

dishonorable discharge and forfeiture of all pay and allowances; if the period is 6 months or more but less than 1 year, the maximum punishment by court-martial also includes a bad-conduct discharge and forfeiture of all pay and allowances; if the period is less than 6 months, the maximum punishment by court-martial also includes forfeiture of two-thirds pay per month for the authorized period of confinement.”

(q) R.C.M. 1004 is revised to read as follows:

“Rule 1004. Capital cases

(a) *In general.* In addition to the provisions in R.C.M. 1001, the provisions in this rule shall apply in capital cases. Death may be adjudged only when—

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war;

(2) The accused was properly notified that the case would be tried as a capital case and was properly notified of the aggravating factors the Government intended to prove;

(3) The accused was convicted of such an offense by either—

(A) the unanimous vote of all twelve members of the court-martial; or

(B) the military judge pursuant to the accused’s plea of guilty to such an offense;

(4) The members unanimously find that at least one of the aggravating factors under R.C.M. 1004(c) existed beyond a reasonable doubt for that offense and notice of such factor was provided in accordance with R.C.M. 1004(b);

(5) The members unanimously find that the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including any relevant aggravating factor(s); and

(6) The members unanimously determine that the sentence for that offense shall be death.

(b) *Notice.*

(1) *Referral.* The referral authority shall indicate that the case is to be tried as a capital case by including a special instruction on the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the referral authority from later adding the required special instruction, provided that—

(A) the referral authority has otherwise complied with the notice requirement of R.C.M. 1004(b)(2); and

(B) if the accused demonstrates specific prejudice from such failure to include the special instruction, the military judge determines that a continuance or a recess is an adequate remedy.

(2) *Arraignment.* Before arraignment, the trial counsel shall give the defense written notice of which specific aggravating factor(s) under R.C.M. 1004(c) the Government intends to prove and to which offense(s) the aggravating factor(s) apply. Failure to provide timely notice under this subsection of any aggravating factors under R.C.M. 1004(c) shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(c) *Aggravating factors.* The trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors enumerated below. Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118;