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Title 3—

The President

Executive Order 13730 of May 20, 2016

2016 Amendments to the Manual for Courts-Martial, United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), and in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473 of April 13, 1984, as amended, it is hereby ordered as follows:

Section 1. Part II, Part III, and Part IV of the Manual for Courts-Martial, United States, are amended as described in the Annex attached and made a part of this order.

Sec. 2. These amendments shall take effect as of the date of this order, subject to the following:

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

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

THE WHITE HOUSE,
May 20, 2016.

Billing code 3295–F6–P

ANNEX

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

(a) The title of R.C.M. 104(b)(1) is amended to read as follows:

"(1) *Evaluation of member, defense counsel, or special victims' counsel.*"

(b) R.C.M. 104(b)(1)(B) is amended to read as follows:

"(B) Give a less favorable rating or evaluation of any defense counsel or special victims' counsel because of the zeal with which such counsel represented any client. As used in this rule, "special victims' counsel" are judge advocates who, in accordance with 10 U.S.C. 1044e, are designated as Special Victims' Counsel."

(c) R.C.M. 305(h)(2)(B)(iii)(a) is amended to read as follows:

"(a) The prisoner will not appear at trial, pretrial hearing, preliminary hearing, or investigation, or"

(d) R.C.M. 305(i)(2)(A)(iv) is amended to read as follows::

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

(e) A new R.C.M. 306(e) is inserted immediately after R.C.M. 306(d) and reads as follows:

"(e) *Sex-related offenses.*

(1) For purposes of this subsection, a "sex-related offense" means any allegation of a violation of Article 120, 120a, 120b, 120c, or 125, or any attempt thereof under Article 80, UCMJ.

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

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

(f) R.C.M. 403(b)(5) is amended to read as follows:

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

(g) R.C.M. 405(i)(2)(A) is amended to read as follows:

"(2) *Notice to and presence of the victim(s).*

(A) The victim(s) of an offense under the UCMJ has the right to reasonable, accurate, and timely notice of a preliminary hearing relating to the alleged offense, the right to be reasonably protected from the accused, and the reasonable right to confer with counsel for the government during the preliminary hearing. For the purposes of this rule, a "victim" is a person who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration."

(h) R.C.M. 407(a)(5) is amended to read as follows:

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

(i) R.C.M. 502(d)(4)(B) is amended to read as follows:

"(B) An investigating or preliminary hearing officer;"

(j) RCM 502(e)(2)(C) is amended to read as follows:

"(C) An investigating or preliminary hearing officer;"

(k) R.C.M. 506(b)(2) is amended by replacing "investigation" with "preliminary hearing."

(l) R.C.M 601(d)(2)(A) is amended to read as follows:

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

(m) R.C.M. 705(c)(2)(A) is amended to read as follows:

"(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or a confessional stipulation will be entered;"

(n) R.C.M. 705(d)(3) is amended to read as follows::

"(3) *Acceptance.*

(A) *In general.* The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

(B) *Victim consultation.* Whenever practicable, prior to the convening authority accepting a pretrial agreement the victim shall be provided an opportunity to express views concerning the pretrial agreement terms and conditions in accordance with regulations prescribed by the Secretary concerned. The convening authority shall consider any such views provided prior to accepting a pretrial agreement. For purposes of this rule, a "victim" is an individual who is alleged to have suffered direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration."

(o) R.C.M. 806(b)(2) is renumbered as R.C.M. 806(b)(3).

(p) A new R.C.M. 806(b)(2) is inserted immediately after R.C.M. 806(b)(1) and reads as follows:

"(2) *Right of victim to notice.* A victim of an alleged offense committed by the accused has the right to reasonable, accurate, and timely notice of court-martial proceedings relating to the offense."

(q) R.C.M. 806(b)(3) is renumbered as R.C.M. 806(b)(4).

(r) R.C.M. 806(b)(4) is renumbered as R.C.M. 806(b)(5).

(s) A new R.C.M. 806(b)(6) is inserted immediately after R.C.M. 806(b)(5) and reads as follows:

"(6) *Right of victim to be reasonably protected from the accused.* A victim of an alleged offense committed by the accused has the right to be reasonably protected from the accused."

(t) R.C.M. 902(b)(2) is amended to read as follows:

"(2) Where the military judge has acted as counsel, preliminary hearing officer, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally."

(u) R.C.M. 905(b)(1) is amended to read as follows:

"(1) Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, or referral of charges, or in the preliminary hearing;"

(v) R.C.M. 907(b)(1) is amended to read as follows:

"(1) *Nonwaivable grounds.* A charge or specification shall be dismissed at any stage of the proceedings if the court-martial lacks jurisdiction to try the accused for the offense."

(w) R.C.M. 907(b)(1)(A)-(B) is deleted.

(x) A new R.C.M. 907(b)(2)(E) is inserted immediately after R.C.M. 907(b)(2)(D)(iv) and reads as follows:

"(E) The specification fails to state an offense."

(y) R.C.M. 912(a)(1)(K) is amended to read as follows:

"(K) Whether the member has acted as accuser, counsel, preliminary hearing officer, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition."

(z) R.C.M. 912(f)(1)(F) is amended to read as follows:

"(F) Has been an investigating or preliminary hearing officer as to any offense charged;"

(aa) R.C.M. 1002 is amended to read as follows:

"(a) *Generally*. Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

(b) *Unitary Sentencing*. Sentencing by a court-martial is unitary. The court-martial will adjudge a single sentence for all the offenses of which the accused was found guilty. A court-martial may not impose separate sentences for each finding of guilty, but may impose only a single, unitary sentence covering all of the guilty findings in their entirety."

(bb) R.C.M. 1103(b)(2)(B)(i) is amended to read as follows:

"(i) The sentence adjudged includes confinement for twelve months or more or any punishment that may not be adjudged by a special court-martial; or"

(cc) The Note currently located immediately following the title of R.C.M. 1107 and prior to R.C.M. 1107(a) is amended to read as follows:

"[Note: Subsections (b)-(f) of R.C.M. 1107 apply to offenses committed on or after 24 June 2014; however, if at least one offense resulting in a finding of guilty in a case occurred prior to 24 June 2014, or includes a date range where the earliest date in the range for that offense is before 24 June 2014, then the prior version of R.C.M. 1107 applies to all offenses in the case, except that mandatory minimum sentences under Article 56(b) and applicable rules under R.C.M. 1107(d)(1)(D)–(E) still apply.]"

(dd) R.C.M. 1107(b)(5) is amended to delete the sentence, "Nothing in this subsection shall prohibit the convening authority from disapproving the findings of guilty and sentence."

(ee) R.C.M. 1107(c) is amended to read as follows:

"(c) *Action on findings.* Action on the findings is not required. However, the convening authority may take action subject to the following limitations:

(1) Where a court-martial includes a finding of guilty for an offense listed in subparagraph (c)(1)(A) of this rule, the convening authority may not take the actions listed in subparagraph (c)(1)(B) of this rule:

(A) *Offenses*

(i) Article 120(a) or (b), Article 120b, or Article 125;

(ii) Offenses for which the maximum sentence of confinement that may be adjudged exceeds two years without regard to the jurisdictional limits of the court; or

(iii) Offenses where the adjudged sentence for the case includes dismissal, dishonorable discharge, bad-conduct discharge, or confinement for more than six months.

(B) *Prohibited actions*

(i) Dismiss a charge or specification by setting aside a finding of guilty thereto; or

(ii) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

(2) The convening authority may direct a rehearing in accordance with subsection (e) of this rule.

(3) For offenses other than those listed in subparagraph (c)(1)(A) of this rule:

(A) The convening authority may change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or

(B) Set aside any finding of guilty and:

(i) Dismiss the specification and, if appropriate, the charge; or

(ii) Direct a rehearing in accordance with subsection (e) of this rule.

(4) If the convening authority acts to dismiss or change any charge or specification for an offense, the convening authority shall provide, at the same time, a written explanation of the reasons for such action. The written explanation shall be made a part of the record of trial and action thereon."

(ff) R.C.M. 1107(d) is amended to read as follows:

"(d) *Action on the sentence.*

(1) The convening authority shall take action on the sentence subject to the following:

(A) The convening authority may disapprove, commute, or suspend, in whole or in part, any portion of an adjudged sentence not explicitly prohibited by this rule, to include reduction in pay grade, forfeitures of pay and allowances, fines, reprimands, restrictions, and hard labor without confinement.

(B) Except as provided in subparagraph (d)(1)(C) of this rule, the convening authority may not disapprove, commute, or suspend, in whole or in part, that portion of an adjudged sentence that includes:

(i) confinement for more than six months; or

(ii) dismissal, dishonorable discharge, or bad-conduct discharge.

(C) *Exceptions.*

(i) *Trial counsel recommendation.* Upon the recommendation of the trial counsel, in recognition of the substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the convening authority or another person authorized to act under this rule shall have the authority to disapprove, commute, or suspend the adjudged sentence, in whole or in part, even with respect to an offense for which a mandatory minimum sentence exists.

(ii) *Pretrial agreement.* If a pretrial agreement has been entered into by the convening authority and the accused, as authorized by R.C.M. 705, the convening authority or another person authorized to act under this rule shall have the authority to approve, disapprove, commute, or suspend a sentence, in whole or in part, pursuant to the terms of the pretrial agreement. However, if a mandatory minimum sentence of a dishonorable discharge applies to an offense for which an accused has been convicted, the convening authority or another person authorized to act under this rule may commute the dishonorable discharge to a bad-conduct discharge pursuant to the terms of the pretrial agreement.

(D) If the convening authority acts to disapprove, commute, or suspend, in whole or in part, the sentence of the court-martial for an offense listed in subparagraph (c)(1)(A) of this rule, the convening authority shall provide, at the same time, a written explanation of the reasons for such action. The written explanation shall be made a part of the record of trial and action thereon."

(gg) R.C.M. 1107(e) is amended to read as follows:

"(e) *Ordering rehearing or other trial.*

(1) *Rehearings not permitted.* A rehearing may not be ordered by the convening authority where the adjudged sentence for the case includes a sentence of dismissal, dishonorable discharge, or bad-conduct discharge or confinement for more than six months.

(2) *Rehearings permitted.*

(A) *In general.* Subject to paragraph (e)(1) and subparagraphs (e)(2)(B) through (e)(2)(E) of this rule, the convening authority may in the convening authority's discretion order a rehearing. A rehearing may be ordered as to some or all offenses of which findings of guilty were entered and the sentence, or as to the sentence only.

(B) *When the convening authority may order a rehearing.* The convening authority may order a rehearing:

(i) *When taking action on the court-martial under this rule.* Prior to ordering a rehearing on a finding, the convening authority must disapprove the applicable finding and the sentence and state the reasons for disapproval of said finding. Prior to ordering a rehearing on the sentence, the convening authority must disapprove the sentence.

(ii) *When authorized to do so by superior competent authority.* If the convening authority finds a rehearing as to any offenses impracticable, the convening authority may dismiss those specifications and, when appropriate, charges.

(iii) *Sentence reassessment.* If a superior competent authority has approved some of the findings of guilty and has authorized a rehearing as to other offenses and the sentence, the convening authority may, unless otherwise directed, reassess the sentence based on the approved findings of guilty and dismiss the remaining charges. Reassessment is appropriate only where the convening authority determines that the accused's sentence would

have been at least of a certain magnitude had the prejudicial error not been committed and the reassessed sentence is appropriate in relation to the affirmed findings of guilty."

(C) *Limitations.*

(i) *Sentence approved.* A rehearing shall not be ordered if, in the same action, a sentence is approved.

(ii) *Lack of sufficient evidence.* A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense included in an offense of which the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

(iii) *Rehearing on sentence only.* A rehearing on sentence only shall not be referred to a different kind of court-martial from that which made the original findings. If the convening authority determines a rehearing on sentence is impracticable, the convening authority may approve a sentence of no punishment without conducting a rehearing.

(D) *Additional charges.* Additional charges may be referred for trial together with charges as to which a rehearing has been directed.

(E) *Lesser included offenses.* If at a previous trial the accused was convicted of a lesser included offense, a rehearing may be ordered only as to that included offense or as to a lesser included offense of the included offense that resulted in a finding of guilty at the previous trial. If, however, a rehearing is ordered improperly on the original offense charged and the

accused is convicted of that offense at the rehearing, the finding as to the lesser included offense of which the accused was convicted at the original trial may nevertheless be approved.

(3) *"Other" trial.* The convening or higher authority may order an "other" trial if the original proceedings were invalid because of lack of jurisdiction or failure of a specification to state an offense. The authority ordering an "other" trial shall state in the action the basis for declaring the proceedings invalid."

(hh) The Note currently located immediately following the title of R.C.M. 1108(b) and prior to the first line, "The convening authority may…", is amended to read as follows:

"[Note: R.C.M. 1108(b) applies to offenses committed on or after 24 June 2014; however, if at least one offense in a case occurred prior to 24 June 2014, then the prior version of R.C.M. 1108(b) applies to all offenses in the case.]"

(ii) R.C.M. 1109(a) is amended to read as follows:

"(a) *In general.* Suspension of execution of the sentence of a court-martial may be vacated for violation of any condition of the suspension as provided in this rule."

(jj) R.C.M. 1109(c)(4)(A) is amended to read as follows:

"(A) *Rights of probationer.* Before the preliminary hearing, the probationer shall be notified in writing of:"

(kk) R.C.M. 1109(c)(4)(C) is amended to read as follows:

"(C) *Decision.* The hearing officer shall determine whether there is probable cause to believe that the probationer violated the conditions of the probationer's suspension. If the hearing officer determines that probable cause is lacking, the hearing officer shall issue a written order directing that the probationer be released from confinement. If the hearing officer determines that there is probable cause to believe that the probationer violated a condition of suspension, the

hearing officer shall set forth this determination in a written memorandum that details therein the evidence relied upon and reasons for making the decision. The hearing officer shall forward the original memorandum or release order to the probationer's commander and forward a copy to the probationer and the officer in charge of the confinement facility."

(ll) A new sentence is added to the end of R.C.M. 1109(d)(1)(A) and reads as follows:

"The purpose of the hearing is for the hearing officer to determine whether there is probable cause to believe that the probationer violated a condition of the probationer's suspension."

(mm) R.C.M. 1109(d)(1)(C) is amended to read as follows:

"(C) *Hearing.* The procedure for the vacation hearing shall follow that prescribed in subsection (h) of this rule."

(nn) A new sentence is added to the end of R.C.M. 1109(d)(1)(D) and reads as follows:

"This record shall include the recommendation, the evidence relied upon, and reasons for making the decision."

(oo) R.C.M. 1109(d)(2)(A) is amended to read as follows:

"(A) *In general.* The officer exercising general court-martial jurisdiction over the probationer shall review the record produced by and the recommendation of the officer exercising special court-martial jurisdiction over the probationer, decide whether there is probable cause to believe that the probationer violated a condition of the probationer's suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising general court-martial jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence."

(pp) A new sentence is added to the end of R.C.M. 1109(e)(1) and reads as follows:

"The purpose of the hearing is for the hearing officer to determine whether there is probable cause to believe that the probationer violated the conditions of the probationer's suspension."

(qq) R.C.M. 1109(e)(3) is amended to read as follows:

"(3) *Hearing.* The procedure for the vacation hearing shall follow that prescribed in subsection (h) of this rule."

(rr) A new sentence is added to the end of R.C.M. 1109(e)(5) and reads as follows:

"This record shall include the recommendation, the evidence relied upon, and reasons for making the decision."

(ss) R.C.M. 1109(e)(6) is amended to read as follows:

"(6) *Decision.* The special court-martial convening authority shall review the record produced by and the recommendation of the person who conducted the vacation proceeding, decide whether there is probable cause to believe that the probationer violated a condition of the probationer's suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence."

(tt) A new sentence is added to the end of R.C.M. 1109(g)(1) and reads as follows:

"The purpose of the hearing is for the hearing officer to determine whether there is probable cause to believe that the probationer violated the conditions of the probationer's suspension."

(uu) R.C.M. 1109(g)(3) is amended to read as follows:

"(3) *Hearing.* The procedure for the vacation hearing shall follow that prescribed in subsection (h) of this rule."

(vv) A new sentence is added to the end of R.C.M. 1109(g)(5) and reads as follows:

"This record shall include the recommendation, the evidence relied upon, and reasons for making the decision."

(ww) R.C.M. 1109(g)(6) is amended to read as follows:

"(6) *Decision.* A commander with authority to vacate the suspension shall review the record produced by and the recommendation of the person who conducted the vacation proceeding, decide whether there is probable cause to believe that the probationer violated a condition of the probationer's suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence."

(xx) A new R.C.M. 1109(h) is inserted immediately after R.C.M. 1109(g)(7) and reads as follows:

"(h) *Hearing procedure.*

(1) *Generally.* The hearing shall begin with the hearing officer informing the probationer of the probationer's rights. The government will then present evidence. Upon the conclusion of the government's presentation of evidence, the probationer may present evidence. The probationer shall have full opportunity to present any matters in defense, extenuation, or mitigation. Both the government and probationer shall be afforded an opportunity to cross-examine adverse witnesses. The hearing officer may also question witnesses called by the parties.

(2) *Rules of evidence.* The Military Rules of Evidence—other than Mil. R. Evid. 301, 302, 303, 305, 412, and Section V—shall not apply. Nor shall Mil. R. Evid. 412(b)(1)(C) apply. In applying these rules to a vacation hearing, the term "military judge," as used in these rules,

shall mean the hearing officer, who shall assume the military judge's authority to exclude evidence from the hearing, and who shall, in discharging this duty, follow the procedures set forth in these rules. However, the hearing officer is not authorized to order production of communications covered by Mil. R. Evid. 513 or 514.

(3) *Production of witnesses and other evidence.* The procedure for the production of witnesses and other evidence shall follow that prescribed in R.C.M. 405(g), except that R.C.M. 405(g)(3)(B) shall not apply. The hearing officer shall only consider testimony and other evidence that is relevant to the limited purpose of the hearing.

(4) *Presentation of testimony.* Witness testimony may be provided in person, by video teleconference, by telephone, or by similar means of remote testimony. All testimony shall be taken under oath, except that the probationer may make an unsworn statement.

(5) *Other evidence.* If relevant to the limited purpose of the hearing, and not cumulative, a hearing officer may consider other evidence, in addition to or in lieu of witness testimony, including statements, tangible evidence, or reproductions thereof, offered by either side, that the hearing officer determines is reliable. This other evidence need not be sworn.

(6) *Presence of probationer.* The taking of evidence shall not be prevented and the probationer shall be considered to have waived the right to be present whenever the probationer:

(A) After being notified of the time and place of the proceeding is voluntarily absent; or

(B) After being warned by the hearing officer that disruptive conduct will cause removal from the proceeding, persists in conduct that is such as to justify exclusion from the proceeding.

(7) *Objections.* Any objection alleging failure to comply with these rules shall be made to the convening authority via the hearing officer. The hearing officer shall include a record of all objections in the written recommendations to the convening authority.

(8) *Access by spectators.* Vacation hearings are public proceedings and should remain open to the public whenever possible. The convening authority who directed the hearing or the hearing officer may restrict or foreclose access by spectators to all or part of the proceedings if an overriding interest exists that outweighs the value of an open hearing. Examples of overriding interests may include: preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety or privacy of a witness or alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Convening authorities or hearing officers must conclude that no lesser methods short of closing the hearing can be used to protect the overriding interest in the case. Convening authorities or hearing officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary. If a convening authority or hearing officer believes closing the hearing is necessary, the convening authority or hearing officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the record.

(9) *Victim's rights.* Any victim of the underlying offense for which the probationer received the suspended sentence, or any victim of the alleged offense that is the subject of the vacation hearing, has the right to reasonable, accurate, and timely notice of the vacation hearing. For purposes of this rule, the term "victim" is defined as an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense."

(yy) A new R.C.M. 1203(g) is inserted immediately after R.C.M. 1203(f) and reads as follows:

"(g) *Article 6b(e) petition for writ of mandamus*. The Judge Advocates General shall establish the means by which the petitions for writs of mandamus described in Article 6b(e) are forwarded to the Courts of Criminal Appeals in accordance with their rule-making functions of Article 66(f)."

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

(a) Mil. R. Evid. 304(c) is amended to read as follows:

"(c) *Corroboration of a Confession or Admission.*

(1) An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession.

(2) Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of the admission or confession, then it may be considered as evidence against the accused. Not every element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety.

(3) Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(4) *Quantum of Evidence Needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the admission or confession. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(5) *Procedure*. The military judge alone is to determine when adequate evidence of corroboration has been received. Corroborating evidence must be introduced before the admission or confession is introduced unless the military judge allows submission of such evidence subject to later corroboration."

(b) Mil. R. Evid. 311(a) is amended to read as follows:

"(a) *General rule*. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) the accused makes a timely motion to suppress or an objection to the evidence under this rule;

(2) the accused had a reasonable expectation of privacy in the person, place, or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the Armed Forces; and

(3) exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system."

(c) A new Mil. R. Evid. 311(c)(4) is inserted immediately after Mil. R. Evid. 311(c)(3)(C) and reads as follows:

"(4) *Reliance on Statute*. Evidence that was obtained as a result of an unlawful search or seizure may be used when the official seeking the evidence acts in objectively reasonable reliance on a statute later held violative of the Fourth Amendment."

(d) Mil. R. Evid. 311(d)(5)(A) is amended to read as follows:

"(A) *In general.* When the defense makes an appropriate motion or objection under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant; that the evidence was obtained by officials in objectively reasonable reliance on a statute later held violative of the Fourth Amendment; or that the deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence."

(e) Mil. R. Evid. 414(d)(2)(A) is amended to read as follows:

"(A) any conduct prohibited by Article 120 and committed with a child, or prohibited by Article 120b."

(f) Mil. R. Evid. 504 is amended to read as follows:

"Rule 504. Marital privilege

(a) *Spousal Incapacity.* A person has a privilege to refuse to testify against his or her spouse. There is no privilege under subdivision (a) when, at the time of the testimony, the parties are divorced, or the marriage has been annulled.

(b) *Confidential Communication Made During the Marriage.*

(1) *General Rule.* A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were married and not separated as provided by law.

(2) *Who May Claim the Privilege.* The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) *Exceptions.*

(1) *To Confidential Communications Only.* Where both parties have been substantial participants in illegal activity, those communications between the spouses during the marriage regarding the illegal activity in which they have jointly participated are not marital communications for purposes of the privilege in subdivision (b) and are not entitled to protection under the privilege in subdivision (b).

(2) *To Spousal Incapacity and Confidential Communications.* There is no privilege under subdivisions (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced

against the other; or with respect to the privilege in subdivision (b), the relationship was a sham at the time of the communication; or

(C) In proceedings in which a spouse is charged, in accordance with Article 133 or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328; with transporting the other spouse in interstate commerce for prostitution, immoral purposes, or another offense in violation of 18 U.S.C. §§ 2421-2424; or with violation of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.

(d) *Definitions.* As used in this rule:

(1) "A child of either" means a biological child, adopted child, or ward of one of the spouses and includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this rule only, a child is:

(A) an individual under the age of 18; or

(B) an individual with a mental handicap who functions under the age of 18.

(2) "Temporary physical custody" means a parent has entrusted his or her child with another. There is no minimum amount of time necessary to establish temporary physical custody, nor is a written agreement required. Rather, the focus is on the parent's agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances where a parent entrusts another with the care of his or her child for recurring care or during absences due to temporary duty or deployments.

(3) As used in this rule, a communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication."

(g) Mil. R. Evid. 505(e)(2) is amended by replacing "investigating officer" with "preliminary hearing officer."

(h) Mil. R. Evid. 801(d)(1)(B) is amended to read as follows:

"(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or"

(i) The first sentence of Mil. R. Evid. 803(6)(E) is amended to read as follows:

"(E) the opponent does not show that the source of information or the method or circumstance of preparation indicate a lack of trustworthiness."

(j) Mil. R. Evid. 803(7)(C) is amended to read as follows

"(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness."

(k) The first sentence of Mil. R. Evid. 803(8)(B) is amended to read as follows:

"(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness."

(l) Mil. R. Evid. 803(10)(B) is amended to read as follows:

"(B) a counsel for the government who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the accused does not object in writing within 7

days of receiving the notice — unless the military judge sets a different time for the notice or the objection."

(m) Mil. R. Evid. 804(b)(1)(B) is amended by replacing "pretrial investigation" with "preliminary hearing."

(n) Mil. R. Evid. 1101(d)(2) is amended by replacing "pretrial investigations" with "preliminary hearings."

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

(a) Paragraph 4, Article 80 – Attempts, subparagraph e. is amended to read as follows:

"e. *Maximum punishment.* Any person subject to the code who is found guilty of an attempt under Article 80 to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be adjudged, and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged. Except in the cases of attempts of Article 120(a) or (b), rape or sexual assault of a child under Article 120b(a) or (b), and forcible sodomy under Article 125, mandatory minimum punishment provisions shall not apply."

(b) Paragraph 57, Article 131 – Perjury, subparagraph c.(1) is amended by replacing "an investigation" with "a preliminary hearing."

(c) Paragraph 57, Article 131 – Perjury, subparagraph c.(3) is amended by replacing "investigation" with "preliminary hearing."

(d) Paragraph 96, Article 134 – Obstructing justice, subparagraph f is amended to read as follows:

"f. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__ , wrongfully (endeavor to) (impede (a trial by court-martial) (an investigation) (a preliminary hearing) (_____)) [influence the actions of _____, (a trial counsel of the court-martial) (a defense counsel of the court-martial) (an officer responsible for making a recommendation concerning disposition of charges) (_____)] [(influence) (alter) the testimony of _____ as a witness before a (court-martial) (an investigating officer) (a preliminary hearing) (_____)] in the case of by [(promising) (offering) (giving) to the

said _____, (the sum of $ _____) (_____ , of a value of about $ _____)] [communicating to the said _____ a threat to _____] [_____], (if) (unless) he/she, the said _____, would [recommend dismissal of the charges against said _____] [(wrongfully refuse to testify) (testify falsely concerning _____) (_____)] [(at such trial) (before such investigating officer) (before such preliminary hearing officer)] [_____]."

(e) Paragraph 108, Testify: wrongful refusal, subparagraph f is amended by replacing "officer conducting an investigation under Article 32, Uniform Code of Military Justice" with "officer conducting a preliminary hearing under Article 32, Uniform Code of Military Justice."

(f) Paragraph 110, Article 134 – Threat, communicating, subparagraph c is amended to read as follows:

"c. *Explanation.* For purposes of this paragraph, to establish that the communication was wrongful it is necessary that the accused transmitted the communication for the purpose of issuing a threat, with the knowledge that the communication would be viewed as a threat, or acted recklessly with regard to whether the communication would be viewed as a threat. However, it is not necessary to establish that the accused actually intended to do the injury threatened. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another. *See also* paragraph 109, Threat or hoax designed or intended to cause panic or public fear."

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