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JMJ

Criminal Law Division (Code 20) & JMJ AUGUST 2023

# SIDEBAR



## MANUAL FOR COURTS- MARTIAL CHANGES IMPLEMENTED BY EXECUTIVE ORDER 14103

On 28 July 2023, the President signed Executive Order (EO) 14103 implementing significant amendments to the Manual for Courts-Martial (MCM). As described below, the EO contains three Annexes with different effective dates. This joint Sidebar includes a summary of the amendments from EO 14103, which can be found [here](#) and should be reviewed in its entirety by practitioners. Amendments making clerical changes are not included in the summary enclosed with this Sidebar.

This EO amends the MCM to account for statutory changes in the FY22 and FY23 National Defense Authorization Acts (NDAA). The amendments are extensive and reflect the updates to the MCM regarding the Office of Special Trial Counsel (OSTC), randomization of member panels, military judge alone sentencing, sentencing

**CDR Chad Temple**  
**Director**

**(202) 685-7057**

[chad.c.temple.mil@us.navy.mil](mailto:chad.c.temple.mil@us.navy.mil)

**Ms. Deanna Daly**  
**Deputy Director**

**(202) 685-7298**

[deanna.daly.civ@us.navy.mil](mailto:deanna.daly.civ@us.navy.mil)

**LtCol Keaton Harrell**  
**Branch Head, JMJ**

**(703) 693-9005**

[keaton.harrell@usmc.mil](mailto:keaton.harrell@usmc.mil)

Questions can be directed to  
LCDR Andrea Kissner at

[andrea.m.kissner.mil@us.navy.mil](mailto:andrea.m.kissner.mil@us.navy.mil) or

Maj Dylan Klossner at  
[dylan.klossner@usmc.mil](mailto:dylan.klossner@usmc.mil).

This Sidebar and attachment has  
been posted to Code 20's page on the  
[JAG Portal and JMJ's page on the  
SJA to CMC website](#)

parameters and criteria, and modification of the appellate review process. This EO also consolidates MCM amendments proposed by the Joint Service Committee on Military Justice (JSC) in past draft EOs. Training regarding all of these amendments is forthcoming.

The JSC is finalizing the publication of an MCM incorporating this EO. The Annex 1 changes will be incorporated into a 2023 Edition, which will be published electronically on the JSC's website. Changes from all three Annexes will be incorporated into the 2024 MCM, which will be printed and distributed once available.

## ANNEX 1 CHANGES: EFFECTIVE 28 JULY 2023

Annex 1 Changes

Changes implemented in Annex 1 consist of both changes recommended by the JSC over the past few years as well as amendments conforming to recent legislation. Annex 1 amends numerous post-trial procedural rules to expand the accused's appellate rights and adjust appellate procedure generally. Annex 1 amendments recommended by the JSC span multiple subjects, including remote presence of court-martial participants, preliminary hearings, pre-referral reviews by the military judge, waiver of the reading of lesser included offense instructions, the effective date for forfeiture of pay, amendments to the Military Rules of Evidence (M.R.E.), and amendments to Part IV.

**Effective date of Annex 1 Changes.** The amendments to the MCM in Annex 1 take effect as of the date of the EO, 28 July 2023. Nothing in Annex 1 shall be construed to make punishable any act committed or omitted prior to the date of the EO that was not punishable when committed or omitted. And, nothing in Annex 1 shall be construed to invalidate any nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action begun prior to the date of the EO, and any such nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action may proceed in the same manner and with the same effect as if the Annex 1 amendments had not been prescribed.

**Part II: Rules for Court-Martial**General Provisions

R.C.M. 104 (Command influence): amended to account for updates to Article 37, UCMJ, from the FY20 NDAA. For more detail on these changes, please review the Code 20 Command Influence Primer or request a copy from Code 20/JMJ.

Jurisdiction

R.C.M. 201(e) (Jurisdiction in general): amended to clarify the convening of a court-martial over personnel from other military services.

Forwarding and Disposition of Charges

R.C.M. 305(j) (Pretrial confinement): amended to explicitly authorize pre-referral review of pretrial confinement by the military judge.

R.C.M. 307(b) (Preferral of charges): amended to authorize remote means for preferral of charges.

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R.C.M. 309 (Pre-referral judicial proceedings): amended to add pre-referral matters that a military judge may review under R.C.M. 309(b), including victims' challenges to investigative subpoena if their personal or confidential information is the subject of the subpoena (consistent with amended R.C.M. 703(g)(3)(G)), challenges to pretrial confinement, mental capacity inquiries under R.C.M. 706 or R.C.M. 909, requests for individual military counsel, and victims' petitions under Articles 6b(b) and 6b(c), UCMJ. NOTE: R.C.M. 309(b) is further amended in Annex 2 to include review of pretrial deposition orders.

R.C.M. 405(f) (Rights of Accused at preliminary hearing): modified the accused's right to be present at the hearing, consistent with updated R.C.M. 405(j)(4).

R.C.M. 405(h)(3)(B)(iii) (Production of evidence at preliminary hearing): clarified the process for requesting investigative subpoenas for relevant, not cumulative evidence that the preliminary hearing officer determines necessary to the hearing.

R.C.M. 405(i)(2)(A) (Rules of Evidence at preliminary hearing): clarified that the type of sexual predisposition evidence admissible at a preliminary hearing is evidence admissible under M.R.E. 412(b)(1) or (2) (and not the no-longer-existent M.R.E. 412(b)(1)(A) or (B)). NOTE: this R.C.M. is further amended in Annex 2 to apply to "any" alleged victim's sexual predisposition instead of "the" alleged victim's sexual predisposition.

R.C.M. 405(j)(3) (Spectator access to preliminary hearing): amended to clarify that preliminary hearings should remain open to the public whenever possible, whether conducted in person or via remote means.

R.C.M. 405(j)(4) (Presence of accused at preliminary hearing): amended to permit the remote presence of the parties and hearing officer, provided that the accused has defense counsel physically present at the accused's location or otherwise consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding.

R.C.M. 406(c) (Distribution of pretrial advice): added to explicitly require that staff judge advocate pre-trial advice be provided to the defense if charges are referred to a general court-martial.

### Pretrial Matters

R.C.M. 703(d) (Employment of expert witnesses and consultants): amended to require the prosecution and defense to submit requests for funding for expert witnesses or consultants pursuant to Departmental regulations, to allow post-referral *ex parte* motions for the employment of defense expert witnesses and consultants upon denial of the request, and to modify procedures

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following a military judge's grant of a defense motion for employment of an expert witness or consultant. NOTE: This Rule is further amended in Annex 2.

R.C.M. 703(g)(3)(G) (Relief from subpoenas): amended to expand the right to request relief to a named victim in a specification whose personal or confidential information has been subpoenaed.

R.C.M. 703A (Warrant or order for wire or electronic communications): amended to recognize a service provider's right to request (R.C.M. 703A(b)(5)) that a military judge quash or modify a warrant and to replace (R.C.M. 703A(d)) "delayed notice" procedures with a procedure for non-disclosure orders.

R.C.M. 705(d)(1) (Plea agreements): added that a plea agreement may contain a specified sentence or portion of a sentence that shall be imposed by the court-martial.

R.C.M. 706(b)(1) (Inquiry into the mental capacity or mental responsibility of the accused): amended to provide that a military judge may order a 706 inquiry pre-referral.

R.C.M. 706(c)(3)(A) (Directions to board conducting mental capacity inquiry): amended to specify the types of counsel involved in the case (Government and defense, vice "all") who shall receive the report of the board's ultimate conclusions.

R.C.M. 707(c)(1) (Procedure for excluding delay from speedy trial clock): removed pre-referral military judge review of pretrial delay requests.

R.C.M. 707(e) (Waiving speedy trial challenge): changed the consequence of a plea of guilty resulting in a finding of guilty from "forfeiture" to "waiver."

### Trial Procedure Generally

R.C.M. 804(b) (Presence of the accused at trial proceedings): amended to allow for presentencing proceedings to occur remotely in exceptional circumstances. NOTE: Annex 2 makes additional significant changes to R.C.M. 804.

R.C.M. 813(d)(1) (Announcing personnel of the court-martial and the accused): added to direct omission of the announcement of the name, grade and position of the convening authority at the opening session.

### Trial Procedures through Findings

R.C.M. 909(c) (Pre-referral determination of accused's capacity to stand trial): amended to add that a military judge may conduct a hearing to determine mental capacity pre-referral upon request of the Government or the accused.

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R.C.M. 910(f)(8) (Plea agreement inquiry): added to codify specific bases upon which a military judge shall reject a plea agreement.

R.C.M. 910(j) (Waiver of objections): amended to add that a plea of guilty that results in a finding of guilty waives objection to non-jurisdictional defects that occurred prior to the plea.

R.C.M. 912A(d)(3)(C) (Impaneling members and alternate members): added to allow for a convening authority to instruct the military judge to empanel enlisted alternate panel members before officer alternate panel members in cases where the accused has elected members with enlisted representation.

R.C.M. 914(e) (Remedy for noncompliance): amended to limit remedies available when party demonstrates its failure to produce a witness statement was not attributable to bad faith or gross negligence.

R.C.M. 920(g) (Waiver of findings instructions): added to implement procedures to waive instructions on lesser included offenses. *See also* Paragraph 3.b.(4), Manual for Courts-Martial, United States (Article 79), as amended, discussed below.

### Sentencing

R.C.M. 1003(b)(2) (Punishment of forfeiture of pay and allowances): amended to clarify that forfeitures of greater than two-thirds' pay per month may be imposed only during periods of confinement.

R.C.M. 1003(c)(2) (Punishments based on grade of accused): amended to eliminate provision authorizing "only general courts-martial" as capable of sentencing officers, cadets, and midshipmen to confinement.

### Post-Trial Procedure

R.C.M. 1101(e) (Modification of statement of trial results): added authorities who may modify the statement of trial results, the bases for modifications, and a requirement to include any modification in the record of trial.

R.C.M. 1102(b) (Exceptions to general rule of effective date of sentences): amended R.C.M. 1102(b)(1) and added R.C.M. 1102(b)(6) to clarify and distinguish the procedures and authorities for effecting forfeiture of pay ((b)(1)) and reduction in enlisted grade ((b)(6)).

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R.C.M. 1104(e) (Post-trial notice to victims): added victim notification requirements regarding post-trial motions, filings, or hearings that may address findings, unsealing of victim information, or action resulting in accused's release.

R.C.M. 1107(b)(2) (Suspension of sentence after entry of judgment): amended to clarify who has the authority to suspend any unexecuted part of a sentence.

R.C.M. 1109(e) (Reduction of sentence for substantial assistance): amended throughout ((e)(3), (e)(5)(B), (e)(7)) to clarify who—including the “convening authority who convened the original court-martial or the convening authority's successor in command”—has the authority to reduce a sentence based on substantial assistance from the accused.

R.C.M. 1109(g)(2) (Action on sentence): amended to ensure that the convening authority issues a written statement explaining actions to reduce, commute, or suspend a sentence.

R.C.M. 1111(c) (Modification of entry of judgment): amended to authorize the military judge to issue a modified judgment prior to certification of the record under R.C.M. 1112 (vice “within 14 days after the judgment was entered”).

R.C.M. 1112(b)(5) (Contents of record of trial): amended requirement for record of trial contents—requiring new elections, if any, both for rules in effect on or after January 1, 2019, under R.C.M. 902A and for sentencing by members vice military judge under R.C.M. 1002(b). NOTE: This provision is eliminated entirely in Annex 3, conforming with the enactment of a military-judge sentencing procedure.

R.C.M. 1113(b)(3)(C) (Disclosure of sealed exhibits, proceedings, and other material): amended to provide the Judge Advocate General the authority to authorize appellate counsel to disclose sealed materials for cases eligible for review at the Court of Criminal Appeals (CCA) or Court of Appeals for the Armed Forces (CAAF) and to clarify who may grant examination of sealed materials.

R.C.M. 1115(a) (Waiver or withdrawal of appellate review): amended waiver of appellate review in all eligible cases to include all non-capital general and special courts-martial with a finding of guilt, regardless of sentence.

R.C.M. 1116(c) (General and special courts-martial not reviewed by a CCA): amended to provide that cases not reviewed by the CCA under Article 66(b)(1) or (3) shall be reviewed (by a judge advocate) under Article 65(d)(2).



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Appeals and Review

R.C.M. 1201(h) (Application to Judge Advocate General for relief after final review): amended to reflect the limitations of relief available in general and special courts-martial reviewed under Article 69, UCMJ.

R.C.M. 1202(b)(2)(A) (Appellate defense counsel): amended to require automatic detail of defense counsel to all cases eligible for direct appeal unless the accused waives the right to appeal.

R.C.M. 1208(c) (Restoration): added a provision to establish that, once a sentence is set aside or disapproved, the effective date of any new sentence relating to that portion which was set aside or disapproved shall be in accordance with R.C.M. 1102.

**Part III: Military Rules of Evidence**

M.R.E. 311(c)(3) (Good Faith Exception of a Warrant or Search Authorization): expands exception's requirements to include circumstances in which the officials seeking and executing the authorization or warrant *reasonably and with good faith believed* it had been by an individual competent to issue it ((c)(3)(B)), and circumstances in which officials seeking and executing the authorization or warrant *reasonably and with good faith believed* that the individual issuing it had a substantial basis for determining the existence of probable cause ((c)(3)(C)). *See United States v. Perkins*, 78 M.J. 381 (C.A.A.F. 2019).

M.R.E. 311(d)(4)(B) (Challenging Probable Cause): amended to expand the definition of a "false statement" to include omission of a material fact. *See United States v. Garcia*, 80 M.J. 379 (C.A.A.F. 2020).

M.R.E. 315(b)(2), (3) (Probable cause search definitions): added search warrants under R.C.M. 703A to the definition of "search warrant" and added "warrant for wire or electronic communications" to the list of defined terms.

M.R.E. 315(d) (Who may authorize a probable cause search): Added "competent, impartial official" ((d)(3)) as designated by regulations of the Secretary of Defense or Secretary concerned, to the list of offices who may grant search authorizations under this rule.

M.R.E. 404(b) (Other Crimes, Wrongs, or Acts): amended to codify the adoption (already in force through M.R.E. 1102 since June 2022) of notice obligations for trial counsel in conformity with the Federal Rules of Evidence, specifically that notice requires articulation of "the permitted purpose" of the evidence "and the reasoning that supports the purpose." M.R.E. 404(b)(3)(B).



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M.R.E. 503 (Communications to clergy): amended to gender-neutral language by changing “clergyman” to “clergy member.”

M.R.E. 611(d)(2)(E) (Mode and order of examining witnesses and presenting evidence): clarified that the definition of “domestic violence” means conduct that may constitute an offense under Article 128b, UCMJ.

M.R.E. 803(16) (Statements in Ancient Documents hearsay exception): amended to change the age requirement for “ancient documents” from 20 years old to “prepared before January 1, 1998.”

M.R.E. 807 (Residual exception): amended to align with the Federal Rules of Evidence, which includes considering the “totality of the circumstances” and a written notice requirement.

M.R.E. 902(13) and M.R.E. 902(14) (Evidence that is self-authenticating): added new rules governing “Certified Records Generated by an Electronic Process or System” and “Certified Data Copied from an Electronic Device, Storage Medium, or File.”

#### **Part IV: Punitive Articles**

Paragraph 3.b.(4) (Article 79 – Lesser included offenses): amended to account for the new rule in R.C.M. 920(g), which requires that instructions on a lesser included offense shall not be given when both parties waive such an instruction.

Paragraph 19.c.(2) (Article 93 – Cruelty and maltreatment): amended to clarify that sexual harassment may be charged under Article 93, UCMJ, if it meets the elements of Article 93, despite the designation of the standalone offense of sexual harassment under Article 134, UCMJ.

Paragraphs 20.b, 20.c and 20.e (Article 93a – Prohibited activities with a military recruit or trainee by person in position of special trust): amended to remove the *mens rea* of “or reasonably should have known” (para. 20.b.(1)(c), (2)(c)), added description of types of “prohibited activity” (para. 20.c.(2)), and modified sample specifications accordingly (para. 20.e.).

Paragraph 60.e. (Article 120 – Rape and sexual assault generally): amended to add “[directly] (through the clothing)] for sample specifications under both “Aggravated sexual contact” and “Abusive sexual contact.”

Paragraph 63.b and Paragraph 63.e (Article 120c – Other sexual misconduct): amended to add “without legal justification or lawful authorization” to the element and sample specifications requiring an accused’s knowing and wrongful viewing of the private area of another person.

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Paragraph 69.c.(1) (Article 123 – Offenses concerning Government computers): amended to expand “access” offenses to include computer systems or computer networks.

Paragraph 77.d.(1) (Article 128 – Assault): amended to *reduce* the maximum punishment for simple assault when committed with an unloaded firearm or other dangerous weapon to dishonorable discharge, total forfeitures and confinement for 2 years, and to *establish* the maximum punishment for simple assault when committed with a loaded firearm to be dishonorable discharge, total forfeitures and confinement for 4 years. This Article is further amended in Annex 2.

Paragraph 77.d.(5) (Article 128 – Assault): amended to add a new maximum punishment for committing assault with the intent to commit murder, rape, or rape of a child (including confinement for 20 years) or with the intent to commit voluntary manslaughter, robbery, arson, burglary, kidnapping, sexual assault, or sexual assault of a child (including confinement for 10 years).

Paragraph 89.c.(2) (Article 132 – Retaliation): amended to expand the definition of “personnel action” to include actions taken against civilian employees.

Paragraph 90 (Article 133 – Conduct unbecoming an officer): added gender-neutral language, defined who is included in the definition of “officer” for purposes of this article, and clarified the relationship of Article 133, UCMJ, to other punitive articles.

Paragraph 91.c.(4)(a)(1)(iii) (Article 134 – General article): amended to update the text of the Federal Assimilative Crimes Act, 18 U.S.C. § 13.

## **Part V: Nonjudicial Punishment Procedure**

Paragraph 1.h (General) and Paragraph 4.c.(4) (Procedure): clarified that the Services shall use the preponderance of the evidence standard. This was already the standard for nonjudicial punishments in the Department of the Navy under JAGMAN, 0110b.

Paragraph 1.j (Service regulations and procedures): added to explicitly provide that, unless otherwise provided the Service regulations of the Service member apply to that Service member’s nonjudicial punishment proceeding.

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**Annex 2 Changes**

Annex 2 amends the MCM to account for the authorities of Special Trial Counsel established by the FY22 NDAA and implements a new randomization procedure in accordance with the amendments made to Article 25, UCMJ, by Section 543 of the FY23 NDAA. Annex 2 contains several other updates, including a new rule that requires referral authorities to consider whether the admissible evidence will probably be sufficient to obtain and sustain a conviction and an amendment to R.C.M. 703 that creates procedures for the defense to submit an ex parte request for the production of lay witnesses (who a military judge, after referral, may subpoena). Annex 2 also includes an updated Appendix 12A, which is now a re-written list of lesser included offenses that is an exhaustive list of offenses that are reasonably included in the greater offense.

Effective date of Annex 2 Changes. The amendments in Annex 2 shall take effect on 27 December 2023 and shall apply with respect to offenses that occur after that date. Pending legislation in the FY24 NDAA may update this effective date. If enacted as drafted, Code 20 and JMJ will provide additional guidance. Nothing in Annex 2 shall be construed to make punishable any act committed or omitted before 27 December 2023. Nothing in Annex 2 shall be construed to invalidate any nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action begun prior to 27 December 2023, and any such nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action may proceed in the same manner and with the same effect as if the Annex 2 amendments had not been prescribed.

**Part I: Preamble.** The EO amended the Preamble section discussing the nature and purpose of military law. The EO adds a new section discussing the evolving military justice system.

**Part II: Rules for Court-Martial**

Definitions, Unlawful Command Influence, and Direct Communications

R.C.M. 103 (Definitions and rules of construction): amended to add definitions for “deferral,” “exercise authority over,” “Lead Special Trial Counsel,” “referral authority,” and “special trial counsel,” which are relevant to the establishment of the Office of Special Trial Counsel and the authorities of special trial counsel by the FY22 NDAA. The EO also adds a definition of “preferral,” which had no previous definition under this Rule.

R.C.M. 104 (Unlawful Command influence): amended to include “taking action on the findings and sentence” as among the actions protected from improper influence.

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R.C.M. 105 (Direct communications: convening authorities and staff judge advocates; among staff judge advocates; with special trial counsel): amended to establish rules governing permissible communications between special trial counsel, staff judge advocates including the Staff Judge Advocate to the Commandant of the Marine Corps, and convening authorities.

Jurisdiction

R.C.M. 201(f)(2)(C) (Jurisdiction in general): amended to account for the possibility of special trial counsel exercising authority over a capital offense.

Initiation of Charges, Apprehension, Pretrial Restraint, Related Matters

R.C.M. 301(c) (Report of offense – Special trial counsel): added to reflect the establishment of the special trial counsel’s authority to determine whether a reported offense is a covered, known, or related offense.

R.C.M. 302(c) (Grounds for apprehension): amended to clarify that probable cause to apprehend exists when there “is a reasonable belief” that an offense has been or is being committed and the person to be apprehended committed or is committing it.

R.C.M. 303 (Preliminary inquiry into reported offenses): amended to state that commanders who receive a report of a covered offense shall promptly forward the report to a special trial counsel in accordance with R.C.M. 301(c).

R.C.M. 303A (Determination by special trial counsel to exercise authority): added to establish procedures for special trial counsel to exercise authority over an offense. A special trial counsel *shall* exercise authority over covered offenses, and *may* exercise authority over a related offense to a covered offense, or an offense known to have been committed by the suspect of a covered offense, and *shall* notify the officer exercising special court-martial convening authority over the suspect when the special trial counsel exercises authority over any reported offense. As noted above, “exercise authority over” is added by Annex 2 to the definitions described in R.C.M. 103.

R.C.M. 305(f) (Pretrial confinement – Notification to Special Trial Counsel): Added a subparagraph requiring the special trial counsel to be notified of the imposition of confinement or release from confinement of a person alleged to have committed a covered offense. The remaining subparagraphs are re-lettered to account for this new subparagraph.

R.C.M. 306 (Initial disposition of offenses over which special trial counsel does not exercise authority): amended to update the commander’s initial disposition procedures when the special trial counsel is not exercising authority

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or has deferred. The commander's authority to initially dispose of an offense is now subject to the special trial counsel's authority as provided in R.C.M. 306A.

R.C.M. 306A (Initial disposition for offenses over which a special trial counsel exercises authority): added to provide the initial disposition procedures for offenses over which a special trial counsel exercises authority. The format and organization of R.C.M. 306A is intended to mirror that of R.C.M. 306.

R.C.M. 307(a) (Preferral of charges): amended to clarify the meaning of the term "preferral." See R.C.M. 103 definitions, as amended, above.

R.C.M. 308 (Notification to accused of charges and required disclosures): amended to incorporate the required disclosures at preferral that were formerly located in R.C.M. 404A.

R.C.M. 309(b)(3) (Requests for relief from subpoena or other process): amended to include persons ordered to sit for a deposition under R.C.M. 702(b)(2) among those authorized to request relief from military judge.

R.C.M. 309(b)(10) (Pre-referral judicial proceedings): amended to allow pre-referral review of depositions.

R.C.M. 309(e) (Record of pre-referral judicial proceedings): amended to account for special trial counsel as among potential recipients of a record of a proceeding under R.C.M. 309.

#### Forwarding and Disposition of Charges

R.C.M. 401(a) (Forwarding and disposition of charges in general): amended to provide that charges over which a special trial counsel has exercised authority must be disposed of in accordance with R.C.M. 401A.

R.C.M. 401A (Disposition of charges over which a special trial counsel exercises authority and has not deferred): added to establish procedures for disposing of offenses over which a special trial counsel has exercised authority and has not deferred, to describe dispositions available for preferred specifications, and to list consequences of deferral actions. NOTE: Special trial counsel's authority is also reflected in amendments to R.C.M. 402, 403, and 404.

R.C.M. 404A (Initial Disclosures): deleted; the substance of this rule is now found in R.C.M. 308 and R.C.M. 405.

R.C.M. 405 (Preliminary hearing): amended to establish procedures for special trial counsel in the preliminary hearing process, including a procedure to notify special trial counsel if an uncharged covered offense is indicated by the evidence.

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R.C.M. 406 (Pretrial advice and special trial counsel determinations): provides procedures for charges alleging covered offenses and other charges over which special trial counsel has exercised authority and has not deferred in accordance with the FY22 NDAA amendments to Article 34, UCMJ. This amended rule also incorporates the requirements previously found in R.C.M. 406A, which is now deleted.

R.C.M. 406A (Pretrial advice before referral to special court-martial): deleted and incorporated into the amended R.C.M. 406.

Court-Martial Composition and Personnel, Convening Courts-Martial

R.C.M. 502(d)(1)(C) (Qualifications and duties of personnel of courts-martial): added to provide the qualifications required for special trial counsel.

R.C.M. 502(d)(3)(A) (Qualifications and duties of personnel of courts-martial): amended to reflect that a special trial counsel's determination to prefer or refer charges shall not disqualify that special trial counsel as an accuser.

R.C.M. 503(a) (Detailing members, military judge, and counsel, and designating military magistrates): establishes new procedures for the randomized selection of detailed members.

R.C.M. 503(c)(1) (Detailing members, military judge, and counsel, and designating military magistrates): amended to describe the procedures for the detailing of special trial counsel as trial counsel.

R.C.M. 504(b)(1) (Convening general courts-martial): amended to provide that a commanding officer shall not be considered an accuser solely due to the commanding officer's role in convening a *special or general* court-martial to which charges and specifications were referred by a special trial counsel. NOTE: The title of the subparagraph refers to general courts-martial, but the rule applies equally to special courts-martial convening authorities.

R.C.M. 505(c) (Changes of members, military judge, and counsel): amended to provide that new members shall be detailed in accordance with the amended procedures described in R.C.M. 503(a).

Referral, Service, Amendment, and Withdrawal of Charges

R.C.M. 601(d)(2) (When charges may be referred): inserted to establish requirement that referral authorities (convening authorities and special trial counsel) consider "whether the admissible evidence will probably be sufficient to obtain and sustain a conviction." R.C.M. 601(d)(3)(B) amendments implement



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the Article 34(c), UCMJ, written determination requirements for special trial counsel.

R.C.M. 603(a) (Changes to charges and specifications): amended to specify that only a special trial counsel may make major and minor changes to charges and specifications for charges over which a special trial counsel has exercised authority and has not deferred.

R.C.M. 604(a) (Withdrawal of charges): amended to specify that only a special trial counsel may withdraw or cause to be withdrawn any charge or specification over which a special trial counsel has exercised authority and has not deferred.

Pretrial Matters

R.C.M. 701(a)(1) (Discovery): amended to provide that written determinations made by special trial counsel pursuant to Article 34 and any written recommendation from a commander as to disposition must be disclosed by trial counsel.

R.C.M. 702(b) (Depositions): amended to specify that only a military judge may order a deposition for offenses over which a special trial counsel exercises authority.

R.C.M. 703(d) (Employment of experts): amended the funding rule ((d)(2), in light of independent defense resources, to provide that the defense *may* (vice shall) submit a request for expert funding in accordance with Service regulation; also, added a notice requirement ((d)(3)) for government and defense expert witnesses, including a written summary of expected testimony, and remedy for noncompliance.

R.C.M. 703(g)(3) (Production of civilian witnesses and evidence): amended to authorize the military judge to issue a post-referral subpoena for a lay witness upon defense *ex parte* request ((g)(3)(D)) and establish a notice requirement for post-referral subpoenas of lay witnesses ((g)(3)(F)).

R.C.M. 704(c) (Authority to grant immunity): amended to explicitly authorize the special trial counsel to grant immunity for offenses over which the special trial counsel has exercised authority and has not deferred.

R.C.M. 705(a) (Plea agreements): amended to account for the special trial counsel's authority to enter into plea agreements in instances where the special trial counsel has exercised authority and has not deferred, and to provide that such plea agreements are binding upon convening authorities and other commanders.



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R.C.M. 705(b)(3) (Nature of plea agreements): amended to allow the convening authority or special trial counsel to promise to take other actions within their authority in accordance with a plea agreement.

R.C.M. 705(e)(3)(B) (Plea agreement procedure): amended to require that, prior to the acceptance of a plea agreement, either the convening authority or special trial counsel, as applicable, must make best efforts to provide the victim an opportunity to submit views regarding the plea agreement.

R.C.M. 706(b) (Inquiry into the mental capacity or mental responsibility of the accused): amended to authorize any applicable convening authority to order an inquiry into the mental capacity or mental responsibility of an accused.

R.C.M. 707(b)(3)(D) (Speedy trial – Rehearings): amended to specify that the 120-day clock begins when the special trial counsel responsible for referring the charges and specifications receives the record of trial and the opinion authorizing or directing a rehearing.

R.C.M. 707(c)(1) (Speedy trial – procedure for excluding delay): amended the procedures for requests for delay, requiring notice to the defense and permitting the convening authority to delegate excludable delay authority to an Article 32 preliminary hearing officer. NOTE: Annex 1 also amended R.C.M. 707(c)(1) procedure.

### Trial Procedure Generally

R.C.M. 804 (Presence at court-martial proceedings): amended to consolidate and update the presence requirements for the accused (R.C.M. 804(a)(3)); the presence requirements that previously existed in R.C.M. 805 for military judge (R.C.M. 804(b)), members (R.C.M. 804(c)), and counsel (R.C.M. 804(d)); and to permit, at the discretion of the military judge and for good cause victim and victim's counsel to be present via audiovisual technology (R.C.M. 804(e)). NOTE: Annex I also made changes to R.C.M. 804.

R.C.M. 810 (Procedures for rehearings, new trials, other trials, and remands): amended to require notification to the special trial counsel of any remand and authorize the special trial counsel to determine if a remand is impracticable.

### Trial Procedures Through Findings

R.C.M. 902(b)(3) (Disqualification of military judge): amended to disqualify a military judge who formerly served as a special trial counsel and, in that capacity, referred charges in the case.

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R.C.M. 905(e)(2) (Effect of failure to raise defenses or objections): amended to provide that except objections to lack of jurisdiction, all motions, requests, defense, or objections, including challenges based on whether a charge alleges an offense, are forfeited unless raised before adjournment.

R.C.M. 906(b)(3) (Motions for appropriate relief – Corrections): amended to account for the special trial counsel’s written determination required by Article 34. The titles for the grounds for appropriate relief are also re-titled to better reflect the subparagraph the title identifies.

R.C.M. 908(b) (Appeal by the United States): amended to add the procedure for filing an Article 62 appeal in cases over which a special trial counsel exercises authority.

R.C.M. 908(c)(3) (Action following decision of Court of Criminal Appeals) amended by changing the phrase “certify a question” to “certify a case” regarding JAG certification to the Court of Criminal Appeals.

R.C.M. 909(c) (Pre-referral determination of accused’s capacity to stand trial): amended to articulate the procedural requirements for making a capacity determination before referral for an accused charged with offenses over which a special trial counsel has exercised authority and has not deferred.

R.C.M. 909(g) (Excludable delay from commitment): amended to require the GCMCA notify the special trial counsel regarding the end of any period of commitment for offenses over which special trial counsel has exercised authority and has not deferred.

R.C.M. 910(a) (Pleas): removed the reference to pleas for which a death sentence is mandatory.

R.C.M. 911 (Randomization and assembly of the court-martial panel): amended to establish the procedures for the randomization of court-martial members by the military judge or designee. The amendments to this Rule require the military judge to determine how many members detailed by the convening authority must be present at the initial session for which members are required, according to their randomly assigned order.

R.C.M. 912(f)(5) (Challenges and removal for cause): deleted to account for the updates to R.C.M. 503, 911, and 912, which require the military judge (or designee) to randomize the detailed members prior to voir dire and the exercises of any challenges.

R.C.M. 912(g) (Peremptory challenges): amended to provide that no member may be impaneled without being subject to peremptory challenge. If

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members who were not previously subject to peremptory challenge are required, the procedures of R.C.M. 912(g)(1) apply with respect to such members.

R.C.M. 912A (Impaneling members and alternate members): amended to account for the new randomization process articulated in R.C.M. 911 and R.C.M. 912, to require that alternate members not be notified that they are alternate members until they are excused prior to deliberations on findings (R.C.M. 912A(a)(4)), and to establish procedures for when the number of members is insufficient (R.C.M. 912A(c)).

R.C.M. 912B(a) (Excusal and replacement of members after impanelment): amended to clarify that this Rule applies prior to the start of deliberations.

R.C.M. 912B(d) (Excusal and replacement of members after the start of deliberations): added a requirement that the military judge declare a mistrial if, after the court has closed for deliberations, the number of members is reduced below the requirements of Article 29, UCMJ.

R.C.M. 918(a)(1)(B) (General findings as to a specification): amended to strike the word “named” to clarify that a lesser included offense is not required to have been specified.

### Post-Trial Procedure

R.C.M. 1113(b)(1) (Examination and disclosure of sealed materials): amended to authorize a special trial counsel to examine and disclose sealed materials for the purposes of making a referral determination.

### Appeals and Review

R.C.M. 1203(e) (Review by a Court of Criminal Appeals): amended to specify authorities regarding rehearing when findings or sentence are set aside.

R.C.M. 1204(c)(1) (Review by the Court of Appeals for the Armed Forces): amended to specify that the special trial counsel shall determine if a rehearing is impracticable if special trial counsel referred the affected charges.

R.C.M. 1210(h)(1) (New trial): amended to replace “convening authority” with “appropriate authority” to account for the authority of special trial counsel to refer.

### Summary Courts-Martial

R.C.M. 1301 and 1302 (Summary courts-martial; Convening a summary court-martial): amended to account for the existence of the Space Force.

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R.C.M. 1306 (Post-trial procedure, summary court-martial): amended to clarify that the convening authority may approve, among other actions, the sentence as adjudged.

### **Part III: Military Rules of Evidence**

#### **Privileges**

M.R.E. 505(f)(4) (Classified information): amended to account for the role of the special trial counsel concerning the invocation of privilege over classified information.

M.R.E. 506(f)(4) (Government information): amended to account for the role of the special trial counsel concerning the invocation of privilege over government information.

M.R.E. 507(e)(3) (Identity of informants): amended to account for the role of the special trial counsel when a military judge determines that disclosure of the identity of an informant is required in certain cases.

### **Part IV: Punitive Articles**

Paragraph 77.d.(1)(b) (Article 128 – Assault): deleted the word “unloaded” from the title of the rule. This paragraph was amended in Annex I to change the maximum punishment for simple assault when committed with an unloaded firearm or other dangerous weapon. Annex I also added the maximum punishment for simple assault when committed with a loaded firearm.

### **Part V: Nonjudicial Punishment Procedures**

Paragraph 1.h (General): amended to expand upon the Annex I changes to the standard and burden applicable at a nonjudicial punishment proceeding.

### **Appendix 12A – Lesser Included Offenses**

Appendix 12A is revised to provide actual notice of factually similar lesser included offenses designated by the President, pursuant to Article 79(b)(2), that are “reasonably included” in the greater offense. The revised Appendix 12A is intended to be an exhaustive list for Article 79(a)(2) purposes for all offenses that are “reasonably included” in the greater offense.

The revised Appendix 12A does not list those offenses that are “necessarily included” in a charged offense, which are also lesser included offenses pursuant to Article 79(b)(1).

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Annex 3 Changes

Annex 3 amends the MCM to account for the military justice sentencing reforms from the FY22 NDAA, including sentencing by military judge alone for all non-capital offenses. Annex 3 also adds three new Appendices to the MCM which reflect the new sentencing parameters and criteria for UCMJ offenses required by the FY22 NDAA.

Effective Date of Annex 3 Changes: The amendments in Annex 3 shall take effect on 27 December 2023 and shall apply to sentences adjudged in cases in which all findings of guilty are for offenses that occurred after 27 December 2023. Nothing in Annex 3 shall be construed to make punishable any act committed or omitted prior to 27 December 2023. Nothing in Annex 3 shall be construed to invalidate any nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action begun prior to 27 December 2023, and any such nonjudicial punishment, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action may proceed in the same manner and with the same effect as if the Annex 3 amendments had not been prescribed.

**Part II: Rules for Court-Martial**

Court-Martial Composition and Personnel Convening Courts-Martial

R.C.M. 502(a)(2)(A) (Qualifications and duties of personnel of courts-martial – members): amended to remove the requirement that members determine the appropriate sentence in non-capital cases.

Trial Procedures through Findings

R.C.M. 902A (Application of sentencing rules): deleted procedures for an accused's sentencing election, consistent with FY22 NDAA amendments to Articles 53 and 56, UCMJ, establishing judge-alone sentencing. See R.C.M. 925.

R.C.M. 906(b)(12)(B) (Unreasonable multiplication of charges): amended to remove provisions relating to member sentencing in instances where a judge finds an unreasonable multiplication of charges as applied to sentence.

R.C.M. 925 (Application of sentencing rules): added to clarify which sentencing rules apply to a given case, and to detail procedures for an accused's sentencing election, if applicable.

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Sentencing

R.C.M. 1001(a)(1) (Presentencing procedure): removed reference to accused's sentencing forum election and amended the matters to be presented by the trial counsel.

R.C.M. 1001(b)(2) (Personal data and character of prior service of the accused): amended to clarify that summary courts-martial can be disciplinary actions that may be introduced, subject to completion of Article 64 review.

R.C.M. 1001(b)(3) (Evidence of prior convictions): removed reference to summary courts-martial findings, which was moved to R.C.M. 1001(b)(2).

R.C.M. 1001(b)(4) (Evidence in aggravation): amended to clarify that appropriate evidence in aggravation against an accused includes if the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived sex (including pregnancy) or gender (including gender identity) of any person.

R.C.M. 1001(c) (Crime victim's right to be reasonably heard): amended in various parts to remove the qualifier "directly" from the definition of victim impact ((c)(2)(B)); to specify that the prohibition on the crime victim's recommending a specific sentence applies only in a capital case, ((c)(2)(D)(i) and (c)(3)); and to modify the procedure for a crime victim's unsworn statement to permit it to be made by the crime victim, the victim's counsel, or both ((c)(5)).

R.C.M. 1001(f)(2)(C) (Production of witnesses): amended to clarify that the one of the conditions for witness production is when the other party refuses to enter into a stipulation of any kind concerning the witness's testimony, not merely a stipulation of fact.

R.C.M. 1001(h) (Argument on sentence): amended to broaden the prohibition on trial counsel purporting to speak for the convening authority or "any other higher authority." The addition of the word "other" to this rule is intended to prohibit trial counsel from purporting to speak on behalf of a Lead Special Trial Counsel during sentencing arguments.

R.C.M. 1002 (Sentencing determination): amended throughout to reflect the military sentencing parameters and criteria required by the FY22 NDAA (a)(2); to add conditions when a military judge may reject a plea agreement in a case with a sentencing parameter ((a)(3)); to remove references to sentencing forum selection and non-capital sentencing by members ((b)(1)); and to move references to capital sentencing from R.C.M. 1002(e) to the restructured R.C.M. 1004.

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R.C.M. 1003(b)(5) (Restriction to specified limits): amended to clarify the restriction that may be adjudged for no more than 2 months.

R.C.M. 1003(c)(1)(A)(i) and R.C.M. 1003(c)(1)(B) (Maximum punishments): amended to reflect that the maximum limits for authorized punishments set forth in Part IV of the Manual apply to offenses listed in Part IV and offenses included in or closely related to those listed offenses, notwithstanding any applicable sentencing parameter.

R.C.M. 1004 (Capital cases): comprehensively rewritten to consolidate and clarify to the procedures for capital sentencing in conformance with the FY22 NDAA.

R.C.M. 1005 (Reconsideration of sentence in non-capital cases): replaced the rule formerly titled “instructions on sentence” with what previously was contained R.C.M. 1009 (Reconsideration). R.C.M. 1005 is also amended to remove provisions relating to members sentencing, and to add procedures for when the special trial counsel becomes aware that the sentence of a court-martial is ambiguous.

R.C.M. 1006 (Deliberations and voting on sentence): removed the rule articulating procedures for members sentencing.

R.C.M. 1007(b)(1) (Announcement of sentence): amended to clarify the procedures for the announcement of sentence in a capital case and remove reference to members sentencing.

R.C.M. 1008 (Impeachment of sentence in noncapital cases): amended to remove reference to members sentencing and updated to explicitly apply solely to non-capital cases.

R.C.M. 1009 (Reserved): is deleted to relocate amended reconsideration procedures into R.C.M. 1005.

### Post-Trial Procedure

R.C.M. 1112(b) (Certification of record of trial; general and special courts-martial): amended to remove reference to the sentencing election of an accused.

R.C.M. 1117 (Appeal of sentence by the United States): amended to create procedures for a government appeal of a sentence as a result of an incorrect application of a sentencing parameter or criteria required by the FY22 NDAA.

**Appendix 12B.** Appendix 12B, “Sentencing Parameter Table – Confinement Range Categories,” is a new appendix that establishes offense categories in order



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to implement the sentencing reform provisions of the FY22 NDAA. This Appendix was developed by the Military Sentencing Parameters and Criteria Board.

**Appendix 12C.** Appendix 12C, “Offense Category Chart,” is a new appendix that establishes an offense category chart to implement the sentencing reform provisions of the FY22 NDAA. This Appendix was developed by the Military Sentencing Parameters and Criteria Board.

**Appendix 12D.** Appendix 12D, “List of Sentencing Criteria Offenses,” is a new appendix that establishes a list of sentencing criteria by UCMJ Article in order to implement the sentencing reform provisions of the FY22 NDAA. This Appendix was developed by the Military Sentencing Parameters and Criteria Board.