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Presidential Documents

Title 3—

The President

Executive Order 12936 of November 10, 1994

Amendments to the Manual for Courts-Martial, United States, 1984

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, Executive Order No. 12767, and Executive Order No. 12888, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. R.C.M. 405(g)(1)(B) is amended to read as follows:

''(B) *Evidence.* Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative, shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely. As soon as practicable after receipt of a request by the accused for information which may be protected under Mil. R. Evid. 505 or 506, the investigating officer shall notify the person who is authorized to issue a protective order under subsection (g)(6) of this rule, and the convening authority, if different. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.''.

b. R.C.M. 405(g) is amended by inserting the following new subparagraph (6) at the end thereof:

''(6) *Protective order for release of privileged information.* If, prior to referral, the Government agrees to disclose to the accused information to which the protections afforded by Mil. R. Evid. 505 or Mil. R. Evid. 506 may apply, the convening authority, or other person designated by regulations of the Secretary of the service 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 in Mil. R. Evid. 505(g)(1)(B) through (F) or Mil. R. Evid. 506(g)(2) through (5).''.

c. R.C.M. 905(f) is amended to read as follows:

''(f) *Reconsideration.* On request of any party or sua sponte, the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.''.

d. R.C.M. 917(f) is amended to read as follows:

''(f) *Effect of ruling.* A ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification, or affected portion thereof, and, when appropriate, of the corresponding charge. A ruling denying a motion for a finding of not guilty may be reconsidered at any time prior to authentication of the record of trial.''.

e. R.C.M. 1001(b)(5) is amended to read as follows:

''(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.* The 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 servicemember 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.''.

f. R.C.M. 1003(b)(2) is amended to read as follows:

''(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 foreign 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.''.

g. R.C.M. 1004(c)(4) is amended to read as follows:

''(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 Article 104, 106a, or 120.''.

h. R.C.M. 1004(c)(7)(B) is amended to read as follows:

''(B) The murder was committed: while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, 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.''.

i. R.C.M. 1004(c)(7)(I) is amended to read as follows:

''(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 a bloody nose. The term ''substantial mental or physical pain and suffering'' is accorded its common meaning and includes torture.''.

j. R.C.M. 1102(b)(2) is amended to read as follows:

''(2) *Article 39(a) sessions.* An Article 39(a) session under this rule may be called for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence. The military judge may also call an Article 39(a) session, upon motion of either party or sua sponte, to reconsider any trial ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence.''.

k. R.C.M. 1105(c)(1) is amended to read as follows:

''(1) *General and special courts-martial.* After a general or special court-martial, the accused may submit matters under this rule within the later of 10 days after a copy of the authenticated record of trial, or, if applicable, the recommendation of the staff judge advocate or legal officer, or an addendum to the recommendation containing new matter is served on the accused. If, within the 10-day period, the accused shows that additional time is required for the accused to submit such matters, the convening authority or that authority's staff judge advocate may, for good cause, extend the 10-day period for not more than 20 additional days; however, only the convening authority may deny a request for such an extension.''.

l. R.C.M. 1106(f)(7) is amended to read as follows:

''(7) *New matter in addendum to recommendation.* The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to comment. When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given ten days from service of the addendum in which to submit comments. Substitute service of the accused's copy of the addendum upon counsel for the accused is permitted in accordance with the procedures outlined in subparagraph (f)(1) of this rule.''.

Sec. 2. Part III of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Mil. R. Evid. 305(d)(1)(B) is amended to read as follows:

''(B) The interrogation is conducted by a person subject to the code acting in a law enforcement capacity or the agent of such a person, the interrogation is conducted subsequent to the preferral of charges, and the interrogation concerns the offenses or matters that were the subject of the preferral of charges.''.

b. Mil. R. Evid. 305(e) is amended to read as follows:

''(e) *Presence of counsel.*

(1) *Custodial interrogation.* Absent a valid waiver of counsel under subdivision (g)(2)(B), when an accused or person suspected of an offense is subjected to custodial interrogation under circumstances described under subdivision (d)(1)(A) of this rule, and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed.

(2) *Post-preferral interrogation.* Absent a valid waiver of counsel under subdivision (g)(2)(C), when an accused or person suspected of an offense is subjected to interrogation under circumstances described in subdivision (d)(1)(B) of this rule, and the accused or suspect either requests counsel

or has an appointed or retained counsel, counsel must be present before any subsequent interrogation concerning that offense may proceed.''.

c. Mil. R. Evid. 305(f) is amended to read as follows:

''(f) *Exercise of rights.*

(1) *The privilege against self-incrimination.* If a person chooses to exercise the privilege against self-incrimination under this rule, questioning must cease immediately.

(2) *The right to counsel.* If a person subjected to interrogation under the circumstances described in subdivision (d)(1) of this rule chooses to exercise the right to counsel, questioning must cease until counsel is present.''.

d. Mil. R. Evid. 305(g)(2) is amended to read as follows:

''(2) *Counsel.*

(A) If the right to counsel in subdivision (d) is applicable and the accused or suspect does not decline affirmatively the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel.

(B) If an accused or suspect interrogated under circumstances described in subdivision (d)(1)(A) requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that——

(i) the accused or suspect initiated the communication leading to the waiver; or

(ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

(C) If an accused or suspect interrogated under circumstances described in subdivision (d)(1)(B) requests counsel, any subsequent waiver of the right to counsel obtained during an interrogation concerning the same offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that the accused or suspect initiated the communication leading to the waiver.''.

e. Mil. R. Evid. 314(g)(3) is amended to read as follows:

''(3) *Examination for other persons.*

(A) *Protective sweep.* When an apprehension takes place at a location in which other persons might be present who might endanger those conducting the apprehension and others in the area of the apprehension, a reasonable examination may be made of the general area in which such other persons might be located. A reasonable examination under this rule is permitted if the apprehending officials have a reasonable suspicion based on specific and articulable facts that the area to be examined harbors an individual posing a danger to those in the area of the apprehension.

(B) *Search of attack area.* Apprehending officials may, incident to apprehension, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of apprehension from which an attack could be immediately launched.''.

f. Mil. R. Evid. 404(b) is amended to read as follows:

''(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided, that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.''.

Sec. 3. Part IV of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Paragraph 44e(1) is amended to read as follows:

''(1) *Voluntary manslaughter.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.''

b. Paragraph 44e(2) is amended to read as follows:

''(2) *Involuntary manslaughter.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.''.

c. Paragraph 45e is amended to read as follows:

''e. *Maximum punishment.*

(1) *Rape.* Death or such other punishment as a court-martial may direct.

(2) *Carnal knowledge with a child who, at the time of the offense, has attained the age of 12 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *Carnal knowledge with a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.''.

d. Paragraph 51e is amended to read as follows: ''e. *Maximum punishment.*

(1) *By force and without consent.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

(2) *With a child who, at the time of the offense, has attained the age of 12 years, but is under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *With a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

(4) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.''.

e. Paragraph 85e is amended to read as follows:

''e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.''.

Sec. 4. These amendments shall take effect on December 9, 1994, subject to the following:

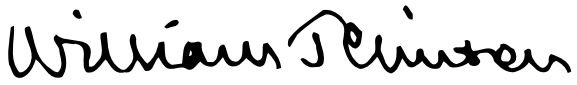
(a) The amendment made to Rule for Courts-Martial 1004(c)(4) shall apply only to offenses committed on or after December 9, 1994.

(b) Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to December 9, 1994, which was not punishable when done or omitted.

(c) The maximum punishment for an offense committed prior to December 9, 1994, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

(d) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to December 9, 1994, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Sec. 5. The Secretary of Defense, on behalf of the President, shall transmit a copy of this order to the Congress of the United States in accord with section 836 of title 10, United States Code.



THE WHITE HOUSE,
November 10, 1994.

Changes to the Discussion Accompanying the Manual for Courts-Martial, United States, 1984

A. The Discussion accompanying R.C.M. 405(g)(1)(B) is amended by adding the following paragraph to the end thereof:

''The provision in (B), requiring the investigating officer to notify the appropriate authorities of requests by the accused for information privileged under M.R.E. 505 or M.R.E. 506, is for the purpose of placing the appropriate authority on notice that an order, as authorized under subparagraph (g)(6), may be required to protect whatever information the government may decide to release to the accused.''.

B. The Discussion accompanying R.C.M. 705(b)(2)(C) is amended to read as follows:

''A convening authority may withdraw certain specifications and/or charges from a court-martial and dismiss them if the accused fulfills the accused's promises in the agreement. Except when jeopardy has attached (see R.C.M. 907(b)(2)(C)), such withdrawal and dismissal does not bar later reinstitution of the charges by the same or a different convening authority. A judicial determination that the accused breached the pretrial agreement is not required prior to reinstitution of withdrawn or dismissed specifications and/or charges. If the defense moves to dismiss the reinstituted specifications and/or charges on the grounds that the government remains bound by the terms of the pretrial agreement, the government will be required to prove, by a preponderance of the evidence, that the accused has breached the terms of the pretrial agreement. If the agreement is intended to grant immunity to an accused, see R.C.M. 704.''.

C. The following Discussion is inserted after R.C.M. 905(f):

''Subsection (f) permits the military judge to reconsider any ruling that affects the legal sufficiency of any finding of guilt or the sentence. See R.C.M. 917(d) for the standard to be used to determine the legal sufficiency of evidence. See also R.C.M. 1102 concerning procedure s for post-trial reconsideration. Different standards may apply depending on the nature of the ruling. See *United States v. Scaff,* 29 M.J. 60 (C.M.A. 1989).''.

D. The last paragraph of the Discussion accompanying R.C.M. 906(b)(13) is amended to read as follows:

''Whether to rule on an evidentiary question before it arises during trial is a matter within the discretion of the military judge. But see R.C.M. 905(b)(3) and (d); and Mil. R. Evid. 304(e)(2); 311(e)(2); 321(d)(2). Reviewability of preliminary rulings will be controlled by the Supreme Court's decision in *Luce* v. *United States,* 469 U.S. 38 (1984).''.

E. The Discussion accompanying R.C.M. 912(g)(1) is amended to read as follows:

''Generally, no reason is necessary for a peremptory challenge. But see *Batson* v. *Kentucky*, 476 U.S. 79 (1986); *United States* v. *Curtis*, 33 M.J. 101 (C.M.A. 1991), *cert. denied*, 112 S. Ct. 1177 (1992); *United States* v. *Moore,* 28 M.J. 366 (C.M.A. 1989); *United States* v. *Santiago-Davila,* 26 M.J. 380 (C.M.A. 1988).''.

F. The following Discussion is inserted after R.C.M. 1001(b)(5)(B):

''See generally Mil. R. Evid. 701, Opinion testimony by lay witnesses. See also Mil. R. Evid. 703, Bases of opinion testimony by experts, if the witness or deponent is testifying as an expert. The types of information and knowledge reflected in this subparagraph are illustrative only.''.

G. The following Discussion is inserted after R.C.M. 1001(b)(5)(D):

''On direct examination, a witness or deponent may respond affirmatively or negatively regarding whether the accused has rehabilitative potential. The witness or deponent may also opine succinctly regarding the magnitude or quality of the accused's rehabilitative potential; for example, the witness or deponent may opine that the accused has ''great'' or ''little'' rehabilitative potential. The witness or deponent, however, generally may not further

elaborate on the accused's rehabilitative potential, such as describing the particular reasons for forming the opinion.''.

H. The following Discussion is inserted after R.C.M. 1001(b)(5)(F):

''For example, on redirect a witness or deponent may testify regarding specific instances of conduct when the cross-examination of the witness or deponent concerned specific instances of conduct. Similarly, for example, on redirect a witness or deponent may offer an opinion on matters beyond the scope of the accused's rehabilitative potential if an opinion about such matters was elicited during cross-examination of the witness or deponent and is otherwise admissible.''.

I. The following Discussion is inserted after R.C.M. 1004(c)(8):

''Conduct amounts to 'reckless indifferences' when it evinces a wanton disregard of consequences under circumstances involving grave danger to the life of another, although no harm is necessarily intended. The accused must have had actual knowledge of the grave danger to others or knowledge of circumstances that would cause a reasonable person to realize the highly dangerous character of such conduct. In determining whether participation in the offense was major, the accused's presence at the scene and the extent to which the accused aided, abetted, assisted, encouraged, or advised the other participants should be considered.'' See *United States v. Berg*, 31 M.J. 38 (C.M.A. 1990); *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993).

J. The Discussion accompanying R.C.M. 1102(b)(2) is amended to read as follows:

''For example, an Article 39(a) session may be called to permit a military judge to reconsider a trial ruling, or to examine allegations of misconduct by a counsel, a member, or a witness. See R.C.M. 917(d) for the standard to be used to determine the legal sufficiency of evidence.''.

K. The Discussion accompanying R.C.M. 1106(f)(1) is amended to read as follows:

''The method of service and the form of proof of service are not prescribed and may be by any appropriate means. See R.C.M. 1103(b)(3)(G). For example, a certificate of service, attached to the record of trial, would be appropriate when the accused is served personally.''.

L. The Discussion accompanying R.C.M. 1106(f)(7) is amended by adding the following paragraph to the end thereof:

''The method of service and the form of proof of service are not prescribed and may be by any appropriate means. See R.C.M. 1103(b)(3)(G). For example, a certificate of service, attached to the record of trial, would be appropriate when the accused is served personally.''.

Changes to the Analysis Accompanying the Manual for Courts-Martial, United States, 1984

1. Changes to Appendix 21, the Analysis accompanying the Rules for Courts-Martial (Part II, MCM, 1984).

a. R.C.M. 405(g)(1)(B). The Analysis accompanying R.C.M. 405(g)(1) is amended by inserting the following at the end thereof:

''*1994 Amendment.* Subparagraph (B) was amended to require the investigating officer to notify the appropriate authority of any requests by the accused for privileged information protected under M.R.E. 505 or M.R.E. 506. This puts the convening authority and other appropriate authorities on notice that a protective order, under subsection (g)(6) of this rule, may be necessary for the protection of any such privileged information that the government agrees to release to the accused. The Discussion was amended to reflect the purpose of the notice requirement.''.

b. R.C.M. 405(g)(6) The Analysis accompanying R.C.M. 405(g) is amended by inserting the following at the end thereof:

''*1994 Amendment.* Subsection (6) was added to allow the convening authority, or other person designated by service Secretary regulations, to

attach conditions to the release of privileged information protected under M.R.E. 505 and 506 through the issuance of a protective order similar in nature to that which the military judge may issue under those rules. Though the prereferral authority to attach conditions already exists in M.R.E. 505(d)(4) and M.R.E. 506(d)(4), these rules did not specify who may take such action on behalf of the government or the manner in which the conditions may be imposed.''.

c. R.C.M. 705(b)(2)(C). The Analysis accompanying R.C.M. 705(b)(2) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The amendment to the Discussion accompanying R.C.M. 705(b)(2)(C), regarding reinstitution of offenses withdrawn or dismissed pursuant to a pretrial agreement and the standard of proof required of the government to withstand a defense motion to dismiss the reinstituted offenses, is based on *United States v. Verrusio,* 803 F.2d 885 (7th Cir. 1986). Alternative procedures available in Federal civilian practice, such as a motion by the government for relief from is obligation under the agreement before it proceeds to the indictment stage (see *United States v. Ataya,* 864 F.2d 1324, 1330 n.9 (7th Cir. 1988)), are inapposite in military practice and thus are not required. See generally R.C.M. 801(a).''.

d. R.C.M. 905(f). The Analysis accompanying R.C.M. 905(f) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The amendment to R.C.M. 905(f) clarifies that the military judge has the authority to take remedial action to correct any errors that have prejudiced the rights of an accused. *United States v. Griffith,* 27 M.J. 42, 47 (C.M.A. 1988). Such remedial action may be taken at a pre-trial session, during trial, or at a post-trial Article 39(a) session. *Id.* See also *United States v. Scaff,* 29 M.J. 60, 65–66 (C.M.A. 1989). The amendment, consistent with R.C.M. 1102(d), clarifies that post-trial reconsideration is permitted until the record of trial is authenticated.

The amendment to the Discussion clarifies that the amendment to subsection (f) does not change the standard to be used to determine the legal sufficiency of evidence. R.C.M. 917(d); see *Griffith, supra;* see also *Scaff, supra.*''.

e. R.C.M. 906(b)(13). The Analysis accompanying R.C.M. 906(b)(13) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The Discussion to subparagraph (13) was amended to reflect the holding in *United States v. Sutton,* 31 M.J. 11 (C.M.A. 1990). The Court of Military Appeals in *Sutton* held that its decision in *United States v. Cofield,* 11 M.J. 422 (C.M.A. 1981), should not be relied upon to determine reviewability of preliminary rulings in courts-martial. Instead reviewability of preliminary rulings will be controlled by *Luce v. United States,* 469 U.S. 38 (1984).''.

f. R.C.M. 912(g)(1). The Analysis accompanying R.C.M. 912(g) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The Discussion for R.C.M. 912(g)(1) was amended to incorporate *Batson v. Kentucky,* 476 U.S. 79 (1986); *United States v. Curtis,* 33 M.J. 101 (C.M.A. 1991), *cert. denied,* 112 S.Ct. 1177 (1992); *United States v. Moore,* 28 M.J. 366 (C.M.A. 1989); and *United States v. Santiago-Davila,* 26 M.J. 380 (C.M.A. 1988).''.

g. R.C.M. 917(f). The Analysis accompanying R.C.M. 917(f) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The amendment to subsection (f) clarifies that the military judge may reconsider a ruling denying a motion for a finding of not guilty at any time prior to authentication of the record of trial. This amendment is consistent with *United States v. Griffith,* 27 M.J. 42 (C.M.A. 1988). As stated by the court, the reconsideration is limited to a determination as to whether the evidence adduced is legally sufficient to establish guilt rather than a determination based on the weight of the evidence, which remains the exclusive province of the finder of fact.''.

h. R.C.M. 1001(b)(5). The Analysis accompanying R.C.M. 1001(b)(5) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The amendment is based on decisional law interpreting subsection (b)(5), including *United States v. Pompey,* 33 M.J. 266 (C.M.A. 1991), *United States v. Claxton,* 32 M.J. 159 (C.M.A. 1991), *United States v. Aurich,* 31 M.J. 95 (C.M.A. 1990), *United States v. Ohrt,* 28 M.J. 301 (C.M.A. 1989), and *United States v. Horner,* 22 M.J. 294 (C.M.A. 1986).''.

i. R.C.M. 1003(b)(2). The Analysis accompanying R.C.M. 1003(b)(2) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The references to ''retired'' and ''retainer'' pay were added to make clear that those forms of pay are subject to computation of forfeiture in the same way as basic pay. Articles 17, 18, and 19, U.C.M.J., do not distinguish between these types of pay. Sentences including forfeiture of these types of pay were affirmed in *United States v. Hooper,* 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958) (retired pay), and *United States v. Overton,* 24 M.J. 309 (C.M.A. 1987) (retainer pay).''.

j. R.C.M. 1004(c)(4). The Analysis accompanying R.C.M. 1004(c)(4) is amended by inserting the following at the end thereof:

''*1994 Amendment.* R.C.M. 1004(c)(4) was amended to clarify that only one person other than the victim need be endangered by the inherently dangerous act to qualify as an aggravating factor. See *United States v. Berg,* 31 M.J. 38 (C.M.A. 1990), *United States v. McMonagle,* 38 M.J. 53 (C.M.A. 1993).''.

k. R.C.M. 1004(c)(7)(B). The Analysis accompanying R.C.M. 1004(c)(7) and (8) is amended by inserting the following:

''*1994 Amendment.* Subsection (7)(B) was amended by adding an additional aggravating factor for premeditated murder—the fact that the murder was drug-related. This change reflects a growing awareness of the fact that the business of trafficking in controlled substances has become increasingly deadly in recent years. Current federal statutes provide for a maximum punishment including the death penalty for certain drug-related killings. See 21 U.S.C. § 848(e) (Pub. L. 100–690, 7001(a)(2)).''.

l. R.C.M. 1004(c)(7)(I). The Analysis accompanying R.C.M. 1004(c) (7) and (8) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The amendment to subsection (c)(7)(I) of this rule defines ''substantial physical harm'' and was added to clarify the type of injury that would qualify as an aggravating factor under the subsection. The definition of ''substantial physical harm'' is synonymous with ''great bodily harm'' and ''grievous bodily harm.'' See Part IV, paragraph 43(c). With respect to the term ''substantial mental or physical pain and suffering,'' see *United States v. Murphy,* 30 M.J. 1040, 1056–58 (ACMR 1990).''.

m. R.C.M. 1102(b)(2). The Analysis accompanying R.C.M. 1102(b) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The amendment to subsection (b)(2) of this rule clarifies that Article 39(a), U.C.M.J., authorizes the military judge to take such action after trial and before authenticating the record of trial as may be required in the interest of justice. See *United States v. Griffith,* 27 M.J. 42, 47 (C.M.A. 1988). The amendment to the Discussion clarifies that the military judge may take remedial action on behalf of an accused without waiting for an order from an appellate court. Under this subsection, the military judge may consider, among other things, misleading instructions, legal sufficiency of the evidence, or errors involving the misconduct of members, witnesses, or counsel. *Id.*; see *United States v. Scaff,* 29 M.J. 60, 65 (C.M.A. 1989).''.

n. R.C.M. 1105(c)(1). The Analysis accompanying 1105(c) is amended by inserting the following at the end thereof:

''*1994 Amendment.* Subsection (c)(1) was amended to clarify that the accused has 10 days to respond to an addendum to a recommendation of the staff judge advocate or legal officer when the addendum contains new matter. See *United States v. Thompson,* 25 M.J. 662 (A.F.C.M.R. 1987).

An additional amendment permits the staff judge advocate to grant an extension of the 10-day period.''.

o. R.C.M. 1106(f)(1). The Analysis accompanying R.C.M. 1106(f)(1) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The Discussion to subsection (f)(1) was amended to correct a grammatical error and to clarify that the method of service of the recommendation on the accused and the accused's counsel should be reflected in the attachments to the record of trial. If it is impractical to serve the accused, the record should contain a statement justifying substitute service. Subsection (f)(1) recognizes that Congress sanctions substitute service on the accused's counsel. H.R. Rep. No. 549, 98th Cong., 1st Sess. 15 (1983). See also *United States v. Roland*, 31 M.J. 747 (A.C.M.R. 1990).''.

p. R.C.M. 1106(f)(7). The Analysis accompanying R.C.M. 1106(f)(7) is amended by inserting the following at the end thereof:

''*1994 Amendment.* Subsection (f)(7) was amended to clarify that when new matter is addressed in an addendum to a recommendation, the addendum should be served on the accused and the accused's counsel. The change also clarifies that the accused has 10 days from the date of service in which to respond to the new matter. The provision for substituted service was also added. Finally, the Discussion was amended to reflect that service of the addendum should be established by attachments to the record of trial.''.

2. Changes to Appendix 21, the Analysis accompanying the punitive articles (Part IV, MCM, 1984).

a. Paragraph 44e(1). The Analysis accompanying paragraph 44 is amended by inserting the following at the end thereof:

''*1994 Amendment.* The amendment to paragraph 44e(1) increased the maximum period of confinement for voluntary manslaughter to 15 years. The 10-year maximum confinement period was unnecessarily restrictive; an egregious case of voluntary manslaughter may warrant confinement in excess of ten years.''.

b. Paragraph 44e(2). The Analysis accompanying paragraph 44 is amended by inserting the following at the end thereof:

''*1994 Amendment.* The amendment to paragraph 44e(2) eliminated the anomaly created when the maximum authorized punishment for a lesser included offense of involuntary manslaughter was greater than the maximum authorized punishment for the offense of involuntary manslaughter. For example, prior to the amendment, the maximum authorized punishment for the offense of aggravated assault with a dangerous weapon was greater than that of involuntary manslaughter. This amendment also facilitates instructions on lesser included offenses of involuntary manslaughter. See *United States v. Emmons*, 31 M.J. 108 (C.M.A. 1990).''.

c. Paragraph 45e. The Analysis accompanying paragraph 45 is amended by inserting the following at the end thereof:

''*1994 Amendment.* Subparagraph e was amended by creating two distinct categories of carnal knowledge for sentencing purposes—one involving children who had attained the age of 12 years at the time of the offense, now designated as subparagraph e(2), and the other for those who were younger than 12 years. The latter is now designated as subparagraph e(3). The punishment for the older children was increased from 16 to 20 years confinement. The maximum confinement for carnal knowledge of a child under 12 years was increased to life. The purpose for these changes is to bring the punishments more in line with those for sodomy of a child under paragraph 51e of this part and with the Sexual Abuse Act of 1986, 18 U.S.C. 2241–2245. The alignment of the maximum punishments for carnal knowledge with those of sodomy is aimed at paralleling the concept of gender-neutrality incorporated into the Sexual Abuse Act.''.

d. Paragraph 51e. The Analysis accompanying subparagraph 51e is amended by inserting the following at the end thereof:

''*1994 Amendment.* One of the objectives of the Sexual Abuse Act of 1986, 18 U.S.C. 2241–2245 was to define sexual abuse in gender-neutral terms. Since the scope of Article 125, U.C.M.J., accommodates those forms of sexual abuse other than the rape provided for in Article 120, U.C.M.J., the maximum punishments permitted under Article 125 were amended to bring them more in line with Article 120 and the Act, thus providing sanctions that are generally equivalent regardless of the victim's gender. Subparagraph e(1) was amended by increasing the maximum period of confinement from 20 years to life. Subparagraph e(2) was amended by creating two distinct categories of sodomy involving a child, one involving children who have attained the age of 12 but are not yet 16, and the other involving children under the age of 12. The latter is now designated as subparagraph e(3). The punishment for the former category remains the same as it was for the original category of children under the age of 16. This amendment, however, increases the maximum punishment to life when the victim is under the age of 12 years.''.

e. Paragraph 85e. The Analysis accompanying paragraph 85 is amended by inserting the following at the end thereof:

''*1994 Amendment.* Subparagraph e was amended to increase the maximum punishment from a bad conduct discharge, total forfeitures, and confinement for 1 year, to a dishonorable discharge, total forfeitures, and confinement for 3 years. This eliminated the incongruity created by having the maximum punishment for drunken driving resulting in injury that does not necessarily involve death exceed that of negligent homicide where the result must be the death of the victim.''.

3. Change to Appendix 22, the Analysis accompanying the Military Rules of Evidence (Part III, MCM, 1984).

a. M.R.E. 304(b)(1). The first paragraph of the Analysis accompanying M.R.E. 304(b)(1) is amended to read as follows:

''(b) *Exceptions.* Rule 304(b)(1) adopts *Harris* v. *New York,* 401 U.S. 222 (1971), insofar as it would allow use for impeachment or at a later trial for perjury, false swearing, or the making of a false official statement, statements taken in violation of the counsel warnings required under M.R.E. 305(d)–(e). Under paragraphs 140a(2) and 153b, MCM, 1969 (Rev.), use of such statements was not permissible. *United States* v. *Girard,* 23 U.S.C.M.A. 263, 49 C.M.R. 438 (1975); *United States* v. *Jordan,* 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971). The Court of Military Appeals has recognized expressly the authority of the President to adopt the holding in *Harris* on impeachment. *Jordan,* 20 U.S.C.M.A. at 617, 44 C.M.R. at 47, and M.R.E. 304(b) adopts *Harris* in military law. Subsequently, in *Michigan* v. *Harvey,* 494 U.S. 344 (1990), the Supreme Court held that statements taken in violation of *Michigan* v. *Jackson,* 475 U.S. 625 (1986), could also be used to impeach a defendant's false and inconsistent testimony. In so doing, the Court extended the Fifth Amendment rationale of *Harris* to Sixth Amendment violations of the right to counsel.''.

b. M.R.E. 305(d)(1)(B). The Analysis accompanying M.R.E. 305(d)(1)(B) is amended by inserting the following at the end thereof:

''*1994 Amendment.* Subdivision (d) was amended to conform military practice with the Supreme Court's decision in *McNeil* v. *Wisconsin,* 501 U.S. 171 (1991). In *McNeil,* the Court clarified the distinction between the Sixth Amendment right to counsel and the Fifth Amendment right to counsel. The Court reiterated that the Sixth Amendment right to counsel does not attach until the initiation of adversary proceedings. In the military, the initiation of adversary proceedings normally occurs at preferral of charges. See *United States* v. *Jordan,* 29 M.J. 177, 187 (C.M.A. 1989); *United States* v. *Wattenbarger,* 21 M.J. 41, 43 (C.M.A. 1985), *cert. denied,* 477 U.S. 904 (1986). However, it is possible that, under unusual circumstances, the courts may find that the Sixth Amendment right attaches prior to preferral. See *Wattenbarger,* 21 M.J. at 43–44. Since the imposition of conditions on liberty, restriction, arrest, or confinement does not trigger the Sixth Amendment right to counsel, references to these events were eliminated from the rule.

These events may, however, be offered as evidence that the government has initiated adversary proceedings in a particular case.''.

c. M.R.E. 305(e). The Analysis accompanying M.R.E. 305(e) is amended by inserting the following at the end thereof:

''*1994 Amendment.* Subdivision (e) was amended to conform military practice with the Supreme Court's decisions in *Minnick v. Mississippi*, 498 U.S. 146 (1990), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Subdivision (e) was divided into two subparagraphs to distinguish between the right to counsel rules under the Fifth and Sixth Amendments and to make reference to the new waiver provisions of subdivision (g)(2).

Subdivision (e)(1) applies an accused's Fifth Amendment right to counsel to the military and conforms military practice with the Supreme Court's decision in *Minnick*. In that case, the Court determined that the Fifth Amendment right to counsel protected by *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981), as interpreted in *Arizona v. Roberson*, 486 U.S. 675 (1988), requires that when a suspect in custody requests counsel, interrogation shall not proceed unless counsel is present. Government officials may not reinitiate custodial interrogation in the absence of counsel whether or not the accused has consulted with his attorney. *Minnick*, 498 U.S. at 150–52. This rule does not apply, however, when the accused or suspect initiates reinterrogation regardless of whether the accused is in custody. *Minnick*, 498 U.S. at 154–55; *Roberson*, 486 U.S. at 677. The impact of a waiver of counsel rights upon the *Minnick* rule is discussed in the analysis to subdivision (g)(2) of this rule.

Subdivision (e)(2) follows *McNeil* and applies the Sixth Amendment right to counsel to military practice. Under the Sixth Amendment, an accused is entitled to representation at critical confrontations with the government after the initiation of adversary proceedings. In accordance with *McNeil*, the amendment recognizes that this right is offense-specific and, in the context of military law, that it normally attaches when charges are preferred. See *United States v. Jordan*, 29 M.J. 177, 187 (C.M.A. 1989); *United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985), *cert. denied*, 477 U.S. 904 (1986).

Subdivision (e)(2) supersedes the prior notice to counsel rule. The prior rule, based on *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976), is not consistent with *Minnick* and *McNeil*. Despite the fact that *McOmber* was decided on the basis of Article 27, U.C.M.J., the case involved a Sixth Amendment claim by the defense, an analysis of the Fifth Amendment decisions of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), and the Sixth Amendment decision of *Massiah v. United States*, 377 U.S. 201 (1964). Moreover, the *McOmber* rule has been applied to claims based on violations of both the Fifth and Sixth Amendments. See e.g., *United States v. Fassler*, 29 M.J. 193 (C.M.A. 1989). *Minnick* and *McNeil* reexamine the Fifth and Sixth Amendment decisions central to the *McOmber* decision; the amendments to subdivision (e) are the result of that reexamination.''.

d. M.R.E. 305(f). The Analysis accompanying M.R.E. 305(f) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The amendment to subdivision (f) clarifies the distinction between the rules applicable to the exercise of the privilege against self-incrimination and the right to counsel. *Michigan* v. *Mosley*, 423 U.S. 96 (1975). See also *United States* v. *Hsu*, 852 F.2d 407, 411, n.3 (9th Cir. 1988). The added language, contained in (f)(2), is based on *Minnick* v. *Mississippi*, 498 U.S. 146 (1990), and *McNeil* v. *Wisconsin*, 501 U.S. 171 (1991). Consequently, when a suspect or an accused undergoing interrogation exercises the right to counsel under circumstances provided for under subdivision (d)(1) of this rule, (f)(2) applies the rationale of *Minnick* and *McNeil* requiring that questioning must cease until counsel is present.''.

e. M.R.E. 305(g)(2). The Analysis accompanying M.R.E. 305(g)(2) is amended to read as follows:

''*1994 Amendment.* The amendment divided subdivision (2) into three sections. Subsection (2)(A) remains unchanged from the first sentence of the previous rule. Subsection (2)(B) is new and conforms military practice with the Supreme Court's decision in *Minnick* v. *Mississippi,* 498 U.S. 146 (1990). In that case, the Court provided that an accused or suspect can validly waive his Fifth Amendment right to counsel, after having previously exercised that right at an earlier custodial interrogation, by initiating the subsequent interrogation leading to the waiver. *Id*. at 156. This is reflected in subsection (2)(B)(i). Subsection (2)(B)(ii) establishes a presumption that a coercive atmosphere exists that invalidates a subsequent waiver of counsel rights when the request for counsel and subsequent waiver occur while the accused or suspect is in continuous custody. See *McNeil* v. *Wisconsin,* 501 U.S. 171 (1991); *Arizona* v. *Roberson,* 486 U.S. 675 (1990). The presumption can be overcome when it is shown that there occurred a break in custody which sufficiently dissipated the coercive environment. See *United States* v. *Schake,* 30 M.J. 314 (C.M.A. 1990).

Subsection (2)(C) is also new and conforms military practice with the Supreme Court's decision in *Michigan v. Jackson,* 475 U.S. 625, 636 (1986). In *Jackson,* the Court provided that the accused or suspect can validly waive his or her Sixth Amendment right to counsel, after having previously asserted that right, by initiating the subsequent interrogation leading to the waiver. The Court differentiated between assertions of the Fifth and Sixth Amendment right to counsel by holding that, while exercise of the former barred further interrogation concerning the same or other offenses in the absence of counsel, the Sixth Amendment protection only attaches to those offenses as to which the right was originally asserted. In addition, while continuous custody would serve to invalidate a subsequent waiver of a Fifth Amendment right to counsel, the existence or lack of continuous custody is irrelevant to Sixth Amendment rights. The latter vest once formal proceedings are instituted by the State and the accused asserts his right to counsel, and they serve to insure that the accused is afforded the right to counsel to serve as a buffer between the accused and the State.''.

f. M.R.E. 314(g)(3). The Analysis accompanying M.R.E. 314(g)(3) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The amendment to Mil. R. Evid. 314(g)(3), based on *Maryland v. Buie,* 494 U.S. 325 (1990), specifies the circumstances permitting the search for other persons and distinguishes between protective sweeps and searches of the attack area.

Subsection (A) permits protective sweeps in the military. The last sentence of this subsection clarifies that an examination under the rule need not be based on probable cause. Rather, this subsection adopts the standard articulated in *Terry v. Ohio,* 392 U.S. 1 (1968) and *Michigan v. Long,* 463 U.S. 1032 (1983). As such there must be articulable facts that, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing the area harbors individuals posing a danger to those at the site of apprehension. The previous language referring to those ''who might interfere'' was deleted to conform to the standards set forth in *Buie.* An examination under this rule is limited to a cursory visual inspection of those places in which a person might be hiding.

A new subsection (B) was also added as a result of *Buie, supra.* The amendment clarifies that apprehending officials may examine the ''attack area'' for persons who might pose a danger to apprehending officials. See *Buie,* 494 U.S. at 334. The attack area is that area immediately adjoining the place of apprehension from which an attack could be immediately launched. This amendment makes it clear that apprehending officials do not need any suspicion to examine the attack area.''.

g. M.R.E. 404(b). The Analysis accompanying M.R.E. 404(b) is amended by inserting the following at the end thereof:

''*1994 Amendment.* The amendment to Mil. R. Evid. 404(b) was based on the 1991 amendment to Fed. R. Evid. 404(b). The previous version

of Mil. R. Evid. 404(b) was based on the now superseded version of the Federal Rule. This amendment adds the requirement that the prosecution, upon request by the accused, provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. Minor technical changes were made to the language of the Federal Rule so that it conforms to military practice.''.

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