided for in a plea agreement;

~~(iii)~~(C) when the accused is found guilty of two or more specifications and the military judge finds that the charges or specifications are unreasonably multiplied; or

~~(iv)~~(D) when otherwise appropriate under subsection (f); or

~~(v)~~(E) in a special court-martial, to the extent necessary to reduce the total confinement to the maximum confinement authorized under R.C.M. 201(f)(2).

~~(c)~~(3) *Unitary sentencing for other forms of punishment.* All punishments other than confinement or fine available under R.C.M. 1003, if any, shall be determined as a single, unitary component of the sentence, covering all of the guilty findings in their entirety. The military judge shall not segment those punishments among the guilty findings.

~~(e) Capital cases. The following applies to cases referred as capital in accordance with R.C.M. 1004(b)(1)(A) that include a finding of guilty for a charge and specification for which death may be adjudged.~~

~~(1) Sentencing by members.~~

~~(A) Where all of the findings of guilty are for charges and specifications for which death may be adjudged, the members shall determine whether the sentence for each such specification shall be death or a lesser punishment. The members shall then determine a single sentence for all charges and specifications for which the accused was found guilty. The military judge shall announce the sentence determined by the members in accordance with R.C.M. 1007~~

~~(B) Where there is a finding of guilty for a specification for which death may be adjudged and a finding~~

~~of guilty for a specification for which death may not be adjudged, and the accused elects sentencing by members under paragraph (b)(2) for those specifications for which a sentence of death may not be adjudged:~~

~~(i) The members shall determine whether the sentence for each specification for which death may be adjudged shall be death or a lesser punishment;~~

~~(ii) The members shall determine a single, unitary sentence for all the charges and specifications for which the accused was found guilty; and~~

~~(iii) The military judge shall announce the sentence determined by the members in accordance with R.C.M. 1007.~~

~~(2) *Sentencing by members and military judge.* Unless a timely election for sentencing by members is made by the accused under paragraph (b)(2), where there is a finding of guilty for a specification for which death may be adjudged and a finding of guilty for a specification for which death may not be adjudged:~~

~~(A) The members shall determine whether the sentence for each specification for which death may be adjudged shall be death or a lesser punishment;~~

~~(B) The members shall determine a single, unitary sentence for the specifications for which death may be adjudged;~~

~~(C) The military judge shall determine the sentence for all charges and specifications for which death may not be adjudged in accordance with paragraph (d)(2); and~~

~~(D) If the sentence determined in subparagraphs (B) and (C) include more than one term of confinement, the military judge shall determine, in accordance with paragraph (d)(2), whether the terms of confinement, including any term of confinement determined by members, will run concurrently or consecutively.~~

~~(E) The military judge shall ensure that the sentence, at a minimum, includes any authorized punishment determined by the members. The military judge, taking into account the noncapital offenses~~

~~addressed in sentencing by the military judge, must include, at a minimum, the discharge determined by the members and may include a more severe form of discharge in the sentence.~~

~~(F) The military judge shall announce the sentence in accordance with R.C.M. 1007.~~

~~(c)~~ (c) *Imposition of sentence.* In sentencing an accused under this rule, the court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

- (1) the nature and circumstances of the offense and the history and characteristics of the accused;
- (2) the impact of the offense on—
 - (A) the financial, social, psychological, or medical well-being of any victim of the offense; and
 - (B) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;
- (3) the need for the sentence to—
 - (A) reflect the seriousness of the offense;
 - (B) promote respect for the law;
 - (C) provide just punishment for the offense;
 - (D) promote adequate deterrence of misconduct;
 - (E) protect others from further crimes by the accused;
 - (F) rehabilitate the accused; and
 - (G) provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and
- (4) the sentences available under these rules.

~~(g)~~ (d) *Information that may be considered.* The court-martial, in applying the factors listed in subsection ~~(f)~~ (c) to the facts of a particular case, may consider—

- (1) Any evidence admitted by the military judge during the presentencing proceeding under R.C.M. 1001;

and

(2) Any evidence admitted by the military judge during the findings proceeding.

(iii) R.C.M. 1003 is amended as follows:

(a) *In general.* Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of one or more charges and specifications by a court-martial.

(b) *Authorized punishments.* Subject to the limitations in this Manual, a court-martial may adjudge only the following punishments:

(1) *Reprimand.* A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority.

(2) *Forfeiture of pay and allowances.* Unless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last.

Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay, retired pay, or retainer pay, as applicable, or, in the case of reserve component personnel on inactive duty, compensation for periods of inactive-duty training, authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or hardship duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced. ~~In the case of an accused who is not confined, forfeitures of pay may not exceed two-thirds of pay per month. Forfeitures of greater than two-thirds' pay per month may be imposed only during periods of confinement.~~

(3) *Fine.* Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. In the case of a member of the armed forces, summary and special courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. In the

case of a person serving with or accompanying an armed force in the field, a summary court-martial may not adjudge a fine in excess of two-thirds of one month of the highest rate of enlisted pay, and a special court-martial may not adjudge a fine in excess of two-thirds of one year of the highest rate of officer pay. To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.

(4) *Reduction in pay grade.* Except as provided in R.C.M. 1301(d), a court-martial may sentence an enlisted member to be reduced to the lowest or any intermediate pay grade;

(5) *Restriction to specified limits.* Restriction may be adjudged for no more than 2 months ~~for each month of authorized confinement and in no case for more than 2 months~~. Confinement and restriction may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection;

(6) *Hard labor without confinement.* Hard labor without confinement may be adjudged for no more than 1-1/2 months for each month of authorized confinement and in no case for more than three months. Hard labor without confinement may be adjudged only in the cases of enlisted members. The court-martial shall not specify the hard labor to be performed. Confinement and hard labor without confinement may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection.

(7) *Confinement.* The place of confinement shall not be designated by the court-martial. When confinement for life is authorized, it may be with or without eligibility for parole. A court-martial shall not adjudge a sentence to solitary confinement or to confinement without hard labor;

(8) *Punitive separation.* A court-martial may not adjudge an administrative separation from the service. There are three types of punitive separation.

(A) *Dismissal*. Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dismissal may be adjudged for any offense of which a commissioned officer, commissioned warrant officer, cadet, or midshipman has been found guilty;

(B) *Dishonorable discharge*. A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dishonorable discharge may be adjudged for any offense of which a warrant officer who is not commissioned has been found guilty. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment; and

(C) *Bad-conduct discharge*. A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M. 201(f)(2)(B). A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary;

(9) *Death*. Death may be adjudged only in accordance with R.C.M. 1004; and

(10) *Punishments under the law of war*. In cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war.

(c) *Limits on punishments*.

(1) *Based on offenses*.

(A) *Offenses listed in Part IV*.

(i) *Maximum punishment.* The maximum limits for the authorized punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge, and apply notwithstanding any applicable sentencing parameter. When a dishonorable discharge is authorized, a bad-conduct discharge is also authorized.

(ii) *Other punishments.* Except as otherwise specifically provided in this Manual, the types of punishments listed in paragraphs (b)(1), (3), (4), (5), (6) and (7) of this rule may be adjudged in addition to or instead of confinement, forfeitures, a punitive discharge (if authorized), and death (if authorized).

(B) *Offenses not listed in Part IV.*

(i) *Included or related offenses.* For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.

(ii) *Not included or related offenses.* An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service. When the United States Code provides for confinement for a specified period or not more than a specified period the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay and allowances; if less than 6 months, forfeiture of two-thirds pay per month for the authorized period of confinement.

(C) *Multiple Offenses.* When the accused is found guilty of two or more specifications, the maximum authorized punishment may be imposed for each separate specification, unless the military judge finds that the specifications are unreasonably multiplied.

(2) *Based on rank of accused.*

(A) *Commissioned or warrant officers, cadets, and midshipmen.*

(i) A commissioned or warrant officer or a cadet or midshipman may not be reduced in grade by any court-martial. However, in time of war or national emergency, the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned, may commute a sentence of dismissal to reduction to any enlisted grade.

~~(ii) Only a general court-martial may sentence a commissioned or warrant officer or a cadet, or midshipman to confinement.~~

~~(iii)~~ (ii) A commissioned or warrant officer or a cadet or midshipman may not be sentenced to hard labor without confinement.

~~(iii)~~ (iii) Only a general court-martial, upon conviction of any offense in violation of the UCMJ, may sentence a commissioned or warrant officer or a cadet or midshipman to be separated from the service with a punitive separation. In the case of commissioned officers, cadets, midshipmen, and commissioned warrant officers, the separation shall be by dismissal. In the case of all other warrant officers, the separation shall be by dishonorable discharge.

(B) *Enlisted persons.* See paragraph (b)(9) of this rule and R.C.M. 1301(d).

(3) *Based on reserve status in certain circumstances.*

(A) *Restriction on liberty.* A member of a reserve component whose order to active duty is approved pursuant to Article 2(d)(5) may be required to serve any adjudged restriction on liberty during that period of active duty. Other members of a reserve component ordered to active duty pursuant to Article 2(d)(1) or tried by summary court-martial while on inactive duty training may not—

(i) be sentenced to confinement; or

(ii) be required to serve a court-martial punishment consisting of any other restriction on liberty except during subsequent periods of inactive-duty training or active duty.

(B) *Forfeiture.* A sentence to forfeiture of pay of a member not retained on active duty after completion of disciplinary proceedings may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

(4) *Based on status as a person serving with or accompanying an armed force in the field.* In the case of a person serving with or accompanying an armed force in the field, no court-martial may adjudge forfeiture of pay and allowances, reduction in pay grade, hard labor without confinement, or a punitive separation.

(5) *Based on other rules.* The maximum limits on punishments in this rule may be further limited by other Rules for Courts-Martial.

(d) *Circumstances permitting increased punishments.*

(1) *Three or more convictions.* If an accused is found guilty of a specification or specifications for none of which a dishonorable discharge is otherwise authorized, proof of three or more previous convictions adjudged by a court-martial during the year next preceding the commission of any offense of which the accused stands convicted shall authorize a dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 1 year, confinement for 1 year. In computing the 1-year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection, the court-martial convictions must be final.

(2) *Two or more convictions.* If an accused is found guilty of a specification or specifications for none of which a dishonorable or bad-conduct discharge is otherwise authorized, proof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a bad-conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 3 months, confinement for 3 months. In computing the 3 year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection the court-martial convictions must be final.

(3) *Two or more specifications.* If an accused is found guilty of two or more specifications for none of

which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances.

(jjj) R.C.M. 1004 is amended as follows:

~~(a) *In general.* Death may be adjudged only when—~~

~~(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and~~

~~(2) The accused was convicted of such an offense by either—~~

~~(A) the unanimous vote of all twelve members of the court martial; or~~

~~(B) the military judge pursuant to the accused's plea of guilty to such an offense; and~~

~~(3) The requirements of subsections (b) and (c) of this rule have been met.~~

~~(b) *Procedure.* In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—~~

~~(1) *Notice.*~~

~~(A) *Referral.* The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction on 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—~~

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

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

~~(B) *Arraignment.* Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.~~

~~(2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.~~

~~(3) *Evidence in extenuation and mitigation.* The accused shall be given broad latitude to present evidence in extenuation and mitigation.~~

~~(4) *Necessary findings.* Death may not be adjudged unless—~~

~~(A) The members unanimously find that at least one of the aggravating factors under subsection (c) existed beyond a reasonable doubt;~~

~~(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and~~

~~(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.~~

~~(5) *Basis for findings.* The findings in paragraph (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.~~

~~(6) *Instructions.* In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, the charge(s) and specification(s) for which the members shall determine a sentence, and on the requirements and procedures under paragraphs (b)(4), (5), (7), and (8) of this rule. The military judge shall~~

~~instruct the members that they must consider all evidence in extenuation and mitigation before a sentence of death may be determined by the members.~~

~~(7) *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. A sentence of death may not be considered unless the members unanimously concur in a finding of the existence of at least one such aggravating factor and unanimously find that the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including any relevant aggravating factor(s) under subsection (c). After voting on the necessary findings, the members shall vote on a sentence in accordance with R.C.M. 1006.~~

~~(8) *Announcement.* If the members voted unanimously for death, the military judge shall, in addition to complying with R.C.M. 1006(e) and 1007, announce which aggravating factors under subsection (c) the members unanimously found to exist beyond a reasonable doubt.~~

~~(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:~~

~~(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118;~~

~~(2) That in committing the offense the accused—~~

~~(A) Knowingly created a grave risk of substantial damage to the national security of the United States;~~

~~or~~

~~(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;~~

~~(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118;~~

~~(4) That the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 103a or 103b;~~

~~(5) That the accused committed the offense with the intent to avoid hazardous duty;~~

~~(6) That, only in the case of a violation of Article 118, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;~~

~~(7) That, only in the case of a violation of Article 118(1):~~

~~(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;~~

~~(B) The murder was committed: while the accused was engaged in the commission or attempted commission of a separate murder, or any robbery, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, aggravated arson, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in the commission or attempted commission of any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense.~~

~~(C) The murder was committed for the purpose of receiving money or a thing of value;~~

~~(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;~~

~~(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;~~

~~(F) The victim was the President of the United States, the President elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice President elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member of Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid. 315(e)(2), 315(e)(3);~~

~~(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;~~

~~(H) The murder was committed with intent to obstruct justice;~~

~~(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim. For purposes of this section, “substantial physical harm” means fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. The term “substantial physical harm” does not mean minor injuries, such as a black eye or bloody nose. The term “substantial mental or physical pain or suffering” is accorded its common meaning and includes torture.~~

~~(J) The accused has been found guilty in the same case of another violation of Article 118;~~

~~(K) The victim of the murder was under 15 years of age.~~

~~(8) That only in the case of a violation of Article 118(a)(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson was major and who manifested a reckless indifference for human life.~~

~~(9) [Reserved]~~

~~(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;~~

~~(11) That, only in the case of a violation of Article 103, 103a, or 103b:~~

~~(A) The accused has been convicted of another offense involving espionage, spying, or treason for which either a sentence of death or imprisonment for life was authorized by statute; or~~

~~(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.~~

~~For purposes of this rule, “national security” means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.~~

~~(d) *Other penalties.* When death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, with or without eligibility for parole, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal as appropriate. Confinement is a necessary incident of a sentence of death, but not a part of it.~~

(a) *In general.* In addition to the provisions in R.C.M. 1001, the provisions in this rule shall apply in capital cases. Death may be adjudged only when—

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war;

(2) The accused was properly notified that the case will be tried as a capital case and was properly notified of the aggravating factors the prosecution intends to prove;

(3) The accused was convicted of such an offense by either—

(A) the unanimous vote of all twelve members of the court-martial; or

(B) the military judge pursuant to the accused's plea of guilty to such an offense;

(4) The members unanimously find that at least one of the aggravating factors under subsection (c) existed beyond a reasonable doubt for that offense and notice of such factor was provided in accordance with subsection (b);

(5) The members unanimously find that the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including any relevant aggravating factor(s); and

(6) The members unanimously determine that the sentence for that offense shall be death.

(b) Notice.

(1) Referral. The convening authority or special trial counsel, as applicable, shall indicate that the case is to be tried as a capital case by including a special instruction on the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority or special trial counsel, as applicable, from later adding the required special instruction, provided that—

(A) the convening authority or special trial counsel, as applicable, has otherwise complied with the notice requirement of subparagraph (2); and

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

(2) Arraignment. Before arraignment, trial counsel shall give the defense written notice of which specific aggravating factors under subsection (c) of this rule the prosecution intends to prove, and to which offense(s) the aggravating factor(s) apply. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(c) Aggravating factors. Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors enumerated below. Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118;

(2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States;

or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118;

(4) That the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 103a or 103b;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed: while the accused was engaged in the commission or attempted commission of a separate murder, or any robbery, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, aggravated arson, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in the commission or attempted commission of any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense.

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in

section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid.315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim. For purposes of this section, “substantial physical harm” means fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. The term “substantial physical harm” does not mean minor injuries, such as a black eye or bloody nose. The term “substantial mental or physical pain or suffering” is accorded its common meaning and includes torture.

(J) The accused has been found guilty in the same case of another violation of Article 118;

(K) The victim of the murder was under 15 years of age.

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson was major and who manifested a reckless indifference for human life.

(9) [Reserved]

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 103, 103a, or 103b:

(A) The accused has been convicted of another offense involving espionage, spying, or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of this rule, “national security” means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

(d) Evidence in extenuation and mitigation. The accused shall be given broad latitude to present evidence in extenuation and mitigation.

(e) Basis for findings. The findings in paragraph (a)(4) and (a)(5) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(f) Instructions. Instructions shall be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.

(1) Requests for instructions. During presentencing proceedings or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction before it is given. The military judge shall inform the parties of the proposed action on such requests before their arguments to the members.

(2) How given. Instructions shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or unless a party objects, portions of them, may also be given to the members for their use during deliberations.

(3) Required instructions. Instructions shall include—

(A) The charge(s) and specification(s) for which the members shall make a sentencing determination;

(B) The applicable aggravating factors under subsection (c) and to which charge(s) and specification(s) the aggravating factors apply;

(C) A statement of the procedures for deliberation and voting set out in subparagraph (h);

(D) A statement informing the members that they are solely responsible for selecting an appropriate determination and may not rely on the possibility of any mitigating action by the convening or higher authority;

(E) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3) and (5);

(F) A statement that the members shall consider the guidance set forth in R.C.M. 1002(d);

(G) A statement that the members shall consider all evidence in extenuation and mitigation before a sentence of death may be determined; and

(H) Such other explanations, descriptions, or directions that the military judge determines to be necessary, whether properly requested by a party or determined by the military judge *sua sponte*.

(4) *Failure to object.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate shall constitute waiver of the objection. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

(g) *Deliberations and voting.*

(1) *In general.* With respect to each charge and specification for which a sentence of death may be determined the members shall deliberate and vote after the military judge instructs the members. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment.

(2) Deliberations. Deliberations require a full and free discussion of the determination to be made in the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(3) Voting Generally.

(A) Duty of members. Each member has the duty to vote on the necessary findings described in R.C.M. 1004(a)(4)-(6) as applicable. No member may abstain from voting.

(B) Secret ballot. Voting shall be by secret written ballot.

(4) Procedure.

(A) Initial Order. The members shall employ the following order for each charge and specification for which death may be determined.

(i) The members shall vote separately on each aggravating factor under subsection (c) of this rule that applies to the offense and on which the members have been instructed. The members shall not proceed to R.C.M. 1004(g)(4)(A)(ii) unless the members unanimously find that at least one of the aggravating factors existed beyond a reasonable doubt.

(ii) The members shall vote on whether the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including any relevant aggravating factor(s) under subsection (c). The members shall not proceed to R.C.M. 1004(g)(4)(B) unless the members unanimously concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances.

(B) Voting on a sentencing determination if death may be adjudged.

(i) If the members unanimously find both that at least one aggravating factor exists and the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances,

the members shall vote on the following sentencing determinations, which shall be binding on the military judge. Except as permitted under R.C.M. 1004(i), the members must vote in the order listed below and are only authorized to vote on each option one time:

(I) Death;

(II) Life in prison without eligibility for parole; or

(III) Whether the offense shall be returned to the military judge for sentencing of a lesser punishment.

(ii) If all twelve members vote for death, the sentencing determination of the members shall be death. If any member does not vote for death, the sentencing determination of the members shall not be death.

(iii) If the members' initial vote does not reach the required unanimous consensus for death, the members shall vote on life without the eligibility for parole. If three-fourths or more of the members vote for life without eligibility for parole, the sentencing determination of the members shall be life without eligibility for parole.

(iv) If the members' vote does not reach the required three-fourths for life without eligibility for parole, the members shall vote on whether the offense is returned to the military judge for sentencing of a lesser punishment in accordance with R.C.M. 1001.

(v) If the members' vote does not reach the required three-fourths required under R.C.M. 1004(g)(4)(B)(iv), the offense shall be returned to the military judge for sentencing of a lesser punishment in accordance with R.C.M. 1001.

(C) Voting on a sentencing determination if death may not be adjudged.

(i) If the members do not unanimously find that at least one aggravating factor exists or the members do not find unanimously that the aggravating circumstances substantially outweigh the extenuating and mitigating circumstances, the members shall vote on one of the following sentencing determinations, in the order listed below, which shall be binding on the military judge:

(I) Life in prison without eligibility for parole.

(II) Whether the offense shall be returned to the military judge for sentencing of a lesser punishment.

(ii) If the members' vote does not reach the required three-fourths for life without eligibility for parole, the members shall vote on whether the offense is returned to the military judge for sentencing of a lesser punishment in accordance with R.C.M. 1001.

(iii) If the members' vote does not reach the required three-fourths required under R.C.M. 1004(g)(4)(C)(ii), the offense shall be returned to the military judge for sentencing of a lesser punishment in accordance with R.C.M. 1001.

(D) Counting votes. The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

(h) Action after a sentence is reached. After the members have agreed upon a determination by the required number of votes in accordance with this rule, the court-martial shall be opened and the president shall inform the military judge that the members have reached a determination. The military judge may, in the presence of the parties, examine any writing used by the president to state the determination and may assist the members in putting the determination in proper form. If the members voted unanimously for a determination of death, the writing shall indicate which aggravating factors under R.C.M. 1004(c) the members unanimously found to exist beyond a reasonable doubt. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the determination.

(i) Reconsideration. Subject to this rule, a sentence may be reconsidered at any time before announced in open session of the court.

(1) Clarification of determination. A sentence determination may be clarified at any time before entry of judgment. When a determination by the members in a capital case is ambiguous, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is

adjourned. If the matter is discovered after adjournment, the military judge may call a session for clarification by the members as soon as practicable after the ambiguity is discovered.

(2) *Action by the convening authority.*

(A) Prior to entry of judgment, if a convening authority becomes aware that the sentence of the court-martial is ambiguous, the convening authority shall return the matter to the court-martial for clarification. When the sentence of the court-martial appears to be illegal, the convening authority shall return the matter to the court-martial for correction.

(B) Prior to entry of judgment, if special trial counsel becomes aware that the sentence of a court-martial is ambiguous, special trial counsel shall make a binding determination that the convening authority return the matter to the court-martial for clarification. When the sentence of the court-martial appears to be illegal, special trial counsel shall make a binding determination that the convening authority shall return the matter to the court-martial for correction

(3) *Reconsideration procedure.* Any member of the court-martial may propose that a determination of the members in a capital case be reconsidered.

(A) *Instructions.* When reconsideration has been requested, the military judge shall instruct the members on the procedure for reconsideration.

(B) *Voting.* The members shall vote by secret written ballot in closed session whether to reconsider a determination.

(C) *Number of votes required for aggravating factors in capital cases.* Members may reconsider a unanimous vote under R.C.M. 1004(b)(4)(A) that an aggravating factor was proven beyond a reasonable doubt if at least one member votes to reconsider. Members may reconsider a unanimous vote under R.C.M. 1004(b)(4)(C) that any extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under R.C.M. 1004(c), if at least one member votes to reconsider. In all other circumstances, a vote under R.C.M.

1004(b)(4)(A) or (C) may be reconsidered only if at least a majority of the members vote for reconsideration.

(D) Number of votes required for determinations.

(i) With a view toward increasing. Members may reconsider a determination with a view toward increasing the severity of the determination only if at least a majority votes for reconsideration. However, members may not reconsider a non-unanimous vote for a determination of death.

(ii) With a view toward decreasing. Members may reconsider a determination with a view toward decreasing the severity of the determination only if:

(I) In the case of a death determination, at least one member votes to reconsider; or

(II) In the case of any other determination, more than one-fourth of the members vote to reconsider.

(E) Successful vote. If a vote to reconsider succeeds, the procedures in this rule shall apply.

(j) Sentencing by military judge.

(1) The military judge shall sentence the accused in accordance with the binding determination of the members under subsection (g). The military judge may include in any sentence to death or life in prison without eligibility for parole, any other authorized lesser punishment. When the military judge's sentence includes confinement or fines, the military judge shall determine an appropriate term of confinement and fine for each specification for which the accused was found guilty.

(2) Where there is a finding of guilty for a specification for which death may be adjudged and a finding of guilty for a specification for which death may not be adjudged.

(A) The members shall make a determination for each specification for which death may be adjudged in accordance with subsection (g).

(B) The military judge shall determine the sentence for any specification returned by the members for sentencing of a lesser punishment than death or life without eligibility for parole.

(C) The military judge shall determine the sentence for all charges and specifications for which death may not be adjudged. If the sentence includes more than one term of confinement, the military judge shall determine whether the terms of confinement will run concurrently or consecutively.

(k) Other penalties. When death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, with or without eligibility for parole, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal as appropriate. Confinement is a necessary incident of a sentence of death, but not a part of it.

(l) Impeachment of determination. A determination which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of any member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

(kkk) R.C.M. 1005 is amended as follows:

~~Rule 1005. Instructions on sentence~~

~~(a) In general. The military judge shall give the members appropriate instructions on sentence.~~

~~(b) When given. Instructions on sentence shall be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.~~

~~(c) Requests for instructions. During presentencing proceedings or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments on sentence.~~

~~(d) *How given.* Instructions on sentence shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or unless a party objects, portions of them, may also be given to the members for their use during deliberations.~~

~~(e) *Required instructions.* Instructions on sentence shall include—~~

~~(1) A statement of the maximum authorized punishment that may be adjudged and of the mandatory minimum punishment, if any;~~

~~(2) A statement of the effect any sentence announced including a punitive discharge and confinement, or confinement in excess of six months, will have on the accused's entitlement to pay and allowances;~~

~~(3) A statement of the procedures for deliberation and voting on the sentence set out in R.C.M. 1006;~~

~~(4) A statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority;~~

~~(5) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3) and (5);~~

~~(6) A statement that the members shall consider the sentencing guidance set forth in R.C.M. 1002(f); and~~

~~(7) Such other explanations, descriptions, or directions that the military judge determines to be necessary, whether properly requested by a party or determined by the military judge *sua sponte*.~~

~~(f) *Failure to object.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence shall constitute forfeiture of the objection. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.~~

Rule 1005. Reconsideration of sentence in noncapital cases

(a) *Reconsideration.* Subject to this rule, a sentence may be reconsidered at any time before such sentence is announced in open session of the court.

(b) Exceptions.

(1) If the sentence announced in open session was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty, the court that announced the sentence may reconsider such sentence upon reconsideration in accordance with subsection (e) of this rule.

(2) If the sentence announced in open session exceeds the maximum permissible punishment for the offense or the jurisdictional limitation of the court-martial, the sentence may be reconsidered after announcement in accordance with subsection (e) of this rule.

(3) If the sentence announced in open session is not in accordance with a sentence limitation in the plea agreement, if any, the sentence may be reconsidered after announcement in accordance with subsection (e) of this rule.

(c) Clarification of sentence. A sentence may be clarified at any time before entry of judgment. When a sentence determined by the military judge is ambiguous, the military judge shall call a session for clarification as soon as practicable after the ambiguity is discovered.

(d) Action by the convening authority.

(1) Prior to entry of judgment, if a convening authority becomes aware that the sentence of the court-martial is ambiguous, the convening authority shall return the matter to the court-martial for clarification. When the sentence of the court-martial appears to be illegal, the convening authority shall return the matter to the court-martial for correction.

(2) Prior to entry of judgment, if special trial counsel becomes aware that the sentence of a court-martial is ambiguous, special trial counsel shall make a binding determination that the convening authority return the matter to the court-martial for clarification. When the sentence of the court-martial appears to be illegal, special trial counsel shall make a binding determination that the convening authority shall return the matter to the court-martial for correction.

(e) Reconsideration procedure. A military judge may reconsider a sentence once announced only under the

circumstances described in subsection (b).

(III) R.C.M. 1006 is deleted and reserved.

(mmm) R.C.M. 1007 is amended as follows:

(a) *In general.* The sentence shall be announced in the presence of all parties promptly after it has been determined.

(b) *Announcement.*

(1) In a capital case, the determination of the members ~~the case of sentencing by members, the sentence~~ shall be announced by the military judge ~~in accordance with the members' determination.~~ If the members voted unanimously for death, the military judge shall announce which aggravating factors under R.C.M. 1004(c) the members unanimously found to exist beyond a reasonable doubt.

(2) In all other cases, the military judge shall announce the sentence and shall specify—

(A) the term of confinement, if any, and the amount of fine, if any, determined for each offense;

(B) for each term of confinement announced under subparagraph (A), whether the term of confinement is to run concurrently or consecutively with any other term or terms of confinement adjudged; and

(C) any other punishments under R.C.M. 1003 as a single, unitary sentence.

(c) *Erroneous announcement.* If the announced sentence is not the one actually determined by the court-martial, the error may be corrected by a new announcement made before entry of the judgment into the record. This action shall not constitute reconsideration of the sentence. If the court-martial is adjourned before the error is discovered, the military judge may call the court-martial into session to correct the announcement.

(d) *Polling prohibited.* Except as provided in Mil. R. Evid. 606, members may not otherwise be questioned about their deliberations and voting.

(nnn) R.C.M. 1008 is amended as follows:

Rule 1008. Impeachment of sentence in noncapital cases

A sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of ~~a member~~ the military judge, outside influence was improperly brought to bear upon ~~any member~~ the military judge, or unlawful command influence was brought to bear upon ~~any member~~ the military judge.

(ooo) R.C.M. 1009 is deleted and reserved.

(ppp) R.C.M. 1103 is amended as follows:

(a) In general.

(1) After a sentence is announced, the convening authority may defer a sentence to confinement, forfeitures, or reduction in grade in accordance with this rule. Deferment may be at the request of the accused as provided in subsection (b), or without a request of the accused as provided in subsection (c). If the accused is convicted of any offense over which special trial counsel has exercised authority, both notice of the request and of the decision by the convening authority shall be provided to special trial counsel.

(2) Deferment of a sentence to confinement, forfeitures, or reduction in grade is a postponement of the running of the sentence.

(b) Deferment requested by an accused. The convening authority or, if the accused is no longer in the convening authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may, upon written application of the accused, at any time after the adjournment of the court-martial and before the entry of judgment, defer the accused's service of a sentence to confinement, forfeitures, and reduction in grade.

(c) Deferment without a request from the accused.

(1) In a case in which a court-martial sentences to confinement an accused referred to in paragraph (2), the convening authority may defer service of the sentence to confinement, without the consent of the accused, until after the accused has been permanently released to the armed forces by a State or foreign country.

(2) Paragraph (1) applies to an accused who, while in custody of a State or foreign country, is temporarily returned by that State or foreign country to the armed forces for trial by court-martial and, after the court-martial, is returned to that State or foreign country under the authority of a mutual agreement or treaty, as the case may be.

(3) As used in this subsection, the term “State” means a State of the United States, the District of Columbia, a territory, and a possession of the United States.

(d) *Action on deferment request.*

(1) The authority acting on the deferment request may, in that authority’s discretion, defer service of a sentence to confinement, forfeitures, or reduction in grade.

(2) In a case in which the accused requests deferment, the accused shall have the burden of showing that the interests of the accused and the community in deferral outweigh the community’s interests in imposition of the punishment on its effective date. Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include, where applicable: the probability of the accused’s flight; the probability of the accused’s commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command’s immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused’s character, mental condition, family situation, and service record. The decision of the authority acting on the deferment request shall be subject to judicial review only for abuse of discretion. The action of the authority acting on the deferment request shall be in writing. A copy of the action on the deferment request, to include any rescission, shall be included in the record of trial and a copy shall be provided to the accused and to the military judge.

(e) *Restraint when deferment is granted.* When deferment of confinement is granted, no form of restraint or other limitation on the accused’s liberty may be ordered as a substitute form of punishment. An accused may, however, be restricted to specified limits or conditions may be placed on the accused’s liberty during

the period of deferment for any other proper reason, including a ground for restraint under R.C.M. 304.

(f) *End of deferment.* Deferment of a sentence to confinement, forfeitures, or reduction in grade ends:

(1) In a case where the accused requested deferment under subsection (b)—

(A) When the military judge of a general or special court-martial enters the judgment into the record of trial under R.C.M. 1111; or

(B) When the convening authority of a summary court-martial acts on the sentence of the court-martial;

(2) In a case where the deferment was granted under subsection (c), when the accused has been permanently released to the armed forces by a State or foreign country;

(3) When the deferred confinement, forfeitures, or reduction in grade are suspended;

(4) When the deferment expires by its own terms; or

(5) When the deferment is otherwise rescinded in accordance with subsection (g).

(g) *Rescission of deferment.*

(1) *Who may rescind.* The authority who granted the deferment or, if the accused is no longer within that authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may rescind the deferment.

(2) *Action.* Deferment of confinement, forfeitures, or reduction in grade may be rescinded when additional information is presented to a proper authority which, when considered with all other information in the case, that authority finds, in that authority's discretion, is grounds for denial of deferment under paragraph (d)(2). The accused and the military judge shall promptly be informed of the basis for the rescission. The accused shall also be informed of the right to submit written matters and to request that the rescission be reconsidered. The accused may be required to serve the sentence to confinement, forfeitures, or reduction in grade pending this action.

(3) *Orders.* Rescission of a deferment before or concurrently with the entry of judgment shall be noted in the judgment that is entered into the record of trial under R.C.M. 1111.

(h) *Waiving forfeitures resulting from a sentence to confinement to provide for dependent support.*

(1) With respect to forfeiture of pay and allowances resulting only by operation of law and not adjudged by the court, the convening authority may waive, for a period not to exceed six months, all or part of the forfeitures for the purpose of providing support to the accused's dependent(s). The convening authority may waive and direct payment of any such forfeitures when they become effective by operation of Article 58(b).

(2) Factors that may be considered by the convening authority in determining the amount of forfeitures, if any, to be waived include, but are not limited to, the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. § 1059.

(3) For the purposes of this rule, a "dependent" means any person qualifying as a "dependent" under 37 U.S.C. § 401.

(qqq) R.C.M. 1104 is amended as follows:

(a) *Post-trial Article 39(a) sessions.*

(1) *In general.* Upon motion of either party or *sua sponte*, the military judge may direct a post-trial Article 39(a) session at any time before the entry of judgment under R.C.M. 1111 and, when necessary, after a case has been returned to the military judge by a higher court. Counsel for the accused shall be present in accordance with R.C.M. 804 and R.C.M. 805.

(2) *Purpose.* The purpose of post-trial Article 39(a) sessions is to inquire into, and, when appropriate, to resolve any matter that arises after trial that substantially affects the legal sufficiency of any findings of guilty or the sentence.

(3) *Scope.* A military judge at a post-trial Article 39(a) session may reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence. Prior to entering such a

finding or findings, the military judge shall give each party an opportunity to be heard on the matter in a post-trial Article 39(a) session. The military judge may *sua sponte*, at any time prior to the entry of judgment, take one or both of the following actions:

(i) enter a finding of not guilty of one or more offenses charged; or

(ii) enter a finding of not guilty of a part of a specification as long as a lesser offense charged is alleged in the remaining portion of the specification.

(b) *Post-trial motions.*

(1) *Matters.* Post-trial motions may be filed by either party or when directed by the military judge to address such matters as—

(A) An allegation of error in the acceptance of a plea of guilty;

(B) A motion to set aside one or more findings because the evidence is legally insufficient;

(C) A motion to correct a computational, technical, or other clear error in the sentence;

(D) An allegation of error in the Statement of Trial Results;

(E) An allegation of error in the post-trial processing of the court-martial; and

(F) An allegation of error in the convening authority's action under R.C.M. 1109 or 1110.

(2) *Timing.*

(A) Except as provided in subparagraphs (B) and (C), post-trial motions shall be filed not later than 14 days after defense counsel receives the Statement of Trial Results. The military judge may extend the time to submit such matters by not more than an additional 30 days for good cause.

(B) A motion to correct an error in the action of the convening authority shall be filed within five days after the party receives the convening authority's action. If any post-trial action by the convening authority is incomplete, irregular, or contains error, the military judge shall—

(i) return the action to the convening authority for correction; or

(ii) with the agreement of all parties, correct the action of the convening authority in the entry of judgment.

(C) A motion to correct a clerical or computational error in a judgment entered by the military judge shall be made within five days after a party is provided a copy of the judgment.

(c) *Matters not subject to post-trial sessions.* A post-trial session may not be directed:

(1) For reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;

(2) For reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty ~~under of~~ a specification ~~laid~~ under that charge, which sufficiently alleges a violation of ~~some article of the code~~ the UCMJ; or

(3) For increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(d) *Procedure.*

(1) *Personnel.* The requirements of R.C.M. 505 and 805 shall apply at post-trial sessions except that, for good cause, a different military judge may be detailed, subject to R.C.M. 502(c) and 902.

(2) *Record.* All post-trial sessions shall be held in open session. The record of the post-trial sessions shall be prepared, certified, and provided in accordance with R.C.M. 1112 and shall be included in the record of the prior proceedings.

(e) *Notice to Victims.* A victim must be notified of any post-trial motion, filing, or hearing that may address:

(1) the findings or sentence of a court-martial with respect to the accused;

(2) the unsealing of privileged or private information of a victim; or

(3) any action resulting in the release of an accused.

(rrr) R.C.M. 1106A is amended as follows:

(a) *In general.* In a case with a crime victim, after a sentence is announced in a court-martial any crime

victim of an offense may submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109, 1110, or 1306.

(b) *Notice to a crime victim.*

(1) *In general.* Subject to such regulations as the Secretary concerned may prescribe, trial counsel, or in the case of a summary court-martial, the summary court-martial officer, shall make reasonable efforts to inform crime victims, through counsel, if applicable, of their rights under this rule, and shall advise such crime victims on the procedure for making submissions.

(2) *Crime victim defined.* As used in this rule, the term "crime victim" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty, and on which the convening authority may take action under R.C.M. 1109 or 1110, or the individual's lawful representative or designee appointed by the military judge under these rules.

(c) *Matters submitted by a crime victim.*

(1) Subject to paragraph (2), a crime victim may submit to the convening authority any matters that may reasonably tend to inform the convening authority's exercise of discretion under R.C.M. 1109 or 1110. The convening authority is only required to consider written submissions. Submissions are not subject to the Military Rules of Evidence.

(2) *Limitations on submissions.*

(A) Submissions under this rule may not include matters that relate to the character of the accused unless such matters were admitted as evidence at trial.

(B) The crime victim is entitled to ~~one opportunity to submit matters~~ a single submission of matters to the convening authority under this rule.

(3) The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to the accused as soon as practicable.

(d) *Access to court-martial record.* Upon request by a crime victim or crime victim's counsel, trial counsel shall provide a copy of the recording of all open sessions of the court-martial, and copies of, or access to, the evidence admitted at the court-martial, and the appellate exhibits. Such access shall not include sealed or classified court-martial material or recordings unless authorized by a military judge upon a showing of good cause. A military judge shall issue appropriate protective orders when authorizing such access.

(e) *Time periods.*

(1) *General and special courts-martial.* After a trial by general or special court-martial, a crime victim may submit matters to the convening authority under this rule within ten days after the sentence is announced.

(2) *Summary courts-martial.* After a trial by summary court-martial, a crime victim may submit matters under this rule within seven days after the sentence is announced.

(3) *Extension of time.*

(A) If, within the period described in paragraph (1) or (2), the crime victim shows that additional time is required for the crime victim to submit matters, the convening authority may, for good cause, extend the period for not more than 20 days.

(B) For purposes of this rule, good cause for an extension ordinarily does not include the need to obtain matters that reasonably could have been obtained prior to the conclusion of the court-martial.

(f) *Waiver.*

(1) *Failure to submit matters.* Failure to submit matters within the time prescribed by this rule waives the right to submit such matters.

(2) *Written waiver.* A crime victim may expressly waive, in writing, the right to submit matters under this rule. Once filed, such a waiver may not be revoked.

(sss) R.C.M. 1112 is amended as follows:

(a) *In general.* Each general and special court-martial shall keep a separate record of the proceedings in

each case brought before it. The record shall be independent of any other document and shall include a recording of the court-martial. Court-martial proceedings may be recorded by videotape, audiotape, or other technology from which sound images may be reproduced to accurately depict the court-martial.

(b) *Contents of the record of trial.* The record of trial contains the court-martial proceedings, and includes any evidence or exhibits considered by the court-martial in determining the findings or sentence. The record of trial in every general and special court-martial shall include:

(1) A substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting;

(2) The original charge sheet or a duplicate;

(3) A copy of the convening order and any amending order;

(4) The request, if any, for trial by military judge alone; the accused's election, if any, of members under R.C.M. 903; and, when applicable, any statement by the convening authority required under R.C.M. 503(a)(2);

~~(5) The election, if any, for application of sentencing rules as in effect on or after January 1, 2019 under R.C.M. 902A; and the election, if any, for sentencing by members in lieu of sentencing by military judge under R.C.M. 1002(b);~~

~~(5)(6)~~ Exhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence and any appellate exhibits;

~~(6)(7)~~ The Statement of Trial Results;

~~(7)(8)~~ Any action by the convening authority under R.C.M. 1109 or 1110; and

~~(8)(9)~~ The judgment entered into the record by the military judge.

(c) *Certification.* A court reporter shall prepare and certify that the record of trial includes all items required under subsection (b). If the court reporter cannot certify the record of trial because of the court reporter's death, disability, or absence, the military judge shall certify the record of trial.

(1) *Timing of certification.* The record of trial shall be certified as soon as practicable after the judgment has been entered into the record.

(2) *Additional proceedings.* If additional proceedings are held after the court reporter certifies the record, a record of those proceedings shall be included in the record of trial, and a court reporter shall prepare a supplemental certification.

(d) *Loss of record, incomplete record, and correction of record.*

(1) If the certified record of trial is lost or destroyed, a court reporter shall, if practicable, certify another record of trial.

(2) A record of trial is complete if it complies with the requirements of subsection (b). If the record is incomplete or defective, a court reporter or any party may raise the matter to the military judge for appropriate corrective action. A record of trial found to be incomplete or defective before or after certification may be corrected to make it accurate. A superior competent authority may return a record of trial to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction. All parties shall be given reasonable access to any court reporter notes or recordings of the proceedings.

(3) The military judge may take corrective action by any of the following means—

(A) reconstructing the portion of the record affected;

(B) dismissing affected specifications;

(C) reducing the sentence of the accused; or

(D) if the error was raised by motion or on appeal by the defense, declaring a mistrial as to the affected specifications.

(e) *Copies of the record of trial.*

(1) *Accused and victim.* Any victim entitled to a copy of the certified record of trial shall be notified of the opportunity to receive a copy of the certified record of trial. Following certification of the record of trial

under subsection (c), in every general and special court-martial, subject to paragraphs (3) and (4), a court reporter shall, in accordance with regulations issued by the Secretary concerned, provide a copy of the certified record of trial free of charge to—

(A) The accused;

(B) The victim of an offense of which the accused was charged if the victim testified during the proceedings; and

(C) Any victim named in a specification of which the accused was charged, upon request, without regard to the findings of the court-martial.

(2) *Providing copy impracticable.* If it is impracticable to provide the record of trial to an individual entitled to receive a copy under paragraph (1) because of the unauthorized absence of the individual, or military exigency, or if the individual so requests on the record at the court-martial or in writing, the individual's copy of the record shall be forwarded to the individual's counsel, if any.

(3) *Sealed exhibits; classified information; closed sessions.* Any copy of the record of trial provided to an individual under paragraph (1) shall not contain classified information, information under seal, or recordings of closed sessions of the court-martial, and shall be handled as follows:

(A) *Classified information.*

(i) *Forwarding to convening authority.* If the copy of the record of trial prepared for an individual under this rule contains classified information, trial counsel, unless directed otherwise by the convening authority, shall forward the individual's copy to the convening authority, before it is provided to the individual.

(ii) *Responsibility of the convening authority.* The convening authority shall:

(I) cause any classified information to be deleted or withdrawn from the individual's copy of the record of trial;

(II) cause a certificate indicating that classified information has been deleted or withdrawn to be

attached to the record of trial; and

(III) cause the expurgated copy of the record of trial and the attached certificate regarding classified information to be provided to the individual as provided in subparagraphs (1)(A), (B), and (C).

(iii) *Contents of certificate.* The certificate regarding deleted or withdrawn classified information shall indicate:

(I) that the original record of trial may be inspected in the Office of the Judge Advocate General under such regulations as the Secretary concerned may prescribe;

(II) the locations in the record of trial from which matter has been deleted;

(III) the locations in the record of trial which have been entirely deleted; and

(IV) the exhibits which have been withdrawn.

(B) *Sealed exhibits and closed sessions.* The court reporter shall delete or withdraw from an individual's copy of the record of trial—

(i) any matter ordered sealed by the military judge under R.C.M. 1113; and

(ii) any recording or transcript of a session that was ordered closed by the military judge, to include closed sessions held pursuant to Mil. R. Evid. 412, 513, and 514.

(4) *Portions of the record protected by the Privacy Act.* Any copy of the record of trial provided to a victim under paragraph (1) shall not contain any portion of the record the release of which would unlawfully violate the privacy interests of any person other than that victim, to include those privacy interests recognized by 5 U.S.C. § 552a, the Privacy Act of 1974.

(5) *Additional copies.* The convening or higher authority may direct that additional copies of the record of trial of any general or special court-martial be prepared.

(f) *Attachments for appellate review.* In accordance with regulations prescribed by the Secretary concerned, a court reporter shall attach the following matters to the record before the certified record of trial is forwarded to the office of the Judge Advocate General for appellate review:

- (1) If not used as exhibits—
 - (A) The preliminary hearing report under Article 32, if any;
 - (B) The pretrial advice under Article 34, if any;
 - (C) If the trial was a rehearing or new or other trial of the case, the record of any former hearings; and
 - (D) Written special findings, if any, by the military judge;
 - (2) Exhibits or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were marked for and referred to on the record but not received in evidence;
 - (3) Any matter filed by the accused or victim under R.C.M. 1106 or 1106A, or any written waiver of the right to submit such matters;
 - (4) Any deferment request and the action on it;
 - (5) Conditions of suspension, if any, and proof of service on probationer under R.C.M. 1107;
 - (6) Any waiver or withdrawal of appellate review under R.C.M. 1115;
 - (7) Records of any proceedings in connection with a vacation of suspension of the sentence under R.C.M. 1108;
 - (8) Any transcription of the court-martial proceedings created pursuant to R.C.M. 1114; and
 - (9) Any redacted materials.
- (g) *Security classification.* If the record of trial contains matters that must be classified under applicable security regulations, trial counsel shall cause a proper security classification to be assigned to the record of trial and on each page thereof on which classified material appears.

(ttt) R.C.M. 1113 is amended as follows:

- (a) *In general.* If the report of preliminary hearing or record of trial contains exhibits, proceedings, or other materials ordered sealed by the preliminary hearing officer or military judge, counsel for the Government, the court reporter, or trial counsel shall cause such materials to be sealed so as to prevent unauthorized

examination or disclosure. Counsel for the 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 record of trial. Copies of the report of preliminary hearing or record of trial shall contain appropriate annotations that 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 shall be implemented in a manner consistent with Executive Order 13526, concerning classified national security information.

(b) *Examination and disclosure of sealed materials.* Except as provided in this rule, sealed materials may not be examined or disclosed.

(1) *Prior to referral.* Prior to referral of charges, the following individuals may examine and disclose sealed materials only if necessary for proper fulfillment of their responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct: 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; and special trial counsel for the purposes of making a determination on referral.

(2) *Referral through certification.* After referral of charges and prior to certification of the record under R.C.M. 1112(c), sealed materials may not be examined or disclosed in the absence of an order from the military judge based upon good cause.

(3) *Reviewing and appellate authorities; appellate counsel.*

(A) *Examination by reviewing and appellate authorities.* Reviewing and appellate authorities may examine sealed matters when those authorities determine 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 conduct.

(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 the appellate counsel's responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct.

(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.

(C) *Disclosure.* Appellate counsel shall not disclose sealed materials in the absence of:

(i) Prior authorization of the Judge Advocate General in the case of review under R.C.M. 1201 or 1210;

(ii) Prior authorization of the appellate court before which a case is pending review under R.C.M. 1203 or 1204; or

(iii) Prior authorization of the Judge Advocate General for a case eligible for review under R.C.M. 1203 or 1204.

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

(i) Judge advocates reviewing records pursuant to R.C.M. 1307;

(ii) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to R.C.M. 1201 and 1210;

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

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

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

(vi) Any other court of competent jurisdiction.

(4) *Examination of sealed materials.* For purposes of this rule, “examination” includes reading, inspecting, and viewing.

(5) *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.

(6) 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.

(uuu) R.C.M. 1117 is amended as follows:

(a) *In general.* With the approval of the Judge Advocate General concerned, the Government may appeal a sentence announced under R.C.M. 1007 to the Court of Criminal Appeals on the grounds that –

(1) The sentence violates the law;

(2) The sentence is a result of an incorrect application of a sentencing parameter, established under Article 56(c), UCMJ; or

~~(2)~~(3) the sentence is plainly unreasonable.

(b) *Timing.*

(1) An appeal under this rule must be filed within 60 days after the date on which the judgment of the court-martial is entered into the record under R.C.M. 1111.

(2) Any request for approval must be submitted in sufficient time to obtain and consider submissions under paragraph (c)(4) of this rule.

(c) *Approval process.*

(1) A request from the Government to the Judge Advocate General for approval of an appeal under this rule shall include a statement of reasons in support of an appeal under paragraph (a)(1), ~~or~~ (a)(2), or (a)(3), as applicable, based upon the information contained in the record before the sentencing authority at the time the sentence was announced under R.C.M. 1007.

(2) A statement of reasons in support of an appeal under paragraph (a)(1) shall identify the specific provisions of law at issue and the facts in the record demonstrating a violation of the law in the announced sentence under R.C.M. 1007.

(3) A statement of reasons in support of an appeal under paragraph (a)(2) shall identify the parameter at issue and the facts supporting how the parameter was applied incorrectly.

~~(3)(4) A statement of reasons in support of an appeal under paragraph (a)(2)(3) shall identify the facts in the record that demonstrate by clear and convincing evidence that the sentence announced under R.C.M. 1007 was plainly unreasonable because no reasonable sentencing authority would adjudge such a sentence in view of the record before the sentencing authority at the time the sentence was announced under R.C.M. 1007.~~

~~(4)(5) Prior to acting on a request from the Government, the Judge Advocate General shall transmit the request to the military judge who presided over the presentencing proceeding for purposes of providing the military judge, the parties, and any person who, at the time of sentencing, was a crime victim as defined by R.C.M. 1001(c)(2)(A), with an opportunity to make a submission addressing the statement of reasons in the Government's request.~~

(A) The military judge shall establish the time for the parties and crime victims to provide such a submission to the military judge, and for the military judge to forward all submissions to the Judge Advocate General. The military judge shall ensure that the parties have not less than 7 days to prepare, review, and transmit such submissions.

(B) Submissions under this paragraph shall not include facts beyond the record established at the time the sentence was announced under R.C.M. 1007.

~~(5)~~(6) The decision of the Judge Advocate General as to whether to approve a request shall be based on the information developed under this rule.

~~(6)~~(7) If an appeal is approved by the Judge Advocate General and submitted to the Court of Criminal Appeals under this rule, the following shall be included with the appeal: the statement of approval, the Government's request and statement of reasons under paragraph (c)(2) or (3), and any submissions under paragraph (c)(4).

(d) *Contents of the record of trial.* Unless the record has been forwarded to the Court of Criminal Appeals for review under R.C.M. 1116(b), the record of trial for an appeal under this rule shall consist of—

- (1) any portion of the record in the case that is designated as pertinent by either of the parties;
- (2) the information submitted during the presentencing proceeding; and
- (3) any information required by rule or order of the Court of Criminal Appeals.

~~(e) *Standard.* A sentence is plainly unreasonable if no reasonable sentencing authority would determine such a sentence in view of the record before the sentencing authority at the time the sentence was announced under R.C.M. 1007.~~

(vvv) R.C.M. 1201 is amended as follows:

(a) *Review of certain general and special courts-martial.* Except as provided in subsection (b), an attorney designated by the Judge Advocate General shall review:

- (1) Each general and special court-martial case that is not eligible for appellate review by a Court of Criminal Appeals under Article 66(b)(1) or (3); and
- (2) Each general or special court-martial eligible for appellate review by a Court of Criminal Appeals in which the Court of Criminal Appeals does not review the case because:

(A) In a case under Article 66(b)(3), other than one in which the sentence includes death, the accused withdraws direct appeal or waives the right to appellate review.

(B) In a case under Article 66(b)(1), the accused does not file a timely appeal, or files a timely appeal and then withdraws it.

(b) *Exception.* If the accused was found not guilty or not guilty only by reason of lack of mental responsibility of all offenses, or if the convening authority set aside all findings of guilty, no review under this rule is required.

(c) *By whom.*

(1) A review conducted under this rule may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated by the Judge Advocate General under regulations prescribed by the Secretary concerned.

(2) No person may review a case under this rule if that person has acted in the same case as an accuser, preliminary hearing officer, member of the court-martial, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense.

(d) *Form and content for review of cases not eligible for appellate review at the Court of Criminal Appeals.*

The review referred to in paragraph (a)(1) shall include a written conclusion as to each of the following:

- (1) Whether the court had jurisdiction over the accused and the offense;
- (2) Whether each charge and specification stated an offense;
- (3) Whether the sentence was within the limits prescribed as a matter of law; and
- (4) When applicable, a response to each allegation of error made in writing by the accused.

(e) *Form and content for review of cases in which the accused has waived or withdrawn appellate review or failed to file an appeal.* The review referred to in paragraph (a)(2) shall include a written conclusion as to each of the following:

- (1) Whether the court had jurisdiction over the accused and the offense;
- (2) Whether each charge and specification stated an offense; and

(3) Whether the sentence was within the limits prescribed as a matter of law.

(f) *Remedies.*

(1) If the attorney conducting the review under subsection (a) believes corrective action is required, the attorney shall forward the matter to the Judge Advocate General, who may modify or set aside the findings or sentence, in whole or in part.

(2) In setting aside the findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered where the evidence was legally insufficient at the trial to support the findings.

(3) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

(4) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority or special trial counsel, as applicable, determines that a rehearing would be ~~impractical~~ impracticable, the convening authority or special trial counsel shall dismiss the charges.

(g) *Notification.* After a case is reviewed under subsection (a), the accused shall be notified of the results of the review and any action taken by the Judge Advocate General or convening authority by means of depositing a copy of the review and any modified judgment in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the accused's official service record. Proof of service shall be attached to the record of trial.

(h) *Application for relief to the Judge Advocate General after final review.*

(1) *In general.* Notwithstanding R.C.M. 1209, the Judge Advocate General may, upon application of the accused or a person with authority to act for the accused, modify or set aside the findings or sentence, in whole or in part, of—

(A) A summary court-martial previously reviewed under R.C.M. 1307; or

(B) A general or special court-martial previously reviewed under paragraph (a)(1) or (2).

(2) *Timing.* In order to qualify for review under this subsection, an accused must submit an application for review not later than one year after—

(A) In the case of a summary court-martial, the date of completion of review under R.C.M. 1307; or

(B) In the case of a general or special court-martial reviewed under paragraph (a)(1) or (a)(2), the later of—

(i) the date on which the accused is notified of the decision of the Judge Advocate General under subsection (g); or

(ii) the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails under subsection (g).

(3) *Extension.* The Judge Advocate General may, for good cause shown, extend the period for submission of an application under paragraph (h)(2) for a time period not to exceed two additional years.

(4) *Scope.*

(A) In a case previously reviewed under R.C.M. 1307 or paragraph (a)(1), the Judge Advocate General may act on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(B) In a case previously reviewed under paragraph (a)(2), the Judge Advocate General's review is limited to the issue of whether the waiver, withdrawal, or failure to file an appeal was invalid under the law.

(5) *Procedure.* Each Judge Advocate General shall provide procedures for considering all cases properly submitted under this rule and may prescribe the manner by which an application for relief under this rule may be made and, if submitted by a person other than the accused, may require that the applicant show authority to act on behalf of the accused.

(i) *Remission and suspension.* The Judge Advocate General may, when so authorized by the Secretary concerned under Article 74, at any time remit or suspend the unexecuted part of any sentence, other than a sentence approved by the President.

(j) *Mandatory review of summary courts-martial forwarded under R.C.M. 1307.* The Judge Advocate General shall review summary courts-martial if the record of trial and the action thereon are forwarded under R.C.M. 1307(g). On such review, the Judge Advocate General may vacate or modify, in whole or in part, the findings or sentence, or both, of the court-martial on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(k) *Cases referred or submitted to the Court of Criminal Appeals.*

(1) *In general.* Action taken by the Judge Advocate General under subsections (h) or (j) may be reviewed by the Court of Criminal Appeals under Article 69(d) as follows:

(A) The Judge Advocate General may forward a case to the Court of Criminal Appeals. If the case is forwarded to a Court of Criminal Appeals, the accused shall be informed and shall have the rights to appellate defense counsel afforded under R.C.M. 1202(b)(2).

(B) The accused may submit an application for review to the Court of Criminal Appeals. The Court of Criminal Appeals may grant such an application only if the application demonstrates a substantial basis for concluding that the Judge Advocate General's action under this rule constituted prejudicial error, and the application is filed not later than the earlier of—

(i) 60 days after the date on which the accused is notified of the decision of the Judge Advocate General; or

(ii) 60 days after the date on which a copy of the decision of the Judge Advocate General is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the accused's official service record. Proof of service shall be attached to the record of trial.

(2) The submission of an application for review under subparagraph (k)(1)(B) does not constitute a proceeding before the Court of Criminal Appeals for purposes of representation by appellate defense counsel under Article 70(c)(1).

(3) In any case reviewed by a Court of Criminal Appeals under this subsection, the Court may take action only with respect to matters of law.

(www) R.C.M. 1203 is amended as follows:

(a) *In general.* Each Judge Advocate General shall establish a Court of Criminal Appeals composed of appellate military judges who shall serve for a tour of not less than three years, subject to such provision for reassignment as may be prescribed in regulations issued by the Secretary concerned.

(b) *Cases reviewed by a Court of Criminal Appeals—Automatic Review.* A Court of Criminal Appeals shall review cases forwarded to it by the Judge Advocate General under Article 65(b)(1).

(c) *Cases eligible for review by a Court of Criminal Appeals—Appeal by the accused.* A Court of Criminal Appeals shall review a timely appeal from the judgment of the court-martial in accordance with the standards set forth in Article 66(b)(1) and the rules prescribed under Article 66(h).

(d) *Timeliness.* In order for an appeal under subsection (c) to be timely, it must be filed in accordance with Article 66(c) and the rules prescribed under Article 66(h).

(e) *Action on cases reviewed by a Court of Criminal Appeals.*

(1) *Forwarding by the Judge Advocate General to the Court of Appeals for the Armed Forces.* The Judge Advocate General may forward the decision of the Court of Criminal Appeals to the Court of Appeals for the Armed Forces for review with respect to any matter of law. In such a case, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals and the order forwarding the case to be served on the accused and on appellate defense counsel. While a review of a forwarded case is pending, the Secretary concerned may defer further service of a sentence to confinement that has been ordered executed in such a case.

(2) *Action when findings are set aside.* In a case reviewed by the Court of Criminal Appeals under this rule in which it has set aside the findings and which is not forwarded to the Court of Appeals for the Armed Forces under paragraph (e)(1), the Judge Advocate General shall instruct an appropriate authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals

has authorized a rehearing on findings, the record shall be sent to an appropriate convening authority or special trial counsel, as applicable.

(A) If the Court has authorized a rehearing, but the convening authority to whom the record is transmitted finds a rehearing impracticable, the convening authority shall dismiss the charges.

(B) If the Court has authorized a rehearing, but special trial counsel to whom the record is transmitted finds a rehearing impracticable, special trial counsel shall dismiss the charges.

(23) *Action when sentence is set aside.* In a case reviewed by the Court of Criminal Appeals under this rule in which it has set aside the sentence and which is not forwarded to the Court of Appeals for the Armed Forces under paragraph (e)(1), the Judge Advocate General shall instruct an appropriate authority to modify the judgment in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ~~ordered~~ authorized a rehearing on sentence, the record shall be sent to an appropriate convening authority or special trial counsel, as applicable.

(A) If ~~that~~ the convening authority finds a rehearing impracticable, ~~that~~ the applicable convening authority ~~may~~ shall order either that a sentence of no punishment be imposed or that the applicable charges be dismissed.

(B) If special trial counsel finds a rehearing impracticable, special trial counsel may dismiss the applicable charges. If special trial counsel makes a determination to not dismiss the applicable charges, the convening authority shall order that a sentence of no punishment be imposed.

(34) *Action when sentence is affirmed in whole or part.*

(A) *Sentence requiring approval by the President.* If the Court of Criminal Appeals affirms any sentence which includes death, the Judge Advocate General shall transmit the record of trial and the decision of the Court of Criminal Appeals directly to the Court of Appeals for the Armed Forces when any period for reconsideration provided by the rules of the Courts of Criminal Appeals has expired.

(B) *Other cases.* If the Court of Criminal Appeals affirms any sentence other than one which includes death, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals to be served on the accused in accordance with subsection (f).

(45) *Remission or suspension.* If the Judge Advocate General believes that a sentence as affirmed by the Court of Criminal Appeals, other than one which includes death, should be remitted or suspended in whole or part, the Judge Advocate General may, before taking action under paragraphs (e)(1) or (3), transmit the record of trial and the decision of the Court of Criminal Appeals to the Secretary concerned with a recommendation for action under Article 74 or may take such action as may be authorized by the Secretary concerned under Article 74(a).

(56) *Action when accused lacks mental capacity.* In a review conducted under subsection (b) or (c), the Court of Criminal Appeals may not affirm the proceedings while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the Court of Criminal Appeals may direct an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the appellate proceedings. The Court may further order a remand under R.C.M. 810(f) as may be necessary. If the record is thereafter returned to the Court of Criminal Appeals, the Court of Criminal Appeals may affirm part or all of the findings or sentence unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity. If the accused does not have the requisite mental capacity, the Court of Criminal Appeals shall stay the proceedings until the accused regains appropriate capacity, or take other appropriate action. Nothing in this subsection shall prohibit the Court of Criminal Appeals from making a determination in favor of the accused which will result in the setting aside of a conviction.

(f) *Notification to accused.*

(1) *Notification of decision.* The accused shall be notified of the decision of the Court of Criminal Appeals in accordance with regulations of the Secretary concerned.

(2) *Notification of right to petition the Court of Appeals for the Armed Forces for review.* If the accused has the right to petition the Court of Appeals for the Armed Forces for review, the accused shall be provided with a copy of the decision of the Court of Criminal Appeals bearing an endorsement notifying the accused of this right. The endorsement shall inform the accused that such a petition:

(A) May be filed only within 60 days from the time the accused was in fact notified of the decision of the Court of Criminal Appeals or the mailed copy of the decision was postmarked, whichever is earlier; and

(B) May be forwarded through the officer immediately exercising general court-martial jurisdiction over the accused and through the appropriate Judge Advocate General or filed directly with the Court of Appeals for the Armed Forces.

(3) *Receipt by the accused—disposition.* When the accused has the right to petition the Court of Appeals for the Armed Forces for review, the receipt of the accused for the copy of the decision of the Court of Criminal Appeals, a certificate of service on the accused, or the postal receipt for delivery of certified mail shall be transmitted in duplicate by expeditious means to the appropriate Judge Advocate General. If the accused is personally served, the receipt or certificate of service shall show the date of service. The Judge Advocate General shall forward one copy of the receipt, certificate, or postal receipt to the clerk of the Court of Appeals for the Armed Forces when required by the court.

(g) *Cases not reviewed by the Court of Appeals for the Armed Forces.* If the decision of the Court of Criminal Appeals is not subject to review by the Court of Appeals for the Armed Forces, or if the Judge Advocate General has not forwarded the case to the Court of Appeals for the Armed Forces and the accused has not filed or the Court of Appeals for the Armed Forces has denied a petition for review, then either:

(1) The Judge Advocate General shall, if the sentence affirmed by the Court of Criminal Appeals includes a dismissal, transmit the record, the decision of the Court of Criminal Appeals, and the Judge Advocate General's recommendation to the Secretary concerned for action under R.C.M. 1206; or

(2) If the sentence affirmed by the Court of Criminal Appeals does not include a dismissal, the unexecuted portion of the sentence affirmed by the Court of Criminal Appeals shall be executed in accordance with R.C.M. 1102.

(xxx) R.C.M. 1204 is amended as follows:

(a) *Cases reviewed by the Court of Appeals for the Armed Forces.* Under such rules as it may prescribe, the Court of Appeals for the Armed Forces shall review the record in all cases:

(1) in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) reviewed by a Court of Criminal Appeals which the Judge Advocate General, after appropriate notification to the other Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps, orders sent to the Court of Appeals for the Armed Forces for review; and

(3) reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) *Petition by the accused for review by the Court of Appeals for the Armed Forces.*

(1) *Counsel.* When the accused is notified of the right to forward a petition for review by the Court of Appeals for the Armed Forces, if requested by the accused, associate counsel qualified under R.C.M. 502(d)(2) shall be detailed to advise and assist the accused in connection with preparing a petition for further appellate review.

(2) *Forwarding petition.* The accused shall file any petition for review by the Court of Appeals for the Armed Forces under paragraph (a)(3) of this rule directly with the Court of Appeals for the Armed Forces.

(c) *Action on decision by the Court of Appeals for the Armed Forces.*

(1) *In general.* After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further proceedings in

accordance with the decision of the court. Otherwise, unless the decision is subject to review by the Supreme Court, or there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the appropriate authority to take action in accordance with that decision. If the Court has ~~ordered~~ authorized a rehearing, but the convening authority to whom the record is transmitted finds a rehearing impracticable, the convening authority may dismiss the charges. If a special trial counsel referred the affected charges, the special trial counsel shall determine if a rehearing is impracticable. If a special trial counsel determines a rehearing is impracticable, the special trial counsel shall dismiss the charges.

(2) Sentence requiring approval of the President.

(A) If the Court of Appeals for the Armed Forces has affirmed a sentence that must be approved by the President before it may be executed, the Judge Advocate General shall transmit the record of trial, the decision of the Court of Criminal Appeals, the decision of the Court of Appeals for the Armed Forces, and the recommendation of the Judge Advocate General to the Secretary concerned.

(B) If the Secretary concerned is the Secretary of a military department, the Secretary concerned shall forward the material received under subparagraph (A) to the Secretary of Defense, together with the recommendation of the Secretary concerned. The Secretary of Defense shall forward the material, with the recommendation of the Secretary concerned and the recommendation of the Secretary of Defense, to the President for the action of the President.

(C) If the Secretary concerned is the Secretary of Homeland Security, the Secretary concerned shall forward the material received under subparagraph (A) to the President, together with the recommendation of the Secretary concerned, for action of the President.

(3) Sentence requiring approval of the Secretary concerned. If the Court of Appeals for the Armed Forces has affirmed a sentence which requires approval of the Secretary concerned before it may be executed, the Judge Advocate General shall follow the procedure in R.C.M. 1203(e)(3).

(4) *Decisions subject to review by the Supreme Court.* If the decision of the Court of Appeals for the Armed Forces is subject to review by the Supreme Court, the Judge Advocate General shall take no action under paragraphs (c)(1), (2), or (3) of this rule until: (A) the time for filing a petition for a writ of certiorari with the Supreme Court has expired; or (B) the Supreme Court has denied any petitions for writ of certiorari filed in the case. After (A) or (B) has occurred, the Judge Advocate General shall take action under paragraphs (c)(1), (2), or (3). If the Supreme Court grants a writ of certiorari, the Judge Advocate General shall take action under R.C.M. 1205(b).

(yyy) R.C.M. 1210 is amended as follows:

(a) *In general.* At any time within three years after the date of entry of judgment, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court-martial. A petition may not be submitted after the death of the accused. A petition for a new trial of the facts may not be submitted on the basis of newly discovered evidence when the petitioner was found guilty of the relevant offense pursuant to a guilty plea.

(b) *Who may petition.* A petition for a new trial may be submitted by the accused personally, or by accused's counsel, regardless whether the accused has been separated from the Service.

(c) *Form of petition.* A petition for a new trial shall be written and shall be signed under oath or affirmation by the accused, by a person possessing the power of attorney of the accused for that purpose, or by a person with the authorization of an appropriate court to sign the petition as the representative of the accused. The petition shall contain the following information, or an explanation why such matters are not included:

- (1) The name, service number, and current address of the accused;
- (2) The date and location of the trial;
- (3) The type of court-martial and the title or position of the convening authority;
- (4) The request for the new trial;
- (5) The sentence or a description thereof as reflected in the judgment of the case, with any later reduction thereof by clemency or otherwise;

- (6) A brief description of any finding or sentence believed to be unjust;
- (7) A full statement of the newly discovered evidence or fraud on the court-martial which is relied upon for the remedy sought;
- (8) Affidavits pertinent to the matters in paragraph (c)(7) of this rule; and
- (9) The affidavit of each person whom the accused expects to present as a witness in the event of a new trial. Each such affidavit should set forth briefly the relevant facts within the personal knowledge of the witness.
- (d) *Effect of petition.* The submission of a petition for a new trial does not stay the execution of a sentence.
- (e) *Who may act on petition.* If the accused's case is pending before a Court of Criminal Appeals or the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise, the Judge Advocate General of the armed force which reviewed the previous trial shall act on the petition, except that petitions submitted by persons who, at the time of trial and sentence from which the petitioner seeks relief, were members of the Coast Guard, and who were members of the Coast Guard at the time the petition is submitted, shall be acted on in the Department in which the Coast Guard is serving at the time the petition is so submitted.
- (f) *Grounds for new trial.*
- (1) *In general.* A new trial may be granted only on grounds of newly discovered evidence or fraud on the court-martial.
- (2) *Newly discovered evidence.* A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:
- (A) The evidence was discovered after the trial;
- (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
- (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(3) *Fraud on court-martial.* No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged.

(g) *Action on petition.*

(1) *In general.* The authority considering the petition may cause such additional investigation to be made and such additional information to be secured as that authority believes appropriate. Upon written request, and in its discretion, the authority considering the petition may permit oral argument on the matter.

(2) *Courts of Criminal Appeals; Court of Appeals for the Armed Forces.* The Courts of Criminal Appeals and the Court of Appeals for the Armed Forces shall act on a petition for a new trial in accordance with their respective rules.

(3) *The Judge Advocates General.* When a petition is considered by the Judge Advocate General, any hearing may be before the Judge Advocate General or before an officer or officers designated by the Judge Advocate General. If the Judge Advocate General believes meritorious grounds for relief under Article 74 have been established but that a new trial is not appropriate, the Judge Advocate General may act under Article 74 if authorized to do so, or transmit the petition and related papers to the Secretary concerned with a recommendation. The Judge Advocate General may also, in cases which have been finally reviewed but have not been reviewed by a Court of Criminal Appeals, act under Article 69.

(h) *Action when new trial is granted.*

(1) *Forwarding to ~~e~~convening appropriate authority.* When a petition for a new trial is granted, the Judge Advocate General shall select and forward the case to ~~the a-~~convening appropriate authority for disposition.

(2) *Charges at new trial.* At a new trial, the accused may not be tried for any offense of which the accused was found not guilty or upon which the accused was not tried at the earlier court-martial.

(3) *Action by convening authority.* The convening authority's action on the record of a new trial is the same as in other courts-martial.

(4) *Disposition of record.* The disposition of the record of a new trial is the same as for other courts-martial.

(5) *Judgment.* After a new trial, a new judgment shall be entered in accordance with R.C.M. 1111.

(6) *Action by persons charged with execution of the sentence.* Persons charged with the administrative duty of executing a sentence adjudged upon a new trial shall credit the accused with any executed portion or amount of the original sentence included in the new sentence in computing the term or amount of punishment actually to be executed pursuant to the sentence.

(zzz) R.C.M. 1301 is amended as follows:

(a) *Composition.* A summary court-martial is composed of one commissioned officer on active duty. Unless otherwise prescribed by the Secretary concerned a summary court-martial shall be of the same armed force as the accused. Summary courts-martial shall be conducted in accordance with the regulations of the military Service to which the accused belongs. Whenever practicable, a summary court-martial should be an officer whose grade is not below lieutenant of the Navy or Coast Guard or captain of the Army, ~~Air Force, or~~ Marine Corps, Air Force, or Space Force. When only one commissioned officer is present with a command or detachment, that officer shall be the summary court-martial of that command or detachment. When more than one commissioned officer is present with a command or detachment, the convening authority may not be the summary court-martial of that command or detachment.

(b) *Function.* The function of the summary court-martial is to promptly adjudicate minor offenses under a simple disciplinary proceeding. A finding of guilt by the summary court-martial does not constitute a criminal conviction as it is not a criminal forum. However, a summary court-martial shall constitute a trial for purposes of determining former jeopardy under Article 44. The summary court-martial shall thoroughly and impartially inquire into both sides of the matter and shall ensure that the interests of both the Government and the accused are safeguarded and that justice is done. A summary court-martial may seek advice from a judge advocate or legal officer on questions of law, but the summary court-martial may not seek advice from any person on factual conclusions that should be drawn from evidence or the sentence that should be imposed, as the summary court-martial has the independent duty to make these determinations.

(c) *Jurisdiction.*

[Note: R.C.M. 1301(c) applies to offenses committed on or after 24 June 2014.]

(1) Subject to Chapter II [and subsection \(c\)\(2\) of this rule](#), summary courts-martial have the power to try persons subject to the UCMJ, except commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by the UCMJ.

(2) Notwithstanding paragraph (c)(1), summary courts-martial do not have jurisdiction over offenses under Articles 120(a), 120(b), 120b(a), 120b(b), and attempts thereof under Article 80. Such offenses shall not be referred to a summary court-martial.

(d) *Punishments.*

(1) *Limitations—amount.* Subject to R.C.M. 1003, summary courts-martial may impose any punishment not forbidden by the UCMJ except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than 1 month, hard labor without confinement for more than 45 days, restriction to specified limits for more than 2 months, or forfeiture of more than two-thirds of 1 month's pay.

(2) *Limitations—pay grade.* In the case of enlisted members above the fourth enlisted pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next pay grade.

(e) *Counsel.* The accused at a summary court-martial does not have the right to counsel. If the accused has counsel qualified under R.C.M. 502(d)(2), that counsel may be permitted to represent the accused at the summary court-martial if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

(f) *Power to obtain witnesses and evidence.* A summary court-martial may obtain evidence pursuant to R.C.M. 703.

(g) *Secretarial limitations.* The Secretary concerned may prescribe procedural or other rules for summary courts-martial not inconsistent with this Manual or the UCMJ.

(aaaa) R.C.M. 1302 is amended as follows:

(a) *Who may convene summary courts-martial.* Unless limited by competent authority summary courts-martial may be convened by:

(1) Any person who may convene a general or special court-martial;

(2) The commander of a detached company or other detachment of the Army;

(3) The commander of a detached squadron or other detachment of the Air Force or a corresponding unit of the Space Force;

(4) The commander or officer in charge of any other command when empowered by the Secretary concerned; or

(5) A superior competent authority to any of the above.

(b) *When convening authority is accuser.* If the convening authority or the summary court-martial is the accuser, it is discretionary with the convening authority whether to forward the charges to a superior authority with a recommendation to convene the summary court-martial. If the convening authority or the summary court-martial is the accuser, the jurisdiction of the summary court-martial is not affected.

(c) *Procedure.* After the requirements of Chapters III and IV of this Part have been satisfied, summary courts-martial shall be convened in accordance with R.C.M. 504(d)(2). The convening order may be by notation signed by the convening authority on the charge sheet. Charges shall be referred to summary courts-martial in accordance with R.C.M. 601.

(bbbb) R.C.M. 1306 is amended as follows:

(a) *Matters submitted.* After a sentence is adjudged by a summary court-martial, the accused and any crime victim may submit matters to the convening authority in accordance with R.C.M. 1106 and R.C.M. 1106A.

(b) *Convening authority's action.*

(1) *In general.* The convening authority shall take action on the sentence of a summary court-martial and, in the discretion of the convening authority, the findings of a summary court-martial.

(2) *Action on findings.* Action on the findings is not required. With respect to findings, the convening authority may:

(A) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or

(B) set aside any finding of guilty and:

(i) dismiss the specification and, if appropriate, the charge; or

(ii) direct a rehearing in accordance with R.C.M. 810 and subsection (e).

(3) *Action on sentence.* The convening authority shall take action on the sentence. The convening authority may approve the sentence as adjudged or disapprove, commute, or suspend, in whole or in part, any portion of an adjudged sentence. The convening authority shall approve the sentence that is warranted by the circumstances of the offense and appropriate for the accused.

(4) *When proceedings resulted in finding of not guilty.* The convening authority shall not take action disapproving a finding of not guilty, a finding of not guilty only by reason of lack of mental responsibility, or a ruling amounting to a finding of not guilty. When an accused is found not guilty only by reason of lack of mental responsibility, the convening authority, however, shall commit the accused to a suitable facility pending a hearing and disposition in accordance with R.C.M. 1105.

(5) *Action when accused lacks mental capacity.* The convening authority may not approve a sentence while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. If, before the convening authority takes action, a substantial question is raised as to the requisite mental capacity of the accused, the convening authority shall either—

(A) direct an examination of the accused in accordance with R.C.M. 706 to determine the accused's present capacity to understand and cooperate in the post-trial proceedings; or

(B) disapprove the findings and sentence.

(c) *Ordering rehearing or other trial.* The convening authority may, in the convening authority's discretion, order a rehearing. A rehearing may be ordered as to some or all offenses of which findings of guilty were entered and the sentence, or as to sentence only. A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense

charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense included in an offense of which the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

(d) *Contents of action and related matters.*

(1) *In general.* The convening authority shall state in writing and insert in the record of trial the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, whether any charges or specifications are changed or dismissed and an explanation for such action, and any orders as to further disposition. The action shall be signed by the convening authority. The convening authority's authority to sign shall appear below the signature. The convening authority may recall and modify any action taken by that convening authority at any time before it has been published, or, if the action is favorable to the accused, at any time prior to forwarding the record for review or before the accused has been officially notified.

(2) *Sentence.* The action shall state whether the sentence adjudged by the court-martial is approved. If only part of the sentence is approved, the action shall state which parts are approved. A rehearing may not be directed if any sentence is approved.

(3) *Suspension.* The action shall indicate, when appropriate, whether an approved sentence is to be executed or whether the execution of all or any part of the sentence is to be suspended. No reasons need be stated.

(4) *Deferment of service of sentence to confinement.* Whenever the service of the sentence to confinement is deferred by the convening authority under R.C.M. 1103 before or concurrently with the initial action in the case, the action shall include the date on which the deferment became effective. The reason for the deferment need not be stated in the action.

(e) *Incomplete, ambiguous, or erroneous action.* When the action of the convening authority or of a higher authority is incomplete, ambiguous, or contains error, the authority who took the incomplete, ambiguous,

or erroneous action may be instructed by an authority acting under Article 64, 66, 67, 67a, or 69 to withdraw the original action and substitute a corrected action.

(f) *Service.* A copy of the convening authority's action shall be served on the accused or on defense counsel and, upon the victim's request, the victim. If the action is served on defense counsel, defense counsel shall, by expeditious means, provide the accused with a copy.

(g) *Subsequent action.* Any action taken on a summary court-martial after the initial action by the convening authority shall be in writing, signed by the authority taking the action, and promulgated in appropriate orders.

(h) *Review by a judge advocate.* A judge advocate shall review each summary court-martial in which there is a finding of guilty pursuant to R.C.M. 1307.

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

(a) Mil. R. Evid. 311 is amended as follows:

(a) *General rule.* Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) the accused makes a timely motion to suppress or an objection to the evidence under this rule;

(2) the accused had a reasonable expectation of privacy in the person, place, or property searched;

the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the Armed Forces; and

(3) exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system.

(b) *Definition.* As used in this rule, a search or seizure is "unlawful" if it was conducted, instigated, or participated in by:

(1) military personnel or their agents and was in violation of the Constitution of the United States as applied to members of the Armed Forces, a federal statute applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or Mil. R. Evid. 312-317;

(2) other officials or agents of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth, or possession, and was in violation of the Constitution of the United States, or is unlawful under the principles of law generally applied in the trial of criminal cases in the United States district courts involving a similar search or seizure; or

(3) officials of a foreign government or their agents, where evidence was obtained as a result of a foreign search or seizure that subjected the accused to gross and brutal maltreatment. A search or seizure is not “participated in” by a United States military or civilian official merely because that person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because that person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

(c) *Exceptions.*

(1) *Impeachment.* Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

(2) *Inevitable Discovery.* Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

(3) *Good Faith Execution of a Warrant or Search Authorization.* Evidence that was obtained as a result of an unlawful search or seizure may be used if:

(A) the search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority, or from such an authorization or warrant issued by an

individual whom the officials seeking and executing the authorization or warrant reasonably and with good faith believed was competent to issue the authorization or warrant;

(B) the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause or the officials seeking and executing the authorization or warrant reasonably and with good faith believed that the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

(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 in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment.

(d) *Motions to Suppress and Objections.*

(1) *Disclosure.* Prior to arraignment, the prosecution must disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, or evidence derived therefrom, that it intends to offer into evidence against the accused at trial.

(2) *Time Requirements.*

(A) When evidence has been disclosed prior to arraignment under subdivision (d)(1), the defense must make any motion to suppress or objection under this rule prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

(B) If the prosecution intends to offer evidence described in subdivision (d)(1) that was not disclosed prior to arraignment, the prosecution must provide timely notice to the military judge and to counsel for the

accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

(3) *Specificity.* The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence described in subdivision (d)(1). If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

(4) *Challenging Probable Cause.*

(A) *Relevant Evidence.* If the defense challenges evidence seized pursuant to a search warrant or search authorization on the ground that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer, except as provided in subdivision (d)(4)(B).

(B) *False Statements.* If the defense makes a substantial preliminary showing that a government agent ~~included a false statement~~ knowingly and intentionally or with reckless disregard for the truth included a false statement or omitted a material fact in the information presented to the authorizing officer, and if the allegedly false statement or omitted material fact is necessary to the finding of probable cause, the defense, upon request, is entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion must be granted unless the search is otherwise lawful under these rules.

(5) *Burden and Standard of Proof.*

(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.

(B) *Statement Following Apprehension.* In addition to subdivision (d)(5)(A), a statement obtained from a person apprehended in a dwelling in violation of R.C.M. 302(d)(2) and (e), is admissible if the prosecution shows by a preponderance of the evidence that the apprehension was based on probable cause, the statement was made at a location outside the dwelling subsequent to the apprehension, and the statement was otherwise in compliance with these rules.

(C) *Specific Grounds of Motion or Objection.* When the military judge has required the defense to make a specific motion or objection under subdivision (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or objected to the evidence.

(6) *Defense Evidence.* The defense may present evidence relevant to the admissibility of evidence as to which there has been an appropriate motion or objection under this rule. An accused may testify for the limited purpose of contesting the legality of the search or seizure giving rise to the challenged evidence. Prior to the introduction of such testimony by the accused, the defense must inform the military judge that the testimony is offered under subdivision (d). When the accused testifies under subdivision (d), the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(7) *Rulings.* The military judge must rule, prior to plea, upon any motion to suppress or objection to evidence made prior to plea unless, for good cause, the military judge orders that the ruling be deferred for

determination at trial or after findings. The military judge may not defer ruling if doing so adversely affects a party's right to appeal the ruling. The military judge must state essential findings of fact on the record when the ruling involves factual issues.

(8) *Informing the Members*. If a defense motion or objection under this rule is sustained in whole or in part, the court-martial members may not be informed of that fact except when the military judge must instruct the members to disregard evidence.

(e) *Effect of Guilty Plea*. Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under the Fourth Amendment to the Constitution of the United States and Mil. R. Evid. 311-317 with respect to the offense, whether or not raised prior to plea.

(b) Mil. R. Evid. 404 is amended as follows:

(a) *Character Evidence*.

(1) *Prohibited Uses*. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for an Accused or Victim*

(A) The accused may offer evidence of the accused's pertinent trait and, if the evidence is admitted, the prosecution may offer evidence to rebut it. General military character is not a pertinent trait for the purposes of showing the probability of innocence of the accused for the following offenses under the UCMJ:

(i) Article 105;

(ii) Articles 120-122;

(iii) Articles 123a-124;

(iv) Articles 126-127;

(v) Articles 129-131;

(vi) Any other offense in which evidence of general military character of the accused is not relevant to any element of an offense for which the accused has been charged; or

(vii) An attempt or conspiracy to commit one of the above offenses.

(B) Subject to the limitations in Mil. R. Evid. 412, the accused may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecution may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the accused's same trait; and

(C) in a homicide or assault case, the prosecution may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness*. Evidence of a witness' character may be admitted under Mil R. Evid. 607, 608, and 609.

(b) *Other Crimes, Wrongs, or Other Acts*.

(1) *Prohibited Uses*. Evidence of any other-a crime, wrong, or ~~other~~ act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Notice in a Criminal Case. On request by the accused, In a criminal case, the trial counsel
~~prosecution~~ must:

(A) provide reasonable notice of any such evidence that the trial counsel ~~prosecution~~ intends to offer at trial, so the accused has a fair opportunity to meet it; and

(B) articulate in the notice the permitted purpose for which the trial counsel intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial – or in any form during trial if the court ~~military judge~~, for good cause, excuses lack of pretrial notice.

(c) Mil. R. Evid. 503 is amended as follows:

(a) *General Rule.* A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergy~~man~~ member or to a clergy~~man~~ member's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) *Definitions.* As used in this rule:

(1) "Clergy~~man~~ member" means a minister, priest, rabbi, chaplain, imam or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergy~~man~~ member.

(2) "Clergy~~man~~ member's assistant" means a person employed by or assigned to assist a clergy~~man~~ member in his capacity as a spiritual advisor.

(3) A communication is "confidential" if made to a clergy~~man~~ member in the clergy~~man~~ member's capacity as a spiritual adviser or to a clergy~~man~~ member's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the person, guardian, or conservator, or by a personal representative if the person is deceased. The clergy~~man~~ member or clergy~~man~~ member's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergy~~man~~ member or clergy~~man~~ member's assistant to do so is presumed in the absence of evidence to the contrary.

(d) Mil. R. Evid. 505 is amended as follows:

(a) *General Rule.* Classified information must be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information. The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to courts-martial and appellate authorities.

(b) *Definitions.* As used in this rule:

(1) “Classified information” means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulations, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. §2014(y).

(2) “National security” means the national defense and foreign relations of the United States.

(3) “In camera hearing” means a session under Article 39(a) from which the public is excluded.

(4) “In camera review” means an inspection of documents or other evidence conducted by the military judge alone in chambers and not on the record.

(5) “Ex parte” means a discussion between the military judge and either defense counsel or prosecution, without the other party or the public present. This discussion can be on or off the record, depending on the circumstances. The military judge will grant a request for an ex parte discussion or hearing only after finding that such discussion or hearing is necessary to protect classified information or other good cause. Prior to granting a request from one party for an ex parte discussion or hearing, the military judge must provide notice to the opposing party on the record. If the ex parte discussion is conducted off the record, the military judge should later state on the record that such ex parte discussion took place and generally summarize the subject matter of the discussion, as appropriate.

(c) *Access to Evidence.* Any information admitted into evidence pursuant to any rule, procedure, or order by the military judge must be provided to the accused.

(d) *Declassification.* Trial counsel should, when practicable, seek declassification of evidence that may be used at trial, consistent with the requirements of national security. A decision not to declassify evidence under this section is not subject to review by a military judge or upon appeal.

(e) *Action Prior to Referral of Charges.*

(1) Prior to referral of charges, upon a showing by the accused that the classified information sought is relevant and necessary to an element of the offense or a legally cognizable defense, the convening authority

must respond in writing to a request by the accused for classified information if the privilege in this rule is claimed for such information. In response to such a request, the convening authority may:

(A) delete specified items of classified information from documents made available to the accused;

(B) substitute a portion or summary of the information for such classified documents;

(C) substitute a statement admitting relevant facts that the classified information would tend to prove;

(D) provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused; or

(E) withhold disclosure if actions under (A) through (D) cannot be taken without causing identifiable damage to the national security.

(2) An Article 32 preliminary hearing officer may not rule on any objection by the accused to the release of documents or information protected by this rule.

(3) Any objection by the accused to the withholding of information or to the conditions of disclosure must be raised through a motion for appropriate relief at a pretrial conference.

(f) *Actions after Referral of Charges.*

(1) *Pretrial Conference.* At any time after referral of charges, any party may move for a pretrial conference under Article 39(a) to consider matters relating to classified information that may arise in connection with the trial. Following such a motion, or when the military judge recognizes the need for such conference, the military judge must promptly hold a pretrial conference under Article 39(a).

(2) *Ex Parte Permissible.* Upon request by either party and with a showing of good cause, the military judge must hold such conference ex parte to the extent necessary to protect classified information from disclosure.

(3) *Matters to be Established at Pretrial Conference.*

(A) *Timing of Subsequent Actions.* At the pretrial conference, the military judge must establish the timing of:

(i) requests for discovery;

(ii) the provision of notice required by subdivision (i) of this rule; and

(iii) established by subdivision (j) of this rule.

(B) *Other Matters.* At the pretrial conference, the military judge may also consider any matter that relates to classified information or that may promote a fair and expeditious trial.

(4) *Convening Authority and Special Trial Counsel Notice and Action.* If a claim of privilege has been made under this rule with respect to classified information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter must be reported to the convening authority and special trial counsel, as applicable. ~~The convening authority may:~~

(A) The convening authority may institute action to obtain the classified information for the use by the military judge in making a determination under subdivision (j).

(B) The convening authority or special trial counsel, as applicable, may:

~~(B)~~ (i) dismiss the charges;

~~(C)~~ (ii) dismiss the charges or specifications or both to which the information relates; or

~~(D)~~ (iii) take such other action as may be required in the interests of justice.

(5) *Remedies.* If, after a reasonable period of time, the information is not provided to the military judge in circumstances where proceeding with the case without such information would materially prejudice a substantial right of the accused, the military judge must dismiss the charges or specifications or both to which the classified information relates.

(g) *Protective Orders.* Upon motion of trial counsel, the military judge must issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused in any court-martial proceeding or that has otherwise been provided to, or obtained by, any such accused in any such court-martial proceeding. The terms of any such protective order may include, but are not limited to, provisions:

(1) prohibiting the disclosure of the information except as authorized by the military judge;

(2) requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

(3) requiring controlled accesses to the material during normal business hours and at other times upon reasonable notice;

(4) mandating that all persons requiring security clearances will cooperate with investigatory personnel in any investigations that are necessary to obtain a security clearance;

(5) requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

(6) regulating the making and handling of notes taken from material containing classified information; or

(7) requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(h) *Discovery and Access by the Accused.*

(1) *Limitations.*

(A) *Government Claim of Privilege.* In a court-martial proceeding in which the government seeks to delete, withhold, or otherwise obtain other relief with respect to the discovery of or access to any classified information, trial counsel must submit a declaration invoking the United States' classified information privilege and setting forth the damage to the national security that the discovery of or access to such information reasonably could be expected to cause. The declaration must be signed by the head, or designee, of the executive or military department or government agency concerned.

(B) *Standard for Discovery or Access by the Accused.* Upon the submission of a declaration under subdivision (h)(1)(A), the military judge may not authorize the discovery of or access to such classified information unless the military judge determines that such classified information would be noncumulative and relevant to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing. If the discovery of or access to such classified information is authorized, it must be addressed in accordance with the requirements of subdivision

(h)(2).

(2) *Alternatives to Full Discovery.*

(A) *Substitutions and Other Alternatives.* The military judge, in assessing the accused's right to discover or access classified information under subdivision (h), may authorize the government:

(i) to delete or withhold specified items of classified information;

(ii) to substitute a summary for classified information; or

(iii) to substitute a statement admitting relevant facts that the classified information or material would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial.

(B) *In Camera Review.* The military judge must, upon the request of the prosecution, conduct an in camera review of the prosecution's motion and any materials submitted in support thereof and must not disclose such information to the accused.

(C) *Action by Military Judge.* The military judge must grant the request of trial counsel to substitute a summary or to substitute a statement admitting relevant facts, or to provide other relief in accordance with subdivision (h)(2)(A), if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information.

(3) *Reconsideration.* An order of a military judge authorizing a request of trial counsel to substitute, summarize, withhold, or prevent access to classified information under subdivision (h) is not subject to a motion for reconsideration by the accused, if such order was entered pursuant to an ex parte showing under subdivision (h).

(i) *Disclosure by the Accused.*

(1) *Notification to Trial Counsel and Military Judge.* If an accused reasonably expects to disclose, or to cause the disclosure of, classified information in any manner in connection with any trial or pretrial proceeding involving the prosecution of such accused, the accused must, within the time specified by the

military judge or, where no time is specified, prior to arraignment of the accused, notify trial counsel and the military judge in writing.

(2) *Content of Notice.* Such notice must include a brief description of the classified information.

(3) *Continuing Duty to Notify.* Whenever the accused learns of additional classified information the accused reasonably expects to disclose, or to cause the disclosure of, at any such proceeding, the accused must notify trial counsel and the military judge in writing as soon as possible thereafter and must include a brief description of the classified information.

(4) *Limitation on Disclosure by Accused.* The accused may not disclose, or cause the disclosure of, any information known or believed to be classified in connection with a trial or pretrial proceeding until:

(A) notice has been given under subdivision (i); and

(B) the government has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in subdivision (j).

(5) *Failure to comply.* If the accused fails to comply with the requirements of subdivision (i), the military judge:

(A) may preclude disclosure of any classified information not made the subject of notification; and

(B) may prohibit the examination by the accused of any witness with respect to any such information.

(j) *Procedure for Use of Classified Information in Trials and Pretrial Proceedings.*

(1) *Hearing on Use of Classified Information.*

(A) *Motion for Hearing.* Within the time specified by the military judge for the filing of a motion under this rule, either party may move for a hearing concerning the use at any proceeding of any classified information. Upon a request by either party, the military judge must conduct such a hearing and must rule prior to conducting any further proceedings.

(B) *Request for In Camera Hearing.* Any hearing held pursuant to subdivision (j) (or any portion of such hearing specified in the request of a knowledgeable United States official) must be held in camera if

a knowledgeable United States official possessing authority to classify information submits to the military judge a declaration that a public proceeding may result in the disclosure of classified information.

(C) *Notice to Accused.* Before the hearing, trial counsel must provide the accused with notice of the classified information that is at issue. Such notice must identify the specific classified information at issue whenever that information previously has been made available to the accused by the United States. When the United States has not previously made the information available to the accused in connection with the case the information may be described by generic category, in such forms as the military judge may approve, rather than by identification of the specific information of concern to the United States.

(D) *Standard for Disclosure.* Classified information is not subject to disclosure under subdivision (j) unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. In presenting proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment must be admitted only if no unclassified version of such information is available.

(E) *Written Findings.* As to each item of classified information, the military judge must set forth in writing the basis for the determination.

(2) *Alternatives to Full Disclosure.*

(A) *Motion by the Prosecution.* Upon any determination by the military judge authorizing the disclosure of specific classified information under the procedures established by subdivision (j), trial counsel may move that, in lieu of the disclosure of such specific classified information, the military judge order:

(i) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove:

(ii) the substitution for such classified information of a summary of the specific classified information; or

(iii) any other procedure or redaction limiting the disclosure of specific classified information.

(B) *Declaration of Damage to National Security.* Trial counsel may, in connection with a motion under subdivision (j), submit to the military judge a declaration signed by the head, or designee, of the executive or military department or government agency concerned certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by trial counsel, the military judge must examine such declaration during an in camera review.

(C) *Hearing.* The military judge must hold a hearing on any motion under subdivision (j). Any such hearing must be held in camera at the request of a knowledgeable United States official possessing authority to classify information.

(D) *Standard for Use of Alternatives.* The military judge must grant such a motion of trial counsel if the military judge finds that the statement, summary, or other procedure or redaction will provide the accused with substantially the same ability to make his or her defense as would disclosure of the specific classified information.

(3) *Sealing of Records of In Camera Hearings.* If at the close of an in camera hearing under subdivision (j) (or any portion of a hearing under subdivision (j) that is held in camera), the military judge determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing must be sealed in accordance with R.C.M. 1113 and preserved for use in the event of an appeal. The accused may seek reconsideration of the military judge's determination prior to or during trial.

(4) *Remedies.*

(A) If the military judge determines that alternatives to full disclosure may not be used and the prosecution continues to object to disclosure of the information, the military judge must issue any order that the interests of justice require, including but not limited to, an order:

- (i) striking or precluding all or part of the testimony of a witness;
- (ii) declaring a mistrial;

(iii) finding against the government on any issue as to which the evidence is relevant and material to the defense;

(iv) dismissing the charges, with or without prejudice; or

(v) dismissing the charges or specifications or both to which the information relates.

(B) The government may avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

(5) *Disclosure of Rebuttal Information.* Whenever the military judge determines that classified information may be disclosed in connection with a trial or pretrial proceeding, the military judge must, unless the interests of fairness do not so require, order the prosecution to provide the accused with the information it expects to use to rebut the classified information.

(A) *Continuing Duty.* The military judge may place the prosecution under a continuing duty to disclose such rebuttal information.

(B) *Sanction for Failure to Comply.* If the prosecution fails to comply with its obligation under subdivision (j), the military judge:

(i) may exclude any evidence not made the subject of a required disclosure; and

(ii) may prohibit the examination by the prosecution of any witness with respect to such information.

(6) *Disclosure at Trial of Previous Statements by a Witness.*

(A) *Motion for Production of Statements in Possession of the Prosecution.* After a witness called by trial counsel has testified on direct examination, the military judge, on motion of the accused, may order production of statements of the witness in the possession of the prosecution that relate to the subject matter as to which the witness has testified. This paragraph does not preclude discovery or assertion of a privilege otherwise authorized.

(B) *Invocation of Privilege by the Government.* If the government invokes a privilege, trial counsel may provide the prior statements of the witness to the military judge for in camera review to the extent necessary to protect classified information from disclosure.

(C) *Action by Military Judge.* If the military judge finds that disclosure of any portion of the statement identified by the government as classified would be detrimental to the national security in the degree required to warrant classification under the applicable Executive Order, statute, or regulation, that such portion of the statement is consistent with the testimony of the witness, and that the disclosure of such portion is not necessary to afford the accused a fair trial, the military judge must excise that portion from the statement. If the military judge finds that such portion of the statement is inconsistent with the testimony of the witness or that its disclosure is necessary to afford the accused a fair trial, the military judge must, upon the request of trial counsel, consider alternatives to disclosure in accordance with subdivision (j)(2).

(k) *Introduction into Evidence of Classified Information.*

(1) *Preservation of Classification Status.* Writings, recordings, and photographs containing classified information may be admitted into evidence in court-martial proceedings under this rule without change in their classification status.

(A) *Precautions.* The military judge in a trial by court-martial, in order to prevent unnecessary disclosure of classified information, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered.

(B) *Classified Information Kept Under Seal.* The military judge must allow classified information offered or accepted into evidence to remain under seal during the trial, even if such evidence is disclosed in the court-martial proceeding, and may upon motion by the government, seal exhibits containing classified information in accordance with R.C.M. 1113 for any period after trial as necessary to prevent a disclosure of classified information when a knowledgeable United States official possessing authority to classify information submits to the military judge a declaration setting forth the damage to the national security that the disclosure of such information reasonably could be expected to cause.

(2) *Testimony.*

(A) *Objection by Trial Counsel.* During the examination of a witness, trial counsel may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.

(B) *Action by Military Judge.* Following an objection under subdivision (k), the military judge must take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring trial counsel to provide the military judge with a proffer of the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information sought to be elicited by the accused. Upon request, the military judge may accept an ex parte proffer by trial counsel to the extent necessary to protect classified information from disclosure.

(3) *Closed session.* The military judge may, subject to the requirements of the United States Constitution, exclude the public during that portion of the presentation of evidence that discloses classified information.

(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 continues to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as any motions and any materials submitted in support thereof must be sealed in accordance with R.C.M. 701(g)(2) or R.C.M. 1113 and attached to the record of trial as an appellate exhibit. Such material will be made available to reviewing and appellate authorities in accordance with R.C.M. 1113. The record of trial with respect to any classified matter will be prepared under R.C.M. 1112(e)(3).

(e) Mil. R. Evid. 506 is amended as follows:

(a) *Protection of Government Information.* Except where disclosure is required by a federal statute, government information is privileged from disclosure if disclosure would be detrimental to the public interest.

(b) *Scope.* “Government information” includes official communication and documents and other information within the custody or control of the Federal Government. This rule does not apply to the identity of an informant (Mil. R. Evid. 507).

(c) *Definitions.* As used in this rule:

(1) “In camera hearing” means a session under Article 39(a) from which the public is excluded.

(2) “In camera review” means an inspection of documents or other evidence conducted by the military judge alone in chambers and not on the record.

(3) “Ex parte” means a discussion between the military judge and either defense counsel or prosecution, without the other party or the public present. This discussion can be on or off the record, depending on the circumstances. The military judge will grant a request for an ex parte discussion or hearing only after finding that such discussion or hearing is necessary to protect government information or other good cause. Prior to granting a request from one party for an ex parte discussion or hearing, the military judge must provide notice to the opposing party on the record. If the ex parte discussion is conducted off the record, the military judge should later state on the record that such ex parte discussion took place and generally summarize the subject matter of the discussion, as appropriate.

(d) *Who May Claim the Privilege.* The privilege may be claimed by the head, or designee, of the executive or military department or government agency concerned. The privilege for records and information of the Inspector General may be claimed by the immediate superior of the inspector general officer responsible for creation of the records or information, the Inspector General, or any other superior authority. A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his or her behalf. The authority of a witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

(e) *Action Prior to Referral of Charges.*

(1) Prior to referral of charges, upon a showing by the accused that the government information sought is relevant and necessary to an element of the offense or a legally cognizable defense, the convening authority

must respond in writing to a request by the accused for government information if the privilege in this rule is claimed for such information. In response to such a request, the convening authority may:

(A) delete specified items of government information claimed to be privileged from documents made available to the accused;

(B) substitute a portion or summary of the information for such documents;

(C) substitute a statement and admitting relevant facts that the government information would tend to prove;

(D) provide the document subject to conditions similar to those set forth in subdivision (g) of this rule;

or

(E) withhold disclosure if actions under subdivisions (e)(1)(A)-(D) cannot be taken without causing identifiable damage to the public interest.

(2) Any objection by the accused to withholding of information or to the conditions of disclosure must be raised through a motion for appropriate relief at a pretrial conference.

(f) Action After Referral of Charges.

(1) *Pretrial Conference.* At any time after referral of charges, any party may move for a pretrial conference under Article 39(a) to consider matters relating to government information that may arise in connection with the trial. Following such a motion, or when the military judge recognizes the need for such conference, the military judge must promptly hold a pretrial conference under Article 39(a).

(2) *Ex Parte Permissible.* Upon request by either party and with a showing of good cause, the military judge must hold such conference ex parte to the extent necessary to protect government information from disclosure.

(3) *Matters to be Established at Pretrial Conference.*

(A) *Timing of Subsequent Actions.* At the pretrial conference, the military judge must establish the timing of:

(i) requests for discovery;

- (ii) the provision of notice required by subdivision (i) of this rule; and
- (iii) the initiation of the procedure established by subdivision (j) of this rule.

(B) *Other Matters.* At the pretrial conference, the military judge may also consider any matter which relates to government information or which may promote a fair and expeditious trial.

(4) *Convening Authority and Special Trial Counsel Notice and Action.* If a claim of privilege has been made under this rule with respect to government information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter must be reported to the convening authority and special trial counsel, as applicable. ~~The convening authority may:~~

(A) The convening authority may institute action to obtain the information for use by the military judge in making a determination under subdivision (j);

(B) The convening authority or special trial counsel, as applicable, may:

~~(B)~~ (i) dismiss the charges;

~~(C)~~ (ii) dismiss the charges or specifications or both to which the information relates; or

~~(D)~~ (iii) take such other action as may be required in the interests of justice.

(5) *Remedies.* If after a reasonable period of time the information is not provided to the military judge in circumstances where proceeding with the case without such information would materially prejudice a substantial right of the accused, the military judge must dismiss the charges or specifications or both to which the information relates.

(g) *Protective Orders.* Upon motion of trial counsel, the military judge must issue an order to protect against the disclosure of any government information that has been disclosed by the United States to any accused in any court-martial proceeding or that has otherwise been provided to, or obtained by, any such accused in any such court-martial proceeding. The terms of any such protective order may include, but are not limited to, provisions:

- (1) prohibiting the disclosure of the information except as authorized by the military judge;

(2) requiring storage of the material in a manner appropriate for the nature of the material to be disclosed;

(3) requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(4) requiring the maintenance of logs recording access by persons authorized by the military judge to have access to the government information in connection with the preparation of the defense;

(5) regulating the making and handling of notes taken from material containing government information;

or

(6) requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(h) *Discovery and Access by the Accused.*

(1) *Limitations.*

(A) *Government Claim of Privilege.* In a court-martial proceeding in which the government seeks to delete, withhold, or otherwise obtain other relief with respect to the discovery of or access to any government information subject to a claim of privilege, trial counsel must submit a declaration invoking the United States' government information privilege and setting forth the detriment to the public interest that the discovery of or access to such information reasonably could be expected to cause. The declaration must be signed by a knowledgeable United States official as described in subdivision (d) of this rule.

(B) *Standard for Discovery or Access by the Accused.* Upon the submission of a declaration under subdivision (h)(1)(A), the military judge may not authorize the discovery of or access to such government information unless the military judge determines that such government information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing. If the discovery of or access to such governmental information is authorized, it must be addressed in accordance with the requirements of subdivision (h)(2).

(2) *Alternatives to Full Disclosure.*

(A) *Substitutions and Other Alternatives.* The military judge, in assessing the accused's right to discovery or access government information under subdivision (h), may authorize the government:

(i) to delete or withhold specified items of government information;

(ii) to substitute a summary for government information; or

(iii) to substitute a statement admitting relevant facts that the government information or material would tend to prove, unless the military judge determines that disclosure of the government information itself is necessary to enable the accused to prepare for trial.

(B) *In Camera Review.* The military judge must, upon the request of the prosecution, conduct an in camera review of the prosecution's motion and any materials submitted in support thereof and must not disclose such information to the accused.

(C) *Action by Military Judge.* The military judge must grant the request of trial counsel to substitute a summary or to substitute a statement admitting relevant facts, or to provide other relief in accordance with subdivision (h)(2)(A), if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific government information.

(i) *Disclosure by the Accused.*

(1) *Notification to Trial Counsel and Military Judge.* If an accused reasonably expects to disclose, or to cause the disclosure of, government information subject to a claim of privilege in any manner in connection with any trial or pretrial proceeding involving the prosecution of such accused, the accused must, within the time specified by the military judge or, where no time is specified, prior to arraignment of the accused, notify trial counsel and the military judge in writing.

(2) *Content of Notice.* Such notice must include a brief description of the government information.

(3) *Continuing Duty to Notify.* Whenever the accused learns of additional government information the accused reasonably expects to disclose, or to cause the disclosure of, at any such proceeding, the accused

must notify trial counsel and the military judge in writing as soon as possible thereafter and must include a brief description of the government information.

(4) *Limitation on Disclosure by Accused.* The accused may not disclose, or cause the disclosure of, any information known or believed to be subject to a claim of privilege in connection with a trial or pretrial proceeding until:

(A) notice has been given under subdivision (i); and

(B) the government has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in subdivision (j).

(5) *Failure to Comply.* If the accused fails to comply with the requirements of subdivision (i), the military judge:

(A) may preclude disclosure of any government information not made the subject of notification; and

(B) may prohibit the examination by the accused of any witness with respect to any such information.

(j) *Procedure for Use of Government Information Subject to a Claim of Privilege in Trials and Pretrial Proceedings.*

(1) *Hearing on Use of Government Information.*

(A) *Motion for Hearing.* Within the time specified by the military judge for the filing of a motion under this rule, either party may move for an in camera hearing concerning the use at any proceeding of any government information that may be subject to a claim of privilege. Upon a request by either party, the military judge must conduct such a hearing and must rule prior to conducting any further proceedings.

(B) *Request for In Camera Hearing.* Any hearing held pursuant to subdivision (j) must be held in camera if a knowledgeable United States official described in subdivision (d) of this rule submits to the military judge a declaration that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

(C) *Notice to Accused.* Subject to subdivision (j)(2) below, the prosecution must disclose government information claimed to be privileged under this rule for the limited purpose of litigating, in camera, the

admissibility of the information at trial. The military judge must enter an appropriate protective order to the accused and all other appropriate trial participants concerning the disclosure of the information according to subdivision (g), above. The accused may not disclose any information provided under subdivision (j) unless, and until, such information has been admitted into evidence by the military judge. In the in camera hearing, both parties may have the opportunity to brief and argue the admissibility of the government information at trial.

(D) *Standard for Disclosure.* Government information is subject to disclosure at the court-martial proceeding under subdivision (j) if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused, and is otherwise admissible in the court-martial proceeding.

(E) *Written Findings.* As to each item of government information, the military judge must set forth in writing the basis for the determination.

(2) *Alternatives to Full Disclosure.*

(A) *Motion by the Prosecution.* Upon any determination by the military judge authorizing disclosure of specific government information under the procedures established by subdivision (j), the prosecution may move that, in lieu of the disclosure of such information, the military judge order:

(i) the substitution for such government information of a statement admitting relevant facts that the specific government information would tend to prove;

(ii) the substitution for such government information of a summary of the specific government information; or

(iii) any other procedure or redaction limiting the disclosure of specific government information.

(B) *Hearing.* The military judge must hold a hearing on any motion under subdivision (j). At the request of trial counsel, the military judge will conduct an in camera hearing.

(C) *Standard for Use of Alternatives.* The military judge must grant such a motion of trial counsel if the military judge finds that the statement, summary, or other procedure or redaction will provide the

accused with substantially the same ability to make his or her defense as would disclosure of the specific government information.

(3) *Sealing of Records of In Camera Hearings.* If at the close of an in camera hearing under subdivision (j) (or any portion of a hearing under subdivision (j) that is held in camera), the military judge determines that the government information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing must be sealed in accordance with R.C.M. 1113 and preserved for use in the event of an appeal. The accused may seek reconsideration of the military judge's determination prior to or during trial.

(4) *Remedies.*

(A) If the military judge determines that alternatives to full disclosure may not be used and the prosecution continues to object to disclosure of the information, the military judge must issue any order that the interests of justice require, including but not limited to, an order:

(i) striking or precluding all or part of the testimony of a witness;

(ii) declaring a mistrial;

(iii) finding against the government on any issue as to which the evidence is relevant and necessary to the defense;

(iv) dismissing the charges, with or without prejudice; or

(v) dismissing the charges or specifications or both to which the information relates.

(B) The government may avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

(5) *Disclosure of Rebuttal Information.* Whenever the military judge determines that government information may be disclosed in connection with a trial or pretrial proceeding, the military judge must, unless the interests of fairness do not so require, order the prosecution to provide the accused with the information it expects to use to rebut the government information.

(A) *Continuing Duty*. The military judge may place the prosecution under a continuing duty to disclose such rebuttal information.

(B) *Sanction for Failure to Comply*. If the prosecution fails to comply with its obligation under subdivision (j), the military judge may make such ruling as the interests of justice require, to include:

(i) excluding any evidence not made the subject of a required disclosure; and

(ii) prohibiting the examination by the prosecution of any witness with respect to such information.

(k) *Appeals of Orders and Rulings*. In a court-martial in which a punitive discharge may be adjudged, the government may appeal an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification, directs the disclosure of government information, or imposes sanctions for nondisclosure of government information. The government may also appeal an order or ruling in which the military judge refuses to issue a protective order sought by the United States to prevent the disclosure of government information, or to enforce such an order previously issued by appropriate authority. The government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

(l) *Introduction into Evidence of Government Information Subject to a Claim of Privilege*.

(1) *Precautions*. The military judge in a trial by court-martial, in order to prevent unnecessary disclosure of government information after there has been a claim of privilege under this rule, may order admission into evidence of only part of a writing, recording, or photograph or admit into evidence the whole writing, recording, or photograph with excision of some or all of the government information contained therein, unless the whole ought in fairness to be considered.

(2) *Government Information Kept Under Seal*. The military judge must allow government information offered or accepted into evidence to remain under seal during the trial, even if such evidence is disclosed in the court-martial proceeding, and may, upon motion by the prosecution, seal exhibits containing government information in accordance with R.C.M. 1113 for any period after trial as necessary to prevent a disclosure of government information when a knowledgeable United States official described in

subdivision (d) submits to the military judge a declaration setting forth the detriment to the public interest that the disclosure of such information reasonably could be expected to cause.

(3) *Testimony.*

(A) *Objection by Trial Counsel.* During examination of a witness, trial counsel may object to any question or line of inquiry that may require the witness to disclose government information not previously found admissible if such information has been or is reasonably likely to be the subject of a claim of privilege under this rule.

(B) *Action by Military Judge.* Following such an objection, the military judge must take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any government information. Such action may include requiring trial counsel to provide the military judge with a proffer of the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information sought to be elicited by the accused. Upon request, the military judge may accept an ex parte proffer by trial counsel to the extent necessary to protect government information from disclosure.

(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 continues to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as any motions and any materials submitted in support thereof must be sealed in accordance with R.C.M. 701(g)(2) or 1113 and attached to the record of trial as an appellate exhibit. Such material will be made available to reviewing and appellate authorities in accordance with R.C.M. 1113.

(f) Mil. R. Evid. 507 is amended as follows:

“(a) *General Rule.* The United States or a State or subdivision thereof has a privilege to refuse to disclose the identity of an informant. Unless otherwise privileged under these rules, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity.

(b) *Definitions.* As used in this rule:

(1) “Informant” means a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime.

(2) “In camera review” means an inspection of documents or other evidence conducted by the military judge alone in chambers and not on the record.

(c) *Who May Claim the Privilege.* The privilege may be claimed by an appropriate representative of the United States, regardless of whether information was furnished to an officer of the United States or a State or subdivision thereof. The privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof, except the privilege will not be allowed if the prosecution objects.

(d) *Exceptions.*

(1) *Voluntary Disclosures; Informant as a Prosecution Witness.* No privilege exists under this rule:

(A) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informant's own action; or

(B) if the informant appears as a witness for the prosecution.

(2) *Informant as a Defense Witness.* If a claim of privilege has been made under this rule, the military judge must, upon motion by the accused, determine whether disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defense, the possible significance of the informant's testimony, and other relevant factors. If it appears from the evidence in the case or from other showing by a party that an informant may be able to give testimony necessary to the accused's defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

(3) *Informant as a Witness regarding a Motion to Suppress Evidence.* If a claim of privilege has been made under this rule with respect to a motion under Mil. R. Evid. 311, the military judge must, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the United States Constitution as applied to members of the Armed Forces. In making this determination, the military judge may make any order required by the interests of justice.

(e) *Procedures.*

(1) *In Camera Review.* If the accused has articulated a basis for disclosure under the standards set forth in this rule, the prosecution may ask the military judge to conduct an in camera review of affidavits or other evidence relevant to disclosure.

(2) *Order by the Military Judge.* If a claim of privilege has been made under this rule, the military judge may make any order required by the interests of justice.

(3) *Action by the Convening Authority and Special Trial Counsel.* If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this rule, and the prosecution elects not to disclose the identity of the informant, the matter must be reported to the convening authority. The convening authority or special trial counsel, as applicable, may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances.

(4) *Remedies.* If, after a reasonable period of time disclosure is not made, the military judge, sua sponte or upon motion of either counsel and after a hearing if requested by either party, may dismiss the charge or specifications or both to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused.

(g) Mil. R. Evid. 513 is amended as follows:

(a) *General Rule.* In a case arising under the UCMJ, ~~A~~ a patient has a privilege to refuse to disclose and to prevent any other person from disclosing ~~a~~ confidential communications made between the patient and a psychotherapist or an assistant to the psychotherapist, ~~in a case arising under the Uniform Code of Military~~

~~Justice~~, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) "Assistant to a psychotherapist" means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel, defense counsel, or any counsel representing the patient to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

- (1) when the patient is dead;
- (2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;
- (3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;
- (4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;
- (5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;
- (6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; or
- (7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice.

(e) *Procedure to Determine Admissibility of Patient Records or Communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the hearing may not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in-camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific, credible factual basis demonstrating a reasonable likelihood that the records or communications would contain or lead to the discovery of evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subdivision (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet

the requirements for one of the enumerated exceptions to the privilege under subdivision (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subdivision (e)(1)(A) of this Rule.

(5) To prevent unnecessary disclosure of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1113 and must remain under seal unless the military judge, the Judge Advocate General, or an appellate court orders otherwise.

(h) Mil. R. Evid. 611 is amended as follows:

(a) Control by the Military Judge; Purposes.

The military judge should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness' credibility. The military judge may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness' testimony. Ordinarily, the military judge should allow leading questions:

- (1) on cross-examination; and
- (2) when a party calls a hostile witness or a witness identified with an adverse party.

(d) Remote live testimony of a child.

(1) In a case involving domestic violence or a case involving the abuse of a child, the military judge must, subject to the requirements of subdivision (d)(3) of this rule, allow a child victim or child witness to testify from an area outside the courtroom as prescribed in R.C.M. 914A.

(2) *Definitions.*

As used in this rule:

(A) “Child” means a person who is under the age of 16 at the time of his or her testimony.

(B) “Abuse of a child” means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.

(C) “Exploitation” means child pornography or child prostitution.

(D) “Negligent treatment” means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to endanger seriously the physical health of the child.

(E) “Domestic violence” means ~~an offense~~ conduct that may constitute an offense under Article 128b, UCMJ ~~that the use, or attempted or threatened use of physical force against a person by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim.~~

(3) Remote live testimony will be used only where the military judge makes the following three findings on the record:

(A) that it is necessary to protect the welfare of the particular child witness;

(B) that the child witness would be traumatized, not by the courtroom generally, but by the presence of the accused; and

(C) that the emotional distress suffered by the child witness in the presence of the accused is more than *de minimis*.

(4) Remote live testimony of a child will not be used when the accused elects to absent himself or herself from the courtroom in accordance with R.C.M. 804(d).

(5) In making a determination under subdivision (d)(3), the military judge may question the child in chambers, or at some comfortable place other than the courtroom, on the record for a reasonable period of time, in the presence of the child, a representative of the prosecution, a representative of the defense, and the child's attorney or guardian ad litem.

(i) Mil. R. Evid. 807 is amended as follows:

(a) *In General.* Under the following conditions ~~circumstances~~, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under ~~specifically covered by~~ a hearsay exception in Mil. R. Evid. 803 or 804:

(1) the statement is supported by sufficient ~~has equivalent circumstantial~~ guarantees of trustworthiness after considering the totality of circumstances under which it is made and evidence, if any, corroborating the statement; and

~~(2) it is offered as evidence of a material fact;~~

~~(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and~~

~~(4) admitting it will best serve the purposes of these rules and the interests of justice.~~

(b) *Notice.* The statement is admissible only if, ~~before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement—~~and its particulars,~~ including its substance and the declarant's name—~~and address,~~ so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Section 4. Part IV of the Manual for Courts-Martial, United States, ¶3.b. is amended as follows:

(1) *In general.* Article 79 contains two provisions concerning notice of Lesser included offenses: (1) offenses that are “necessarily included” in the charged offense in accordance with Article 79(b)(1); and (2) offenses designated as Lesser included offenses by the President under Article 79(b)(2). Each provision sets forth an independent basis for providing notice of a lesser included offense.

(2) *“Necessarily included” offenses.* Under Article 79(b)(1), an offense is “necessarily included” in a charged offense when the elements of the lesser offense are a subset of the elements of the charged offense, thereby putting the accused on notice to be prepared to defend against the lesser offense in addition to the offense specifically charged. A lesser offense is “necessarily included” when:

(a) All of the elements of the lesser offense are included in the greater offense, and the common elements are identical (for example, wrongful appropriation as a lesser included offense of larceny);

(b) All of the elements of the lesser offense are included in the greater offense, but at least one element is a subset by being legally less serious (for example, unlawful entry as a lesser included offense of burglary); or

(c) All of the elements of the lesser offense are “included and necessary” parts of the greater offense, but the mental element is a subset by being legally less serious (for example, voluntary manslaughter as a lesser included offense of premeditated murder).

(3) *Offenses designated by the President.* Under Article 79(b)(2), Congress has authorized the President to designate Lesser included offenses by regulation.

(a) The President may designate an offense as a lesser included offense under Article 79(b)(2), subject to the requirement in Article 79(c) that the designated lesser included offense “shall be reasonably included in the greater offense.”

(b) Appendix 12A sets forth the list of Lesser included offenses designated by the President under Article 79(b)(2).

(c) The President may include a “necessarily included offense” in the list of offenses prescribed under Article 79(b)(2), but is not required to do so. A court may identify an offense as a “necessarily included” offense under Article 79(b)(1) regardless of whether the offense has been designated under Article 79(b)(2).

(4) *Sua sponte duty.* [Subject to R.C.M. 920\(g\)](#), [Aa](#) military judge must instruct panel members on Lesser included offenses reasonably raised by the evidence.

(5) *Multiple Lesser included offenses.* When the offense charged is a compound offense comprising two or more Lesser included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged.

(6) *Findings of guilty to a lesser included offense.* A court-martial may find an accused not guilty of the offense charged, but guilty of a lesser included offense by the process of exception and substitution. The court-martial may except (that is, delete) the words in the specification that pertain to the offense charged and, if necessary, substitute language appropriate to the lesser included offense. For example, the accused is charged with murder in violation of Article 118, but found guilty of voluntary manslaughter in violation of Article 119. Such a finding may be worded as follows:

Of the Specification: Guilty, except the word “murder” substituting therefor the words “willfully and unlawfully kill,” of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge: Not guilty, but guilty of a violation of Article 119.

If a court-martial finds an accused guilty of a lesser included offense, the finding as to the charge shall state a violation of the specific punitive article violated and not a violation of Article 79.

Section 5. Part V of the Manual for Courts-Martial, United States is amended as follows:

(a) ¶1.h. is amended as follows:

h. ~~*Applicable standards.*~~ *Burden of proof.* ~~Unless otherwise provided, the Service regulations and procedures of the Servicemember shall apply. The burden of proof to be utilized by commanders throughout the nonjudicial punishment process shall be a preponderance of the evidence. This means the commanding officer must determine it is “more likely than not” the member committed an offense defined by the UCMJ. Each element of each offense, as defined in the Manual for Courts-Martial, must be supported by a preponderance of the evidence (i.e., it is “more likely than not” that the element occurred). This standard is more rigorous than a “probable cause” standard of proof used by law enforcement to obtain a warrant but a lower standard of proof than the “beyond a reasonable doubt” standard used at a court-martial.~~

(b) ¶1.f. is added as follows:

j. *Applicable standards.* Unless otherwise provided, the Service regulations and procedures of the Servicemember shall apply.

(c) ¶4.c.(4) is amended as follows:

(4) *Decision.* After considering all relevant matters presented ~~by a preponderance of the evidence standard~~, if the nonjudicial punishment authority—

(A) does not conclude that the Servicemember committed the offenses alleged, the nonjudicial punishment authority shall so inform the member and terminate the proceedings;

(B) concludes that the Servicemember committed one or more of the offenses alleged, the nonjudicial punishment authority shall:

(i) so inform the Servicemember;

(ii) inform the Servicemember of the punishment imposed; and

(iii) inform the Servicemember of the right to appeal (*see* paragraph 7 of this Part).

Section 6. Appendix 12A of the Manual for Courts-Martial, United States, is amended as follows:

(a) The prefatory language is amended as follows:

PRESIDENTIALLY-PRESCRIBED LESSER INCLUDED OFFENSES PURSUANT TO ARTICLE 79(b)(2), UNIFORM CODE OF MILITARY JUSTICE

~~This Appendix contains the list of lesser included offenses prescribed by the President in EO Exec. Order No. 13825, 83 Fed. Reg. 9889 (March 1, 2018) under Article 79(b)(2) as “reasonably included” in the greater offense. See Part IV, paragraph 3.b. of this Manual for an explanation regarding the offenses designated under Article 79(b)(2). This is not an exhaustive list of lesser included offenses. For offenses that may or may not be lesser included offenses, see R.C.M. 307(c)(3) and its accompanying Discussion regarding charging in the alternative.~~

This authoritative list provides actual notice of factually similar lesser included offenses designated by the

President, pursuant to Article 79(b)(2), UCMJ, that are “reasonably included” in the greater offense. The military justice system has unique, but closely related, military offenses, which are not “necessarily included” lesser offenses under the “elements test.” See *United States v. Teters*, 37 M.J. 370 (C.A.A.F. 1993); see also *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2009).

(b) The chart is deleted and replaced as follows:

Article	Offense (Part IV Citation)	Reasonably Included Offense (RIO) Article	RIO (Part IV Citation)
85 - Desertion	9.b.(1)-(3)	85 - Desertion	9.b.(4)
87a - Resistance, flight, breach of arrest, and escape	12.b.(5)	86 - Absent without leave	10.b.(3)
87b - Offenses against correctional custody and restriction	13.b.(1)	86 - Absent without leave	10.b.(3)
93a - Prohibited activities with military recruit or trainee by person in position of special trust	20.b.(1); 20.b.(2)	93 - Cruelty and maltreatment	19.b.
94 - Mutiny or sedition	21.b.(1)	94 - Mutiny or sedition	21.b.(6)
100 - Subordinate compelling surrender	28.b.(1)	100 - Subordinate compelling surrender	28.b.(2)
103a - Espionage	32.b.(1)	103a - Espionage	32.b.(2)
103b - Aiding the enemy	33.b.(1)	103b - Aiding the enemy	33.b.(2)
104b - Unlawful enlistment, appointment, or separation	36.b.	107- False official statements; false swearing	41.b.(1)
118 - Murder	56.b.(1); 56.b.(2); 56.b.(3); 56.b.(4)	114 - Endangerment Offenses	52.b.(1)
119 - Manslaughter	57.b.(1)	114 - Endangerment Offenses	52.b.(1)
119a - Death or injury of an unborn child	58.b.(2); 58.b.(4)	119a - Death or injury of an unborn child	58.b.(3)
120 - Rape and Sexual Assault	60.b.(1)	128 - Assault with intent to commit specified offenses (rape)	77.b.(3)

120 - Rape and Sexual Assault	60.b.(2)	128 - Assault with intent to commit specified offenses (sexual assault)	77.b.(3)
120b - Rape of a child	62.b.(1)	128 - Assault with intent to commit specified offenses (rape of a child)	77.b.(3)
120b - Rape of a child	62.b.(2)	128 - Assault with intent to commit specified offenses (sexual assault of a child)	77.b.(3)
128 - Assault	77.b.(2); 77.b.(3); 77.b.(4); 77.b.(5)	128 - Assault	77.b.(1)
134 - Check, worthless making and uttering by dishonorably failing to maintain funds	94.b.	134 - Debt, dishonorably failing to pay	96.b.
134 - Child pornography	95.b.(1); 95.b.(2); 95.b.(3); 95.b.(4)	134 - Indecent conduct	104.b.
134 - Disloyal statements	97.b.	88 - Contempt toward officials	14.b.