

Flow of Allegation from Report to Referral under the Annex 2 MCM changes implementing the FY22 NDAA

Alleged Offense reported/discovered

Alleged offense occurred after 27 December 2023?*

R.C.M. 301(c) "Special trial counsel. All reports of covered offenses shall be forwarded promptly to a special trial counsel. A special trial counsel shall have the authority to determine whether a reported offense is a covered, known, or related offense in accordance with R.C.M. 303A."

Read this first: This is a chart that depicts the flow of an allegation from report to referral under the new military justice system enacted by Subtitle D of the FY22 NDAA. This chart is for informational-use only. The quoted rules are from the MCM, as amended by EO 14103. For questions or identified errors contact Maj Klossner at dylan.klossner@usmc.mil or 703-693-8901.

*Pending legislation in the FY24 NDAA expands the STC's authority to include discretionary authority over certain offenses that are committed on or before 27 December 2023.

INITIAL AUTHORITY DETERMINATION

R.C.M. 303A. **Determination by special trial counsel to exercise authority**
 "(a) *Initial determination.* A special trial counsel has the exclusive authority to determine if a reported offense is a covered offense."

R.C.M. 303A(b) "*Covered Offense.* If a special trial counsel determines that a reported offense is a covered offense or receives a preferred charge alleging a covered offense, a special trial counsel shall exercise authority over that covered offense."

R.C.M. 303A(c) "*Related Offenses.* If a special trial counsel exercises authority pursuant to R.C.M. 303A(b), the special trial counsel may also exercise authority over any reported offense or charge related to a covered offense, whether alleged to have been committed by the suspect of the covered offense or by anyone else subject to the UCMJ."

R.C.M. 303A(d) "*Known Offenses.* If special trial counsel exercises authority pursuant to R.C.M. 303A(b), the special trial counsel may also exercise authority over any offense or charge alleged to have been committed by the suspect of the covered offense."

R.C.M. 303A(e) "*Notification to command.* When a special trial counsel exercises authority over any reported offense, the special trial counsel shall notify the officer exercising special court-martial convening authority over the suspect."

INITIAL DISPOSITION DETERMINATION

**R.C.M. 307
Preferral**

R.C.M. 306A. **Initial disposition for offenses over which special trial counsel exercises authority**
 "(a) *Disposition of offenses that are not the subject of preferred charges.* Once a special trial counsel has exercised authority over an offense, only a special trial counsel may dispose of that offense, unless a special trial counsel defers the offense. For each offense over which a special trial counsel has exercised authority that is not subject of a preferred charge, a special trial counsel shall:
 (1) **Prefer**, or cause to be preferred, a charge; or
 (2) **Defer** the offense by electing not to prefer a charge. If a special trial counsel defers the offense, the special trial counsel shall promptly forward the offense to a commander or convening authority for disposition, and the commander or convening authority shall dispose of the offense pursuant to R.C.M. 306."

**R.C.M. 306A(a)(2)
Deferral**

[Investigation continues (if applicable). Commander may dispose of allegation according to RCM 306 and RCM 401, as applicable. Except a commander cannot refer a covered offense to a special or general court-martial.]

R.C.M. 401A. Disposition of Charges over which a special trial counsel exercises authority and has not deferred
 "(a) *Who may dispose of preferred specifications.* Regardless of who preferred a specification, only a special trial counsel may dispose of a specification alleging a covered offense or another offense over which a special trial counsel has exercised authority and has not deferred. A superior competent authority may withhold the authority of a subordinate special trial counsel to dispose of offenses charged in individual cases, types of cases, or generally."
 (b) *Prompt Determination.* [omitted from chart].
 (c) *Disposition of preferred specifications* [see below].

CONTINUED EXERCISE OF AUTHORITY

R.C.M. 401A(c)(1) "*Referral.* For those offenses over which a special trial counsel has exercised authority and not deferred, a special trial counsel may refer a charge and any specification thereunder to a special or general court-martial. If a preliminary hearing in accordance with Article 32 and R.C.M. 405 is required, a special trial counsel shall request a hearing officer and a hearing officer shall be provided by the convening authority."

R.C.M. 401A(c)(2) "*Dismissal.* For those offenses over which a special trial counsel has exercised authority and not deferred, a special trial counsel may dismiss any charge or specification thereunder. A dismissal may be accompanied by a deferral as defined in this rule. Further disposition by a special trial counsel in accordance with this rule or by a convening authority pursuant to RCM 306(c) is not barred."

R.C.M. 401A(c)(3) *Deferral.*
 "(A) *Pre-referral.* A special trial counsel may defer a charged offense by electing not to refer the charged offense to a special or general court-martial. Upon such a determination, the special trial counsel shall promptly forward the matter to the commander or convening authority for disposition. The commander or convening authority shall dispose of the offense pursuant to R.C.M. 306 or the charged offense pursuant to R.C.M. 401, as applicable. The commander or convening authority may dismiss a charge preferred by a special trial counsel. However, a convening authority may not refer a charge alleging a covered offense to a special or general court-martial.
 (B) *Post-referral.* After referral, a charge referred to a general or special court-martial by a special trial counsel must be withdrawn before the offense alleged by that charge may be deferred."

R.C.M. 405 Preliminary Hearing
 "(c)(2) For charges and specifications over which a special trial counsel has exercised authority, the special trial counsel shall determine whether a preliminary hearing is required. If a special trial counsel determines that a hearing is required, the special trial counsel shall request that a convening authority provide a preliminary hearing officer. Upon such a request, the convening authority shall provide a preliminary hearing officer and direct a preliminary hearing in accordance with this rule. If a special trial counsel determines a previous preliminary hearing is required to be reopened, the convening authority shall direct the preliminary hearing to be reopened." [remainder of rule omitted from chart].

[Preliminary Hearing Occurs]

R.C.M. 406 Pretrial advice and special trial counsel determinations
 (a) *Pretrial Advice by the Staff Judge Advocate* [Omitted from chart]
 "(b) *Special trial counsel determinations.* For all charges alleging covered offenses, and other charges over which special trial counsel has exercised authority and has not deferred, referral to a special or general court-martial may only be made by a special trial counsel and the referral must be accompanied by a special trial counsel's written determination that:
 (1) each specification under a charge alleges an offense under the UCMJ;
 (2) there is probable cause to believe that the accused committed the offense charged; and
 (3) a court-martial would have jurisdiction over the accused and the offense."
 [remainder of rule omitted from chart].

R.C.M. 503 Detailing members, military judge, and counsel, and designating military magistrates "(c)(1) *By whom detailed.* [First portion of rule omitted from chart]...For each general and special court-martial for which charges and specifications were referred by special trial counsel, a special trial counsel shall be detailed as trial counsel, and, in accordance with regulations prescribed by the Secretary concerned, a special trial counsel may detail other trial counsel who are judge advocates..." [remainder of rule omitted from chart].

R.C.M. 504 Convening courts-martial "(a) *In general.* A court-martial is created by a convening order of the convening authority." [remainder of rule omitted from chart].

[special trial counsel do not convene courts-martial]

REFERRAL

R.C.M. 601 "(a) *In general.* Referral is the order of a convening authority or a special trial counsel that one or more charges and specifications against an accused will be tried by a specified court-martial."
 R.C.M. 601 "(b) *Who may refer...*(2) For charges over which a special trial counsel has exercised authority and has not deferred, only a special trial counsel may refer charges to a court-martial."
 R.C.M. 601 "(c) *Disqualification...*(2) A special trial counsel shall not be disqualified from referring charges to a general or special court-martial as a result of having preferred charges or having caused charges to be preferred.
 R.C.M. 601 "(d) *When charges may be referred...*(1)(B) For offenses over which a special trial counsel has exercised authority and has not deferred, if a special trial counsel makes a written determination that each specification under a charge alleges an offense under the UCMJ, there is probable cause to believe that the accused committed the offense charged, and the court-martial would have jurisdiction over the accused and the offense, a special trial counsel may refer it..."
 R.C.M. 601 "(d)(2) *Consideration.* Referral authorities shall consider whether the admissible evidence will probably be sufficient to obtain and sustain a conviction."