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Title 3—

The President

Executive Order 13696 of June 17, 2015

2015 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,
June 17, 2015.

Billing code 3295–F5

ANNEX

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

(a) R.C.M. 201(f)(1) is amended to insert the following after "Types of courts-martial" and before "(1) General courts-martial":

"[Note: R.C.M. 201(f)(1)(D) and (f)(2)(D) apply to offenses committed on or after 24 June 2014.]"

(b) R.C.M. 201(f)(1)(D) is inserted immediately after R.C.M. 201(f)(1)(C) and reads as follows:

"(D) *Jurisdiction for Certain Sexual Offenses*. Only a general court-martial has jurisdiction to try offenses under Article 120(a), 120(b), 120b(a), and 120b(b), forcible sodomy under Article 125, and attempts thereof under Article 80."

(c) R.C.M. 201(f)(2)(D) is inserted immediately after R.C.M. 201(f)(2)(C)(iii) and reads as follows:

"(D) *Certain Offenses under Articles 120, 120b, and 125*. Notwithstanding subsection (f)(2)(A), special courts-martial do not have jurisdiction over offenses under Articles 120(a), 120(b), 120b(a), and 120b(b), forcible sodomy under Article 125, and attempts thereof under Article 80. Such offenses shall not be referred to a special court-martial."

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

"(i) *Matters considered.* The review under this subsection shall include a review of the memorandum submitted by the prisoner's commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the prisoner. The prisoner and the prisoner's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable. A representative of the command may also appear before the reviewing officer to make a statement."

(e) R.C.M. 305(i)(2)(A)(iv) is inserted immediately after R.C.M. 305(i)(2)(A)(iii) and reads 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. The victim of an alleged offense shall be notified of these rights in accordance with regulations of the Secretary concerned."

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

"(C) *Action by 7-day reviewing officer.* Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release. If the reviewing officer orders immediate release, a victim of an alleged offense committed by the prisoner has the right to reasonable, accurate, and timely notice of the release, unless such notice may endanger the safety of any person."

(g) R.C.M. 305(i)(2)(D) is amended to read as follows:

"(D) *Memorandum.* The 7-day reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. The memorandum shall also state whether the victim was notified of the review, was given the opportunity to confer with the representative of the command or counsel for the government, and was given a reasonable opportunity to be heard. A copy of the memorandum and all documents considered by the 7-day reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request."

(h) R.C.M. 305(n) is inserted immediately after R.C.M. 305(m)(2) and reads as follows:

"(n) *Notice to victim of escaped prisoner.* A victim of an alleged offense committed by the prisoner for which the prisoner has been placed in pretrial confinement has the right to reasonable, accurate, and timely notice of the escape of the prisoner, unless such notice may endanger the safety of any person."

(i) R.C.M. 404(e) is amended to read as follows:

"(e) 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."

(j) A new rule, R.C.M. 404A, is inserted immediately after R.C.M. 404(e) and reads as follows:

"Rule 404A. Disclosure of matters following direction of preliminary hearing

(a) When a convening authority directs a preliminary hearing under R.C.M. 405, counsel for the government shall, subject to subsections (b) through (d) of this rule, within 5 days of issuance of the Article 32 appointing order, provide to the defense the following information or matters:

(1) Charge sheet;

(2) Article 32 appointing order;

(3) Documents accompanying the charge sheet on which the preferral decision was based;

(4) Documents provided to the convening authority when deciding to direct the preliminary hearing;

(5) Documents the counsel for the government intends to present at the preliminary hearing; and

(6) Access to tangible objects counsel for the government intends to present at the preliminary hearing.

(b) *Contraband.* If items covered by subsection (a) of this rule are contraband, the disclosure required under this rule is a reasonable opportunity to inspect said contraband prior to the hearing.

(c) *Privilege.* If items covered by subsection (a) of this rule are privileged, classified or otherwise protected under Section V of Part III, no disclosure of those items is required under this rule. However, counsel for the government may disclose privileged, classified, or otherwise protected information covered by subsection (a) of this rule if authorized by the holder of the privilege, or in the case of Mil. R. Evid. 505 or 506, if authorized by a competent authority.

(d) *Protective order if privileged information is disclosed.* If the government agrees to disclose to the accused information to which the protections afforded by Section V of Part III may apply, the convening authority, or other person designated by regulation of the Secretary concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(2)-(6) or 506(g)(2)-(5)."

(k) R.C.M. 405 is amended to read as follows:

"Rule 405. Preliminary hearing

(a) *In general.* Except as provided in subsection (k) of this rule, no charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing in substantial compliance with this rule. A preliminary hearing conducted under this rule is not intended to serve as a means of discovery and will be limited to an examination of those issues necessary to determine whether there is probable cause to conclude that an offense or offenses have been committed and whether the accused committed it; to determine whether a court-

martial would have jurisdiction over the offense(s) and the accused; to consider the form of the charge(s); and to recommend the disposition that should be made of the charge(s). Failure to comply with this rule shall have no effect on the disposition of the charge(s) if the charge(s) is not referred to a general court-martial.

(b) *Earlier preliminary hearing.* If a preliminary hearing of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the preliminary hearing and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further preliminary hearing is required.

(c) *Who may direct a preliminary hearing.* Unless prohibited by regulations of the Secretary concerned, a preliminary hearing may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(d) *Personnel.*

(1) *Preliminary hearing officer.* Whenever practicable, the convening authority directing a preliminary hearing under this rule shall detail an impartial judge advocate certified under Article 27(b), not the accuser, as a preliminary hearing officer, who shall conduct the preliminary hearing and make a report that addresses whether there is probable cause to believe that an offense or offenses have been committed and that the accused committed the offense(s); whether a court-martial would have jurisdiction over the offense(s) and the accused; the form of the charges(s); and a recommendation as to the disposition of the charge(s).

When the appointment of a judge advocate as the preliminary hearing officer is not practicable, or in exceptional circumstances in which the interest of justice warrants, the convening authority directing the preliminary hearing may detail an impartial commissioned officer, who is not the accuser, as the preliminary hearing officer. If the preliminary hearing

officer is not a judge advocate, an impartial judge advocate certified under Article 27(b) shall be available to provide legal advice to the preliminary hearing officer.

When practicable, the preliminary hearing officer shall be equal or senior in grade to the military counsel detailed to represent the accused and the government at the preliminary hearing. The Secretary concerned may prescribe additional limitations on the appointment of preliminary hearing officers.

The preliminary hearing officer shall not depart from an impartial role and become an advocate for either side. The preliminary hearing officer is disqualified to act later in the same case in any other capacity.

(2) *Counsel to represent the United States.* A judge advocate, not the accuser, shall serve as counsel to represent the United States, and shall present evidence on behalf of the government relevant to the limited scope and purpose of the preliminary hearing as set forth in subsection (a) of this rule.

(3) *Defense counsel.*

(A) *Detailed counsel.* Except as provided in subsection (d)(3)(B) of this rule, military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) *Individual military counsel.* The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b).

(C) *Civilian counsel.* The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the preliminary hearing. However, the preliminary hearing shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subsections (d)(3)(A) and (B) of this rule.

(4) *Others*. The convening authority who directed the preliminary hearing may also, as a matter of discretion, detail or request an appropriate authority to detail:

(A) A reporter; and

(B) An interpreter.

(e) *Scope of preliminary hearing.*

(1) The preliminary hearing officer shall limit the inquiry to the examination of evidence, including witnesses, necessary to:

(A) Determine whether there is probable cause to believe an offense or offenses have been committed and whether the accused committed it;

(B) Determine whether a court-martial would have jurisdiction over the offense(s) and the accused;

(C) Consider whether the form of the charge(s) is proper; and

(D) Make a recommendation as to the disposition of the charge(s).

(2) If evidence adduced during the preliminary hearing indicates that the accused committed any uncharged offense(s), the preliminary hearing officer may examine evidence and hear witnesses relating to the subject matter of such offense(s) and make the findings and recommendations enumerated in subsection (e)(1) of this rule regarding such offense(s) without the accused first having been charged with the offense. The accused's rights under subsection (f)(2) of this rule, and, where it would not cause undue delay to the proceedings, subsection (g) of this rule, are the same with regard to both charged and uncharged offenses. When considering uncharged offenses identified during the preliminary hearing, the preliminary hearing officer shall inform the accused of the general nature of each uncharged offense considered, and

otherwise afford the accused the same opportunity for representation, cross examination, and presentation afforded during the preliminary hearing of any charged offense.

(f) *Rights of the accused.*

(1) Prior to any preliminary hearing under this rule the accused shall have the right to:

(A) Notice of any witnesses that the government intends to call at the preliminary hearing and copies of or access to any written or recorded statements made by those witnesses that relate to the subject matter of any charged offense;

(i) For purposes of this rule, a "written statement" is one that is signed or otherwise adopted or approved by the witness that is within the possession or control of counsel for the government; and

(ii) For purposes of this rule, a "recorded statement" is an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a digital or other recording or a transcription thereof that is within the possession or control of counsel for the government.

(B) Notice of, and reasonable access to, any other evidence that the government intends to offer at the preliminary hearing; and

(C) Notice of, and reasonable access to, evidence that is within the possession or control of counsel for the government that negates or reduces the degree of guilt of the accused for an offense charged.

(2) At any preliminary hearing under this rule the accused shall have the right to:

(A) Be advised of the charges under consideration;

(B) Be represented by counsel;

(C) Be informed of the purpose of the preliminary hearing;

(D) Be informed of the right against self-incrimination under Article 31;

(E) Except in the circumstances described in R.C.M. 804(c)(2), be present throughout the taking of evidence;

(F) Cross-examine witnesses on matters relevant to the limited scope and purpose of the preliminary hearing;

(G) Present matters in defense and mitigation relevant to the limited scope and purpose of the preliminary hearing; and

(H) Make a statement relevant to the limited scope and purpose of the preliminary hearing.

(g) *Production of Witnesses and Other Evidence.*

(1) *Military Witnesses.*

(A) Prior to the preliminary hearing, defense counsel shall provide to counsel for the government the names of proposed military witnesses whom the accused requests that the government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the government shall respond that either: (1) the government agrees that the witness's testimony is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and will seek to secure the witness's testimony for the hearing; or (2) the government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing.

(B) If the government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing.

(C) If the government does not object to the proposed defense military witness or the preliminary hearing officer determines that the military witness is relevant, not cumulative, and necessary, counsel for the government shall request that the commanding officer of the proposed military witness make that person available to provide testimony. The commanding officer shall determine whether the individual is available based on operational necessity or mission requirements, except that a victim, as defined in this rule, who declines to testify shall be deemed to be not available. If the commanding officer determines that the military witness is available, counsel for the government shall make arrangements for that individual's testimony. The commanding officer's determination of unavailability due to operational necessity or mission requirements is final. If there is a dispute among the parties, the military witness's commanding officer shall determine whether the witness testifies in person, by video teleconference, by telephone, or by similar means of remote testimony.

(2) *Civilian Witnesses.*

(A) Defense counsel shall provide to counsel for the government the names of proposed civilian witnesses whom the accused requests that the government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the government shall respond that either: (1) the government agrees that the witness's testimony is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and will seek to secure the witness's testimony for the hearing; or (2) the government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing.

(B) If the government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing.

(C) If the government does not object to the proposed civilian witness or the preliminary hearing officer determines that the civilian witness's testimony is relevant, not cumulative, and necessary, counsel for the government shall invite the civilian witness to provide testimony and, if the individual agrees, shall make arrangements for that witness's testimony. If expense to the government is to be incurred, the convening authority who directed the preliminary hearing, or the convening authority's delegate, shall determine whether the witness testifies in person, by video teleconference, by telephone, or by similar means of remote testimony.

(3) *Other evidence.*

(A) *Evidence under the control of the government.*

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the government a list of evidence under the control of the government the accused requests the government produce to the defense for introduction at the preliminary hearing. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the government shall respond that either: (1) the government agrees that the evidence is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and shall make reasonable efforts to obtain the evidence; or (2) the government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing.

(ii) If the government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced.

The preliminary hearing officer shall determine whether the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing. If the preliminary hearing officer determines that the evidence shall be produced, counsel for the government shall make reasonable efforts to obtain the evidence.

(B) *Evidence not under the control of the government.*

(i) Evidence not under the control of the government may be obtained through noncompulsory means or by *subpoenas duces tecum* issued by counsel for the government in accordance with the process established by R.C.M. 703.

(ii) Prior to the preliminary hearing, defense counsel shall provide to counsel for the government a list of evidence not under the control of the government that the accused requests the government obtain. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the government shall respond that either: (1) the government agrees that the evidence is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and shall issue *subpoenas duces tecum* for the evidence; or (2) the government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing.

(iii) If the government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. If the preliminary hearing officer determines that the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing and that the issuance of *subpoenas duces tecum* would not cause undue delay to the preliminary hearing, the preliminary hearing officer shall direct counsel for the government to issue *subpoenas duces*

tecum for the defense-requested evidence. The preliminary hearing officer shall note in the report of preliminary hearing any failure on the part of counsel for the government to issue *subpoenas duces tecum* directed by the preliminary hearing officer.

(h) *Military Rules of Evidence.* The Military Rules of Evidence do not apply in preliminary hearings under this rule except as follows:

(1) Mil. R. Evid. 301-303 and 305 shall apply in their entirety.

(2) Mil. R. Evid. 412 shall apply in any case that includes a charge defined as a sexual offense in Mil. R. Evid. 412(d), except that Mil. R. Evid. 412(b)(1)(C) shall not apply.

(3) Mil. R. Evid., Section V, Privileges, shall apply, except that Mil. R. Evid. 505(f)-(h) and (j); 506(f)-(h), (j), (k), and (m); and 514(d)(6) shall not apply.

(4) In applying these rules to a preliminary hearing, the term "military judge," as used in these rules, shall mean the preliminary hearing officer, who shall assume the military judge's authority to exclude evidence from the preliminary hearing, and who shall, in discharging this duty, follow the procedures set forth in the rules cited in subsections (h)(1)-(3) of this rule. However, the preliminary hearing officer is not authorized to order production of communications covered by Mil. R. Evid. 513 and 514.

(5) Failure to meet the procedural requirements of the applicable rules of evidence shall result in exclusion of that evidence from the preliminary hearing, unless good cause is shown.

(i) *Procedure.*

(1) *Generally.* The preliminary hearing shall begin with the preliminary hearing officer informing the accused of the accused's rights under subsection (f) of this rule. Counsel for the government will then present evidence. Upon the conclusion of counsel for the government's presentation of evidence, defense counsel may present matters in defense and mitigation

consistent with subsection (f) of this rule. For the purposes of this rule, "matters in mitigation" are defined as matters that may serve to explain the circumstances surrounding a charged offense. Both counsel for the government and defense shall be afforded an opportunity to cross-examine adverse witnesses. The preliminary hearing officer may also question witnesses called by the parties. If the preliminary hearing officer determines that additional evidence is necessary to satisfy the requirements of subsection (e) of this rule, the preliminary hearing officer may provide the parties an opportunity to present additional testimony or evidence relevant to the limited scope and purpose of the preliminary hearing. The preliminary hearing officer shall not consider evidence not presented at the preliminary hearing. The preliminary hearing officer shall not call witnesses *sua sponte*.

(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 and the reasonable right to confer with counsel for the government. 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.

(B) A victim of an offense under consideration at the preliminary hearing is not required to testify at the preliminary hearing.

(C) A victim has the right not to be excluded from any portion of a preliminary hearing related to the alleged offense, unless the preliminary hearing officer, after receiving clear and convincing evidence, determines the testimony by the victim would be materially altered if the victim heard other testimony at the proceeding.

(D) A victim shall be excluded if a privilege set forth in Mil. R. Evid. 505 or 506 is invoked or if evidence is offered under Mil. R. Evid. 412, 513, or 514, for charges other than those in which the victim is named.

(3) *Presentation of evidence.*

(A) *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 accused may make an unsworn statement. The preliminary hearing officer shall only consider testimony that is relevant to the limited scope and purpose of the preliminary hearing.

(B) *Other evidence.* If relevant to the limited scope and purpose of the preliminary hearing, and not cumulative, a preliminary 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 preliminary hearing officer determines is reliable. This other evidence need not be sworn.

(4) *Access by spectators.* Preliminary hearings are public proceedings and should remain open to the public whenever possible. The convening authority who directed the preliminary hearing or the preliminary 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 preliminary 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 preliminary hearing

officers must conclude that no lesser methods short of closing the preliminary hearing can be used to protect the overriding interest in the case. Convening authorities or preliminary 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 preliminary hearing officer believes closing the preliminary hearing is necessary, the convening authority or preliminary hearing officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the report of preliminary hearing.

(5) *Presence of accused.* The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present whenever the accused:

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

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

(6) *Recording of the preliminary hearing.* Counsel for the government shall ensure that the preliminary hearing is recorded by a suitable recording device. A victim, as defined by subsection (i)(2)(A) of this rule, may request access to, or a copy of, the recording of the proceedings. Upon request, counsel for the government shall provide the requested access to, or a copy of, the recording to the victim not later than a reasonable time following dismissal of the charges, unless charges are dismissed for the purpose of re-referral, or court-martial adjournment. A victim is not entitled to classified information or access to or a copy of a recording of closed sessions that the victim did not have the right to attend under subsections (i)(2)(C) or (i)(2)(D) of this rule.

(7) *Objections.* Any objection alleging a failure to comply with this rule shall be made to the convening authority via the preliminary hearing officer.

(8) *Sealed exhibits and proceedings.* The preliminary hearing officer has the authority to order exhibits, proceedings, or other matters sealed as described in R.C.M. 1103A.

(j) *Report of preliminary hearing.*

(1) *In general.* The preliminary hearing officer shall make a timely written report of the preliminary hearing to the convening authority who directed the preliminary hearing.

(2) *Contents.* The report of preliminary hearing shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or, if not present, the reason why;

(B) The substance of the testimony taken on both sides;

(C) Any other statements, documents, or matters considered by the preliminary hearing officer, or recitals of the substance or nature of such evidence;

(D) A statement that an essential witness may not be available for trial;

(E) An explanation of any delays in the preliminary hearing;

(F) A notation if counsel for the government failed to issue a *subpoena duces tecum* that was directed by the preliminary hearing officer;

(G) The preliminary hearing officer's determination as to whether there is probable cause to believe the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing occurred;

(H) The preliminary hearing officer's determination as to whether there is probable cause to believe the accused committed the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing;

(I) The preliminary hearing officer's determination as to whether a court-martial has jurisdiction over the offense(s) and the accused;

(J) The preliminary hearing officer's determination as to whether the charge(s) and specification(s) are in proper form; and

(K) The preliminary hearing officer's recommendations regarding disposition of the charge(s).

(3) *Sealed exhibits and proceedings.* If the report of preliminary hearing contains exhibits, proceedings, or other matters ordered sealed by the preliminary hearing officer in accordance with R.C.M. 1103A, counsel for the government shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure.

(4) *Distribution of the report.* The preliminary hearing officer shall cause the report to be delivered to the convening authority who directed the preliminary hearing. That convening authority shall promptly cause a copy of the report to be delivered to each accused.

(5) *Objections.* Any objection to the report shall be made to the convening authority who directed the preliminary hearing, via the preliminary hearing officer. Upon receipt of the report, the accused has 5 days to submit objections to the preliminary hearing officer. The preliminary hearing officer will forward the objections to the convening authority as soon as practicable. This subsection does not prohibit a convening authority from referring the charge(s) or taking other action within the 5-day period.

(k) *Waiver.* The accused may waive a preliminary hearing under this rule. However, the convening authority authorized to direct the preliminary hearing may direct that it be conducted notwithstanding the waiver. Failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the convening authority who directed the preliminary hearing, a superior convening authority, or the military judge, as appropriate, for good cause shown."

(l) R.C.M. 601(g) is inserted immediately after R.C.M. 601(f) and reads as follows:

"(g) *Parallel convening authorities.* If it is impracticable for the original convening authority to continue exercising authority over the charges, the convening authority may cause the charges, even if referred, to be transmitted to a parallel convening authority. This transmittal must be in writing and in accordance with such regulations as the Secretary concerned may prescribe. Subsequent actions taken by the parallel convening authority are within the sole discretion of that convening authority."

(m) R.C.M. 702(a) is amended to read as follows:

"(a) *In general.* A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a preliminary hearing under Article 32 or a court-martial. A victim's declination to testify at a preliminary hearing or a victim's declination to submit to pretrial interviews shall not, by themselves, be considered exceptional circumstances. In accordance with subsection (b) of this rule, the convening authority or military judge may order a deposition of a victim only if it is determined, by a preponderance of the evidence, that the victim will not be available to testify at court-martial."

(n) R.C.M. 702(c)(2) is amended to read as follows:

"(2) *Contents of request.* A request for a deposition shall include:

(A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(B) A statement of the matters on which the person is to be examined; and

(C) Whether an oral or written deposition is requested."

(o) R.C.M. 702(c)(3)(A) is amended to read as follows:

"(A) Upon receipt of a request for a deposition, the convening authority or military judge shall determine whether the requesting party has shown, by a preponderance of the evidence, that due to exceptional circumstances and in the interest of justice, the testimony of the prospective witness must be taken and preserved for use at a preliminary hearing under Article 32 or court-martial."

(p) R.C.M. 702(d)(1) is amended to read as follows:

"(1) *Detail of deposition officer.* When a request for a deposition is approved, the convening authority shall detail a judge advocate certified under Article 27(b) to serve as deposition officer. When the appointment of a judge advocate as deposition officer is not practicable, the convening authority may detail an impartial commissioned officer or appropriate civil officer authorized to administer oaths, not the accuser, to serve as deposition officer. If the deposition officer is not a judge advocate, an impartial judge advocate certified under Article 27(b) shall be made available to provide legal advice to the deposition officer."

(q) R.C.M. 703(e)(2)(B) is amended to read as follows:

"(B) *Contents.* A subpoena shall state the command by which the proceeding is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command the person to whom it is directed to produce books, papers, documents, data, or other objects or electronically stored information designated therein at the proceeding or at an earlier time for inspection by the parties. A subpoena issued for a preliminary hearing pursuant to Article 32 shall not command any person to attend or give testimony at an Article 32 preliminary hearing."

(r) R.C.M. 703(e)(2)(C) is amended to read as follows:

"(C) *Who may issue.*

(1) A subpoena to secure evidence may be issued by:

(a) The summary court-martial;

(b) At an Article 32 preliminary hearing, detailed counsel for the government;

(c) After referral to a court-martial, detailed trial counsel;

(d) The president of a court of inquiry; or

(e) An officer detailed to take a deposition."

(s) R.C.M. 703(f)(4)(B) is amended to read as follows:

"(B) *Evidence not under the control of the government.* Evidence not under the control of the government may be obtained by a subpoena issued in accordance with subsection (e)(2) of this rule. A *subpoena duces tecum* to produce books, papers, documents, data, or other objects or electronically stored information for a preliminary hearing pursuant to Article 32 may be issued, following the convening authority's order directing such preliminary hearing, by counsel for the government. A person in receipt of a *subpoena duces tecum* for an Article 32 hearing need not personally appear in order to comply with the subpoena."

(t) R.C.M. 801(a)(6) is inserted after R.C.M. 801(a)(5) and reads as follows:

"(6) In the case of a victim of an offense under the UCMJ who is under 18 years of age and not a member of the armed forces, or who is incompetent, incapacitated, or deceased, designate in writing a family member, a representative of the estate of the victim, or another suitable individual to assume the victim's rights under the UCMJ.

(A) For the purposes of this rule, the individual is designated for the sole purpose of assuming the legal rights of the victim as they pertain to the victim's status as a victim of any offense(s) properly before the court.

(B) *Procedure to determine appointment of designee.*

(i) As soon as practicable, trial counsel shall notify the military judge, counsel for the accused, and the victim(s) of any offense(s) properly before the court when there is an apparent requirement to appoint a designee under this rule.

(ii) The military judge will determine if the appointment of a designee is required under this rule.

(iii) At the discretion of the military judge, victim(s), trial counsel, and the accused may be given the opportunity to recommend to the military judge individual(s) for appointment.

(iv) The military judge is not required to hold a hearing before determining whether a designation is required or making such an appointment under this rule.

(v) If the military judge determines a hearing pursuant to Article 39(a), UCMJ, is necessary, the following shall be notified of the hearing and afforded the right to be present at the hearing: trial counsel, accused, and the victim(s).

(vi) The individual designated shall not be the accused.

(C) At any time after appointment, a designee shall be excused upon request by the designee or a finding of good cause by the military judge.

(D) If the individual appointed to assume the victim's rights is excused, the military judge shall appoint a successor consistent with this rule."

(u) 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 attend.* A victim of an alleged offense committed by the accused may not be excluded from a court-martial relating to the offense unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be

materially altered if the victim heard other testimony at that hearing or proceeding. The right to attend requires reasonable, accurate, and timely notice of a court-martial relating to the offense."

(v) A new R.C.M. 806(b)(3) is inserted immediately after the new R.C.M. 806(b)(2) and reads as follows:

"(3) *Right of victim to confer.* A victim of an alleged offense committed by the accused has the reasonable right to confer with the trial counsel."

(w) R.C.M. 806(b)(2) is renumbered as R.C.M. 806(b)(4).

(x) R.C.M. 906(b)(8) is amended to read as follows:

"(8) *Relief from pretrial confinement.* Upon a motion for release from pretrial confinement, a victim of an alleged offense committed by the accused has the right to reasonable, accurate, and timely notice of the motion and any hearing, the right to confer with trial counsel, and the right to be reasonably heard. Inability to reasonably afford a victim these rights shall not delay the proceedings. The right to be heard under this rule includes the right to be heard through counsel."

(y) R.C.M. 912(i)(3) is amended to read as follows:

"(3) *Preliminary hearing officer.* For purposes of this rule, "preliminary hearing officer" includes any person who has examined charges under R.C.M. 405 and any person who was counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged."

(z) R.C.M. 1001(a)(1)(B) is amended to read as follows:

"(B) Victim's right to be reasonably heard. *See* R.C.M. 1001A."

(aa) R.C.M. 1001(a)(1)(C)–(G) are amended to read as follows:

"(C) Presentation by the defense of evidence in extenuation or mitigation or both.

(D) Rebuttal.

(E) Argument by trial counsel on sentence.

(F) Argument by defense counsel on sentence.

(G) Rebuttal arguments in the discretion of the military judge."

(bb) A new rule, R.C.M. 1001A, is inserted immediately after R.C.M. 1001(g) and reads as follows:

"Rule 1001A. Crime victims and presentencing

(a) *In general.* A crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at a sentencing hearing relating to that offense. A victim under this rule is not considered a witness for purposes of Article 42(b). Trial counsel shall ensure the victim is aware of the opportunity to exercise that right. If the victim exercises the right to be reasonably heard, the victim shall be called by the court-martial. This right is independent of whether the victim testified during findings or is called to testify under R.C.M. 1001.

(b) *Definitions.*

(1) *Crime victim.* For purposes of this rule, a "crime victim" is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty.

(2) *Victim Impact.* For the purposes of this rule, "victim impact" includes any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty.

(3) *Mitigation.* For the purposes of this rule, "mitigation" includes a matter to lessen the punishment to be adjudged by the court-martial or to furnish grounds for a recommendation of clemency.

(4) *Right to be reasonably heard.*

(A) *Capital cases.* In capital cases, for purposes of this rule, the "right to be reasonably heard" means the right to make a sworn statement.

(B) *Non-capital cases.* In non-capital cases, for purposes of this rule, the "right to be reasonably heard" means the right to make a sworn or unsworn statement.

(c) *Content of statement.* The content of statements made under subsections (d) and (e) of this rule may include victim impact or matters in mitigation.

(d) *Sworn statement.* The victim may give a sworn statement under this rule and shall be subject to cross-examination concerning the statement by the trial counsel or defense counsel or examination on the statement by the court-martial, or all or any of the three. When a victim is under 18 years of age, incompetent, incapacitated, or deceased, the sworn statement may be made by the victim's designee appointed under R.C.M. 801(a)(6). Additionally, a victim under 18 years of age may elect to make a sworn statement.

(e) *Unsworn statement.* The victim may make an unsworn statement and may not be cross-examined by the trial counsel or defense counsel upon it or examined upon it by the court-martial. The prosecution or defense may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both. When a victim is under 18 years of age, incompetent, incapacitated, or deceased, the unsworn statement may be made by the victim's designee appointed under R.C.M. 801(a)(6). Additionally, a victim under 18 years of age may elect to make an unsworn statement.

(1) *Procedure for presenting unsworn statement.* After the announcement of findings, a victim who would like to present an unsworn statement shall provide a copy to the trial counsel, defense counsel, and military judge. The military judge may waive this requirement for good cause shown.

(2) Upon good cause shown, the military judge may permit the victim's counsel to deliver all or part of the victim's unsworn statement.

(cc) R.C.M. 1103A(a) is amended to read as follows:

"(a) *In general.* If the report of preliminary hearing or record of trial contains exhibits, proceedings, or other matter ordered sealed by the preliminary hearing officer or military judge, counsel for the government or trial counsel shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure. Counsel for the government or trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the preliminary hearing officer or military judge, and inserted at the appropriate place in the original record of trial. Copies of the report of preliminary hearing or record of trial shall contain appropriate annotations that matters were sealed by order of the preliminary hearing officer or military judge and have been inserted in the report of preliminary hearing or original record of trial. This Rule shall be implemented in a manner consistent with Executive Order 13526, concerning classified national security information."

(dd) R.C.M. 1103A(b)(1) is amended to read as follows:

"(1) *Prior to referral.* The following individuals may examine sealed materials only if necessary for proper fulfillment of their responsibilities under the UCMJ, the MCM, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility: the judge advocate advising the convening authority who directed the Article 32 preliminary hearing; the convening authority who directed the Article 32 preliminary hearing; the staff judge advocate to the general court-martial convening authority; and the general court-martial convening authority."

(ee) R.C.M. 1103A(b)(5) is inserted immediately after R.C.M. 1103A(b)(4)(E)(viii) and reads as follows:

"(5) *Examination of sealed matters.* For the purpose of this rule, "examination" includes reading, viewing, photocopying, photographing, disclosing, or manipulating the sealed matters in any way."

(ff) R.C.M. 1105 is amended by inserting the following Note before the rule's heading:

"[Note: R.C.M. 1105(b)(1) and (b)(2)(C) apply to offenses committed on or after 24 June 2014.]"

(gg) R.C.M. 1105(b)(1) is amended to read as follows:

"(1) The accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence, except as may be limited by R.C.M. 1107(b)(3)(C). The convening authority is only required to consider written submissions."

(hh) R.C.M. 1105(b)(2)(C) is amended to read as follows:

"(C) Matters in mitigation that were not available for consideration at the court-martial, except as may be limited by R.C.M. 1107(b)(3)(B); and"

(ii) R.C.M. 1107 is amended by inserting the following Note before the rule's heading:

"[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 in a case occurred prior to 24 June 2014, then the prior version of RCM 1107 applies to all offenses in the case, except that mandatory minimum sentences under Article 56(b) and applicable rules under RCM 1107(d)(1)(D)-(E) still apply.]"

(jj) R.C.M. 1107(b)(1) is amended to read as follows:

"(1) *Discretion of convening authority.* Any action to be taken on the findings and sentence is within the sole discretion of the convening authority. The convening authority is not required to review the case for legal errors or factual sufficiency."

(kk) R.C.M. 1107(b)(3)(A)(iii) is amended to read as follows:

"(iii) Any matters submitted by the accused under R.C.M. 1105 or, if applicable, R.C.M. 1106(f);"

(ll) R.C.M. 1107(b)(3)(A)(iv) is amended to read as follows:

"(iv) Any statement submitted by a crime victim pursuant to R.C.M. 1105A and subsection (C) of this rule."

(mm) R.C.M. 1107(b)(3)(B)(i) is amended to read as follows:

"(i) The record of trial, subject to the provisions of R.C.M. 1103A and subsection (C) of this rule;"

(nn) 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) For offenses charged under subsection (a) or (b) of Article 120, offenses charged under Article 120b, and offenses charged under Article 125:

(A) The convening authority is prohibited from:

(i) Setting aside any finding of guilt or dismissing a specification; or

(ii) Changing 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.

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

(2) For offenses other than those listed in subsection (c)(1) of this rule for which the maximum sentence of confinement that may be adjudged does not exceed two years without regard to the jurisdictional limits of the court, and the sentence adjudged does not include dismissal, a dishonorable discharge, bad-conduct discharge, or confinement for more than six months:

(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.

(3) 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."

(oo) R.C.M. 1107(d)(1) is amended to read as follows:

"(1) *In general.*

(A) The convening authority may not disapprove, commute, or suspend, in whole or in part, any portion of an adjudged sentence of confinement for more than six months.

(B) The convening authority may not disapprove, commute, or suspend that portion of an adjudged sentence that includes a dismissal, dishonorable discharge, or bad-conduct discharge.

(C) The convening authority may disapprove, commute, or suspend, in whole or in part, any portion of an adjudged sentence when doing so is not explicitly prohibited by this Rule.

Actions affecting reduction in pay grade, forfeitures of pay and allowances, fines, reprimands, restrictions, and hard labor without confinement are not explicitly prohibited by this Rule.

(D) The convening authority shall not disapprove, commute, or suspend any mandatory minimum sentence of dismissal or dishonorable discharge except in accordance with subsection (E) of this Rule.

(E) *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 section 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 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. The convening authority may commute a mandatory sentence of a dishonorable discharge to a bad-conduct discharge pursuant to the terms of the pretrial agreement.

(F) If the convening authority acts to disapprove, commute, or suspend, in whole or in part, the sentence of the court-martial 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."

(pp) R.C.M. 1107(d)(2) is amended to read as follows:

"(2) *Determining what sentence should be approved.* The convening authority shall, subject to the limitations in subsection (d)(1) above, approve that sentence that is warranted by the circumstances of the offense and appropriate for the accused."

(qq) R.C.M. 1107(e)(1)(B)(ii) is amended to read as follows:

"(ii) In cases subject to review by the Court of Criminal Appeals, before the case is forwarded under R.C.M. 1111(a)(1) or (b)(1), but only as to any sentence that was approved or findings of guilty as were not disapproved in any earlier action. In cases of rehearing under subparagraph (c)(2) of this Rule, a supplemental action disapproving the sentence and some or all of the findings , as appropriate, shall be taken; or"

(rr) R.C.M. 1107(e)(1)(C)(ii) is deleted.

(ss) R.C.M. 1107(e)(1)(C)(iii) is renumbered as R.C.M. 1107(e)(1)(C)(ii).

(tt) R.C.M. 1107(f)(2) is amended to read as follows:

"(2) *Modification of initial action.* Subject to the limitations in subsections (c) and (d) of this Rule, the convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified. The convening authority may also recall and modify any action at any time prior to forwarding the record for review, as long as the modification does not result in action less favorable to the accused than the earlier action. In addition, in any special court-martial, the convening authority may recall and correct an illegal, erroneous, incomplete, or ambiguous action at any time before completion of review under R.C.M. 1112, as long as the correction does not result in action less favorable to the accused than the earlier action. When so directed by a higher reviewing authority or the Judge Advocate General, the convening authority shall modify any incomplete, ambiguous, void, or inaccurate action noted in review of the record of

trial under Articles 64, 66, 67, or examination of the record of trial under Article 69. The convening authority shall personally sign any supplementary or corrective action. A written explanation is required for any modification of initial action that: 1) sets aside any finding of guilt or dismisses or changes any charge or specification for an offense; or 2) disapproves, commutes, or suspends, in whole or in part, the sentence. The written explanation shall be made a part of the record of trial and action thereon."

(uu) R.C.M. 1107(g) is amended to read as follows:

"(g) *Incomplete, ambiguous, or erroneous action.* When the action of the convening authority or of a higher authority is incomplete or ambiguous or contains error, the authority who took the incomplete, ambiguous, or erroneous action may be instructed by an authority acting under Articles 64, 66, 67, 67a, or 69 to withdraw the original action and substitute a corrected action."

(vv) R.C.M. 1108(b) is amended to insert the following before the rule's text:

"[Note: R.C.M. 1108(b) applies to offenses committed on or after 24 June 2014.]"

(ww) R.C.M. 1108(b) is amended to read as follows:

"(b) *Who may suspend and remit.* The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence of a court-martial, except for a sentence of death or as prohibited under R.C.M. 1107(d). The general court-martial convening authority over the accused at the time of the court-martial may, when taking action under R.C.M. 1112(f), suspend or remit any part of the sentence. The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President or a

sentence of confinement for life without eligibility for parole that has been ordered executed. The Secretary concerned may, however, suspend or remit the unexecuted part of a sentence of confinement for life without eligibility for parole after the service of a period of confinement of not less than 20 years. The commander of the accused who has the authority to convene a court-martial of the kind that adjudged the sentence may suspend or remit any part of the unexecuted part of any sentence by summary court-martial or of any sentence by special court-martial that does not include a bad-conduct discharge regardless of whether the person acting has previously approved the sentence. The "unexecuted part of any sentence" is that part that has been approved and ordered executed but that has not actually been carried out."

(xx) R.C.M. 1301(c) is amended to insert the following before the rule's text:

"[Note: R.C.M. 1301(c) applies to offenses committed on or after 24 June 2014.]"

(yy) R.C.M. 1301(c) is amended to number the current paragraph as (1), and a new R.C.M. 1301(c)(2) is inserted after the new R.C.M. 1301(c)(1) and reads as follows:

"(2) Notwithstanding subsection (c)(1) of this Rule, summary courts-martial do not have jurisdiction over offenses under Articles 120(a), 120(b), 120b(a), 120b(b), forcible sodomy under Article 125, and attempts thereof under Article 80. Such offenses shall not be referred to a summary court-martial."

(zz) R.C.M. 406(b)(2) and R.C.M. 1103 are amended by changing "report of investigation" to "report of preliminary hearing".

(aaa) R.C.M. 603(b) and R.C.M. 912(f)(1)(F) are amended by changing "an investigating officer" to "a preliminary hearing officer".

(bbb) R.C.M. 705(c)(2)(E), R.C.M. 905(b)(1), and R.C.M. 906(b)(3) are amended by changing "Article 32 investigation" to "Article 32 preliminary hearing".

(ccc) R.C.M. 706(a), R.C.M. 706(c)(3)(A), R.C.M. 902(b)(2), R.C.M. 912(a)(1)(K), R.C.M. 1106(b), and R.C.M. 1112(c) are amended by changing "investigating officer" to "preliminary hearing officer".

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

(a) Mil. R. Evid. 404(a)(2)(A) is amended to read as follows:

"(A) The accused may offer evidence of the accused's pertinent trait and, if the evidence is admitted, the prosecution may offer evidence to rebut it. General military character is not a pertinent trait for the purposes of showing the probability of innocence of the accused for the following offenses under the UCMJ:

(i) Articles 120–123a;

(ii) Articles 125–127;

(iii) Articles 129–132;

(iv) Any other offense in which evidence of general military character of the accused is not relevant to any element of an offense for which the accused has been charged; or

(v) An attempt or conspiracy to commit one of the above offenses."

(b) Mil. R. Evid. 412(c)(2) is amended to read as follows:

"(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. 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, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and remain under seal unless the military judge or an appellate court orders otherwise."

(c) Mil. R. Evid. 513(b)(2) is amended to read as follows:

"(2) "Psychotherapist" means a psychiatrist, clinical psychologist, clinical social worker, or other mental health professional who is licensed in any State, territory, possession, the District of Columbia, or Puerto Rico to perform professional services as such, or who holds credentials to provide such services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials."

(d) Mil. R. Evid. 513(d)(8) is deleted.

(e) Mil. R. Evid. 513(e)(2) is amended to read as follows:

"(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. 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, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members."

(f) Mil. R. Evid. 513(e)(3) is amended to read as follows:

"(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources."

(g) A new Mil. R. Evid. 513(e)(4) is inserted immediately after Mil. R. Evid. 513(e)(3) and reads as follows:

"(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) of this Rule."

(h) Mil. R. Evid. 513(e)(4) is renumbered as Mil. R. Evid. 513(e)(5).

(i) Mil. R. Evid. 513(e)(5) is renumbered as Mil. R. Evid. 513(e)(6).

(j) The title of Mil. R. Evid. 514 is amended to read as follows:

"Victim advocate-victim and Department of Defense Safe Helpline staff-victim privilege"

(k) Mil. R. Evid. 514(a) is amended to read as follows:

"(a) *General Rule.* A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate or between the alleged victim and Department of Defense Safe Helpline staff, in a case

arising under the UCMJ, if such communication was made for the purpose of facilitating advice or assistance to the alleged victim."

(l) Mil. R. Evid. 514(b)(3)-(5) is amended to read as follows

"(3) "Department of Defense Safe Helpline staff" are persons who are designated by competent authority in writing as Department of Defense Safe Helpline staff.

(4) A communication is "confidential" if made in the course of the victim advocate-victim relationship or Department of Defense Safe Helpline staff-victim relationship and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a victim's records or communications" means testimony of a victim advocate or Department of Defense Safe Helpline staff, or records that pertain to communications by a victim to a victim advocate or Department of Defense Safe Helpline staff, for the purposes of advising or providing assistance to the victim."

(m) Mil. R. Evid. 514(c) is amended to read as follows:

"(c) *Who May Claim the Privilege.* The privilege may be claimed by the victim or the guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a counsel representing the victim to claim the privilege on his or her behalf. The victim advocate or Department of Defense Safe Helpline staff who received the communication may claim the privilege on behalf of the victim. The authority of such a victim advocate, Department of Defense Safe Helpline staff, guardian, conservator, or a counsel representing the victim to so assert the privilege is presumed in the absence of evidence to the contrary."

(n) Mil. R. Evid. 514(d)(2)-(4) is amended to read as follows:

"(2) When federal law, state law, Department of Defense regulation, or service regulation imposes a duty to report information contained in a communication;

(3) When a victim advocate or Department of Defense Safe Helpline staff believes that a victim's mental or emotional condition makes the victim a danger to any person, including the victim;

(4) If the communication clearly contemplated the future commission of a fraud or crime, or if the services of the victim advocate or Department of Defense Safe Helpline staff are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;"

(o) Mil. R. Evid. 514(e)(2) is amended to read as follows:

"(2) Before ordering the production or admission of evidence of a victim's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the victim, and offer other relevant evidence. The victim must be afforded a reasonable opportunity to attend the hearing and be heard. 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, including Special Victims' Counsel under section 1044e of title 10, United States Code. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members."

(p) Mil. R. Evid. 514(e)(3) is amended to read as follows:

"(3) The military judge may examine the evidence, or a proffer thereof, in camera if such examination is necessary to rule on the production or admissibility of protected records or

communications. Prior to conducting an in camera review, the military judge must find by a preponderance of the evidence that the moving party showed:

(A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;

(B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;

(C) that the information sought is not merely cumulative of other information available; and

(D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources."

(q) A new Mil. R. Evid. 514(e)(4) is inserted immediately after Mil. R. Evid. 514(e)(3) and reads as follows:

"(4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) above and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) above."

(r) Mil. R. Evid. 514(e)(4) is renumbered as Mil. R. Evid. 514(e)(5).

(s) Mil. R. Evid. 514(e)(5) is renumbered as Mil. R. Evid. 514(e)(6).

(t) Mil. R. Evid. 615(e) is amended to read as follows:

"(e) A victim of an offense from the trial of an accused for that offense, unless the military judge, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that hearing or proceeding."

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

(a) Paragraph 5, Article 81 – Conspiracy, subparagraph a is amended to read as follows:

"a. Text of statute.

(a) Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

(b) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly performs an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct."

(b) Paragraph 5, Article 81 – Conspiracy, subparagraph b is amended to read as follows:

"b. *Elements.*

(1) *Conspiracy.*

(a) That the accused entered into an agreement with one or more persons to commit an offense under the UCMJ; and

(b) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

(2) *Conspiracy when offense is an offense under the law of war resulting in the death of one or more victims.*

(a) That the accused entered into an agreement with one or more persons to commit an offense under the law of war;

(b) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused knowingly performed an overt act for the purpose of bringing about the object of the conspiracy; and

(c) That death resulted to one or more victims."

(c) Paragraph 5, Article 81 – Conspiracy, subparagraph e is amended to read as follows:

"e. *Maximum punishment.* Any person subject to the code who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense that is the object of the conspiracy. However, with the exception noted below, if death is an authorized punishment for the offense that is the object of the conspiracy, the maximum punishment shall be dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole. If the offense that is the object of the conspiracy is an offense under the law of war, the person knowingly performed an overt act for the purpose of bringing about the object of the conspiracy, and death results to one or more victims, the death penalty shall be an available punishment."

(d) Paragraph 5, Article 81 – Conspiracy, subparagraph f is amended to read as follows:

"f. *Sample specifications.*

(1) *Conspiracy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, conspire with _____ (and _____) to commit an offense under the Uniform Code of Military Justice, to wit: (larceny of _____ , of a value of (about) $ _____ , the property of _____), and in order to effect the object of the conspiracy the said _____ (and _____) did _____.

(2) *Conspiracy when offense is an offense under the law of war resulting in the death of one*

or more victims.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, conspire with _____ (and _____) to commit an offense under the law of war, to wit: (murder of _____), and in order to effect the object of the conspiracy the said _____ knowingly did _____ resulting in the death of _____."

(e) Paragraph 16, Article 92 – Failure to obey order or regulation, is amended by inserting after subparagraph b.(3)(c) a new Note and a new subparagraph b.(3)(d) as follows:

"[Note: In cases where the dereliction of duty resulted in death or grievous bodily harm, add the following as applicable]

(d) That such dereliction of duty resulted in death or grievous bodily harm to a person other than the accused."

(f) Paragraph 16, Article 92 – Failure to obey order or regulation, is amended by inserting new subparagraphs c.(3)(e) and (f) immediately after Paragraph 16c.(3)(d) and read as follows:

"(e) Grievous bodily harm. "Grievous bodily harm" means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

(f) Where the dereliction of duty resulted in death or grievous bodily harm, an intent to cause death or grievous bodily harm is not required."

(g) Paragraph 16, Article 92 – Failure to obey order or regulation, is amended by renumbering the existing subparagraph e.(3)(B) as subparagraph e.(3)(C), inserting new subparagraph e.(3)(B), inserting a new subparagraph e.(3)(D), and inserting a new note following subparagraph

e.(3)(D) as follows:

"(B) *Through neglect or culpable inefficiency resulting in death or grievous bodily harm.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(C) *Willful.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(D) *Willful dereliction of duty resulting in death or grievous bodily harm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years."

[Note: For (1) and (2) above, the punishment set forth does not apply in the following cases: if, in the absence of the order or regulation that was violated or not obeyed, the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or if the violation or failure to obey is a breach of restraint imposed as a result of an order. In these instances, the maximum punishment is that specifically prescribed elsewhere for that particular offense.]

(h) Paragraph 16, Article 92 – Failure to obey order or regulation, subparagraph f.(4) is amended to read as follows:

"(4) *Dereliction in the performance of duties.*

In that, _____ (personal jurisdiction data), who (knew) (should have known) of his/her duties (at/on board—location) (subject-matter jurisdiction data, if required), (on or about ____ 20__) (from about ____ 20__ to about _____ 20__), was derelict in the performance of those duties in that he/she (negligently) (willfully) (by culpable inefficiency) failed _____, as it was his/her duty to do (, and that such dereliction of duty resulted in (grievous bodily harm, to wit: (broken leg) (deep cut) (fractured skull) to) (the death of) _____)."

(i) Paragraph 17, Article 93 – Cruelty and maltreatment, subparagraph e is amended to read as

follows:

" e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years."

(j) Paragraph 57, Article 131 – Perjury, subparagraph c is amended by changing "an investigation conducted under Article 32" to "a preliminary hearing conducted under Article 32" and by changing "an Article 32 investigation" to "an Article 32 preliminary hearing".

(k) Paragraph 96, Article 134 – Obstructing justice, subparagraph f is amended by changing "an investigating officer" to "a preliminary hearing officer" and by changing "before such investigating officer" to "before such preliminary hearing officer."

(l) Paragraph 96a, Article 134 – Wrongful interference with an adverse administrative proceeding, paragraph f is amended by changing "an investigating officer" to "a preliminary hearing officer" and by changing "before such investigating officer" to "before such preliminary hearing officer."

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