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DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2015–OS–0099]

Manual for Courts-Martial; Publication of Supplementary Materials

AGENCY: Joint Service Committee on Military Justice (JSC), Department of Defense.

ACTION: Publication of Discussion and Analysis (Supplementary Materials) accompanying the Manual for Courts-Martial, United States (2012 ed.) (MCM).

SUMMARY: The JSC hereby publishes Supplementary Materials accompanying the MCM as amended by Executive Orders 13643, 13669, 13696, and 13730. These changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, "Preparation, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters and Testimony," June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency. These Supplementary Materials have been approved by the JSC and the Acting General Counsel of the Department of Defense, and shall be applied in conjunction with the rule with which they are associated. The Discussions are effective insofar as the Rules they supplement are effective, but may not be applied earlier than the date of publication of this notice in the Federal Register.

DATES: The Supplementary Materials are effective as of **[INSERT THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Major Harlye S.M. Carlton, USMC, (703) 963-9299 or harlye.carlton@usmc.mil. The JSC website is located at: http://jsc.defense.gov.

SUPPLEMENTARY INFORMATION:

Public Comments: The JSC solicited public comments for these changes to the supplementary materials accompanying the MCM via the Federal Register on October 19, 2015 (80 FR 63204–63212, Docket ID: DOD-2015-OS-0099), held a public meeting at the Court of Appeals for the Armed Forces on November 5, 2015, and published the JSC response to public comments via the Federal Register on March 22, 2016 (81 FR 15272–15278, Docket ID: DOD-2015-OS-0099). The amendments to the Analysis and Discussion accompanying the MCM are as follows:

Annex

Section 1. Appendix 21, Analysis of Rules for Courts-Martial is amended as follows:

(a) Rule 306 is amended by inserting the following at the end:

"*2016 Amendment*: R.C.M. 306(b)(2) implements Section 534(b) of the National Defense Authorization Act for Fiscal Year 2015, P.L. 113-291, 19 December 2014."

(b) Rule 401 is amended by inserting the following at the end:

"*2016 Amendment*: The first paragraph of the R.C.M. 401(c) Discussion was added in light of the recommendation in the Response Systems to Adult Sexual Assault Crimes Panel's (RSP) June 2014 report for trial counsel to convey victims' preferences as to disposition to the convening authority. This Discussion implements this recommendation by allowing Service regulations to determine the appropriate authority responsible for communicating the victims' views to the convening authority. The RSP was a congressionally mandated panel tasked to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses."

(c) Rule 604 is amended by inserting the following at the end:

"*2016 Amendment*: The fourth paragraph of the R.C.M. 604(a) Discussion was added to align the Discussion with R.C.M. 705(d)(3)."

(d) Rule 907 is amended by inserting the following at the end:

"*2016 Amendment*: R.C.M. 907(b) was amended consistent with *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), where the court held that a defective specification does not constitute structural error or warrant automatic dismissal."

(e) Rule 1002 is amended by inserting the following at the end:

"*2016 Amendment*: R.C.M. 1002(b) clarifies the military's unitary sentencing concept. *See United States v. Gutierrez*, 11 M.J. 122, 123 (C.M.A. 1981); *see generally Jackson v. Taylor*, 353 U.S. 569 (1957)."

(f) Rule 1103(b) is amended by inserting the following immediately before the paragraph beginning with "Subsection 2(C)":

"*2016 Amendment*: R.C.M. 1103(b)(2)(B)(i) was amended in a manner that aligns the requirement for a verbatim transcript with special courts-martial jurisdictional maximum punishments."

(g) Rule 1107 is amended by inserting the following at the end:

"*2016 Amendment*: The R.C.M. 1107(b)(1) Discussion was amended to clarify that the limitations contained in Article 60 apply to the convening authority or other commander acting under Article 60."

(h) Rule 1109 is amended by inserting the following at the end:

"*2016 Amendment*: R.C.M. 1109 was modified following the National Defense Authorization Act for Fiscal Year 2014, P.L. 113-66, 26 December 2013, amendments to Article 32 and the resulting changes to R.C.M. 405 as promulgated by Executive Order 13696. The revision clarifies throughout the rule that the purpose of vacation hearings is to determine whether there is probable cause that the probationer violated any condition of the probationer's suspension."

Section 2. Appendix 22, Analysis of the Military Rules of Evidence is amended as follows:

(a) Rule 304(c) is amended by inserting the following at the end:

"*2016 Amendment*: This change brings military practice in line with federal practice. *See Opper v. United States*, 348 U.S. 84 (1954), and *Smith v. United States*, 348 U.S. 147 (1954)."

(b) Rule 311(a) is amended by inserting the following at the end:

"*2016 Amendment*: Rule 311(a)(3) incorporates the balancing test limiting the application of the exclusionary rule set forth in *Herring v. United States*, 555 U.S. 135 (2009), where the Supreme Court held that to trigger the exclusionary rule, "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system." *Id.* at 147; *see also United States v. Wicks*, 73 M.J. 93, 104 (C.A.A.F. 2014) ("The exclusionary rule applies only where it results in appreciable deterrence for future Fourth Amendment violations and where the benefits of deterrence must outweigh the costs" (internal quotation marks omitted))."

(c) Rule 311(c) is amended by inserting the following at the end:

"*2016 Amendment*: Rule 311(c)(4) was added. It adopts the expansion of the "good faith" exception to the exclusionary rule set forth in *Illinois v. Krull*, 480 U.S. 340 (1987), where the Supreme Court held that the exclusionary rule is inapplicable to evidence obtained by an officer acting in objectively reasonable reliance on a statute later held violative of the Fourth Amendment."

(d) Rule 504 is amended by inserting the following at the end:

"*2016 Amendment*: References to gender were removed throughout the rule. Rule 504(c)(1), as amended, makes clear that the exception only applies to confidential communications. The definition of "confidential communications" was moved to Rule 504(d)."

(e) Rule 801(d)(1)(B) is amended by inserting the following immediately before the paragraph beginning with "Under Rule 801(d)(1)(C)":

"*2016 Amendment*. Rule 801(d)(1)(B)(ii) was added in accordance with an identical change to Federal Rule of Evidence 801(d)(1)(B). The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The amendment extends substantive effect to consistent statements that rebut other attacks on a witness – such as the charges of inconsistency or faulty memory. The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously – the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well."

(f) The fourth paragraph of Rule 803(6), beginning with "Paragraph 144 *d*" is amended to read as follows:

"Paragraph 144 *d* prevented a record "made principally with a view to prosecution, or other disciplinary or legal action" from being admitted as a business record."

(g) Rule 803(6) is amended by inserting the following at the end:

"*2016 Amendment*: Rule 803(6)(E) was modified following the amendment to Fed. R. Evid. 803(6), effective 1 December 2014. It clarifies that if the proponent of a record has established the requirements of the exception, then the burden is on the opponent to show a lack of trustworthiness. In meeting its burden, the opponent is not necessarily required to introduce affirmative evidence of untrustworthiness. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable."

(h) Rule 803(7) is amended by inserting the following at the end:

"*2016 Amendment*: Rule 803(7)(C) was modified following the amendment to Fed. R. Evid. 803(7), effective 1 December 2014. It clarifies that if the proponent has established the stated requirements of the exception then the burden is on the opponent to show a lack of trustworthiness."

(i) Rule 803(8) is amended by inserting the following at the end:

"*2016 Amendment*: Rule 803(8)(B) was modified following the amendment to Fed. R. Evid. 803(8)(B), effective 1 December 2014. The amendment clarifies that if the proponent has established that the record meets the stated requirements of the exception then the burden is on the opponent to show a lack of trustworthiness as public records have justifiably carried a presumption of reliability. The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances."

(j) Rule 803(8) is amended by deleting the following:

"Rule 803(8)(C) makes admissible, but only against the Government, "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources

of information or other circumstances indicate lack of trustworthiness." This provision will make factual findings made, for example, by an Article 32 Investigating Officer or by a Court of Inquiry admissible on behalf of an accused. Because the provision applies only to "factual findings," great care must be taken to distinguish such factual determinations from opinions, recommendations, and incidental inferences."

(k) Rule 803(10) is amended by inserting the following at the end:

"*2016 Amendment*: Rule 803(10) was modified following the amendment to Fed. R. Evid. 803(10), effective 1 December 2013. The amendment of the Federal Rules was in response to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment to Rule 803(10) is largely identical to the amendment to the Fed. R. Evid. 803(10) but has been modified in a manner that reflects differences in the military environment."

Section 3. Appendix 23, Analysis of Punitive Articles is amended as follows:

(a) Paragraph 4, Article 80 – Attempts, is amended by inserting the following at the end:

"*2016 Amendment*: Subparagraph e. as amended includes exceptions to the general rule that mandatory minimum punishments shall not apply to attempts. This change brings this paragraph into conformity with Article 56 as amended by Section 1705 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113-66, 26 December 2013.

(b) Paragraph 110, Article 134 – Threat, communicating, is amended by inserting the following at the end:

"*2016 Amendment*: Subparagraph c. was amended following the Supreme Court's decision in *Elonis v. United States*, 135 S. Ct. 2001 (2015)."

Section 4. The Discussion to Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) The first paragraph of the Discussion immediately following R.C.M. 204(a) is amended to read as follows:

"Such regulations should describe procedures for ordering a reservist to active duty for disciplinary action, preferral of charges, preliminary hearings, forwarding of charges, referral of charges, designation of convening authorities and commanders authorized to conduct nonjudicial punishment proceedings, and for other appropriate purposes."

(b) Section (6) of the Discussion immediately following R.C.M. 305(h)(2)(B)(iv) and immediately prior to R.C.M. 305(h)(2)(C) is amended to read as follows:

"(6) The accused's record of appearance at or flight from other preliminary hearings, trials, and similar proceedings; and"

(c) A new Discussion is inserted after R.C.M. 306(e)(2) and before R.C.M. 306(e)(3) and reads as follows:

"Any preferences as to disposition expressed by the victim regarding jurisdiction, while not binding, should be considered by the cognizant commander prior to making initial disposition.

The cognizant commander should continue to consider the views of the victim as to jurisdiction until final disposition of the case."

(d) Section (H)(ii) of the Discussion immediately following R.C.M. 307(c)(3) is amended to read as follows:

"(ii) *Victim.* In the case of an offense against the person or property of a person, the first name, middle initial, and last name or first, middle, and last initials of such person should be alleged, if known. If the name of the victim is unknown, a general physical description may be

used. If this cannot be done, the victim may be described as "a person whose name is unknown." Military rank or grade should be alleged, and must be alleged if an element of the offense, as in an allegation of disobedience of the command of a superior officer. If the person has no military position, it may otherwise be necessary to allege the status as in an allegation of using provoking words toward a person subject to the code. *See* paragraph 42 of Part IV. Counsel for the government should be aware that if initials of victims are used, additional notice of the identity of victims will be required."

(e) The Discussion immediately following R.C.M. 401(c) is amended by inserting the following new paragraph at the beginning of the Discussion:

"When an alleged offense involves a victim, the victim should, whenever practicable, be provided an opportunity to express views regarding the disposition of the charges. The commander with authority to dispose of charges should consider such views of the victim prior to deciding how to dispose of the charges and should continue to consider the views of the victim until final disposition of the case. 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."

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

"A preliminary hearing should be directed when it appears the charges are of such a serious nature that trial by general court-martial may be warranted. *See* R.C.M. 405. If a preliminary hearing of the subject has already been conducted, see R.C.M. 405(b)."

(g) The Discussion immediately following R.C.M. 407(a)(5) is amended to read as follows:

"A preliminary hearing should be directed when it appears the charges are of such a serious nature that trial by general court-martial may be warranted. *See* R.C.M. 405. If a preliminary hearing of the subject has already been conducted, see R.C.M. 405(b)."

(h) The Discussion immediately following R.C.M. 603(d) is amended to read as follows:

"If there has been a major change or amendment over the accused's objection to a charge already referred, a new referral is necessary. Similarly, in the case of a general court-martial, a new preliminary hearing under R.C.M. 405 will be necessary if the charge as amended or changed was not covered in the prior preliminary hearing. If the substance of the charge or specification as amended or changed has not been referred or, in the case of a general court-martial, has not been subject to a preliminary hearing, a new referral and, if appropriate, preliminary hearing are necessary. When charges are re-referred, they must be served anew under R.C.M. 602."

(i) The Discussion immediately following R.C.M. 604(a) is amended by inserting the following new paragraph between the third and fourth paragraphs:

"When an alleged offense involves a victim, the victim should, whenever practicable, be provided an opportunity to express views regarding the withdrawal of any charges or specifications in which the victim is named. The convening authority or other individual authorized to act on the charges should consider such views of the victim prior to withdrawing said charges or specifications and should continue to consider the views of the victim until final disposition of the case. 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."

(j) The second sentence of the Discussion immediately following R.C.M. 703(e)(2)(B) is amended to read as follows:

"In accordance with subsection (f)(4)(B) of this rule, a *subpoena duces tecum* to produce books, papers, documents, data, or other objects or electronically stored information for preliminary hearings pursuant to Article 32 may be issued, following the convening authority's order directing such preliminary hearing, by the counsel representing the United States."

(k) The last paragraph of the Discussion immediately following R.C.M. 703(e)(2)(G)(i) is amended to read as follows:

"For subpoenas issued for a preliminary hearing pursuant to Article 32 under subsection (f)(4)(B), the general court-martial convening authority with jurisdiction over the case may issue a warrant of attachment to compel production of documents."

(l) The second sentence of the Discussion immediately following R.C.M. 703(f)(4)(B) is amended to read as follows:

"Although the amended language cites Article 32(b), this new subpoena power extends to documents subpoenaed by counsel representing the United States, whether or not requested by the defense."

(m) A new Discussion section is inserted immediately following R.C.M. 705(c)(2)(C) and reads as follows:

"A promise to provide restitution includes restitution to a victim of an alleged offense committed by the accused in accordance with Article 6b(a)(6)."

(n) The Discussion immediately following R.C.M. 905(b)(1) is amended to read as follows:

"Such nonjurisdictional defects include unsworn charges, inadequate Article 32 preliminary hearing, and inadequate pretrial advice. *See* R.C.M. 307; 401–407; 601–604."

(o) The Discussion section following R.C.M. 907(b)(1)(B) is deleted and reinserted immediately after R.C.M. 907(b)(2)(E).

(p) The third sentence in the Discussion immediately following R.C.M. 914(a)(2) is amended to read as follows:

"This rule does not apply to preliminary hearings under Article 32."

(q) The Discussion immediately after the sole paragraph in R.C.M. 1002 is moved to immediately after R.C.M. 1002(b).

(r) The Discussion section following R.C.M. 1105(b)(2)(C) is amended to read as follows:

"For example, post-trial conduct of the accused, such as providing restitution to the victim of the accused's offense in accordance with Article 6b(a)(6), or exemplary behavior, might be appropriate."

(s) The Discussion section following R.C.M. 1107(b)(1) is amended to read as follows:

"The action is taken in the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons. If errors are noticed by the convening authority, the convening authority may take corrective action under this rule to the extent that the convening authority is empowered by Article 60."

(t) A new Discussion section is inserted immediately following R.C.M. 1107(c)(2) and reads as follows:

"The military follows a unitary sentencing model where the court-martial may impose only a single, unitary sentence covering all of the offenses for which there was a finding of guilty; courts-martial do not impose sentences per offense. *See* R.C.M. 1002(b). Therefore, where the adjudged sentence for the case includes dismissal, dishonorable discharge, bad-conduct discharge, or confinement for more than six months, the sentence adjudged for the entire case,

and not per offense, controls when deciding what actions are available to the convening authority."

(u) A new Discussion section is inserted immediately following R.C.M. 1107(e)(1) and reads as follows:

"Pursuant to Article 60(c)(4)(A) and subsection (d)(1)(A) and (B) of this rule, disapproval of the sentence is not authorized where a court-martial's adjudged sentence for the case includes confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad-conduct discharge. In such cases, the convening authority may not order a rehearing because disapproval of the sentence is required for a convening authority to order a rehearing. *See* Article 60(f)(3)."

(v) The following Discussion immediately after the new R.C.M. 1107(e)(2)(B)(ii) is deleted:

"A sentence rehearing, rather than a reassessment, may be more appropriate in cases where a significant part of the government's case has been dismissed. The convening authority may not take any actions inconsistent with directives of superior competent authority. Where that directive is unclear, appropriate clarification should be sought from the authority issuing the original directive."

(w) A new Discussion is inserted after the new R.C.M. 1107(e)(2)(B)(iii) and reads as follows:

"A sentence rehearing, rather than a reassessment, may be more appropriate in cases where a significant part of the government's case has been dismissed. The convening authority may not take any actions inconsistent with directives of superior competent authority. Where that directive is unclear, appropriate clarification should be sought from the authority issuing the original directive. For purposes of R.C.M. 1107(e)(1)(B), the term "superior competent

authority" does not include superior convening authorities but rather, for example, the appropriate Judge Advocate General or a court of competent jurisdiction."

(x) A Discussion is inserted after the new R.C.M. 1107(e)(2)(C)(ii) and reads as follows:

"For example, if proof of absence without leave was by improperly authenticated documentary evidence admitted over the objection of the defense, the convening authority may disapprove the findings of guilty and sentence and order a rehearing if there is reason to believe that properly authenticated documentary evidence or other admissible evidence of guilt will be available at the rehearing. On the other hand, if no proof of unauthorized absence was introduced at trial, a rehearing may not be ordered."

(y) A new paragraph is added to the end of the Discussion immediately following R.C.M. 1108(b) and reads as follows:

"The limitations on suspension of the execution of any sentence or part thereof contained in Article 60 apply to a decision by a convening authority or other person acting on the case under Article 60, as opposed to an individual remitting or suspending a sentence pursuant to a different authority, such as Article 74. *See* R.C.M. 1107(d)."

(z) A new Discussion section is inserted immediately following the new R.C.M. 1109(h)(4) and reads as follows:

"The following oath may be given to witnesses:

"Do you (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?"

The hearing officer is required to include in the record of the hearing, at a minimum, a summary of the substance of all testimony.

All hearing officer notes of testimony and recordings of testimony should be preserved until the end of trial.

If during the hearing any witness subject to the Code is suspected of an offense under the Code, the hearing officer should comply with the warning requirements of Mil. R. Evid. 305(c), (d), and, if necessary, (e).

Bearing in mind that the probationer and government are responsible for preparing and presenting their cases, the hearing officer may ask a witness questions relevant to the limited purpose of the hearing. When questioning a witness, the hearing officer may not depart from an impartial role and become an advocate for either side."

Dated: June 10, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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