

THE JOINT RULES OF APPELLATE PROCEDURE FOR COURTS OF CRIMINAL APPEALS



Effective 1 January 2019

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I. GENERAL

Rule 1. COURTS OF CRIMINAL APPEALS

(a) The titles of the Courts of Criminal Appeals of the respective services are:

- (1) “United States Army Court of Criminal Appeals.”
- (2) “United States Navy-Marine Corps Court of Criminal Appeals.”
- (3) “United States Air Force Court of Criminal Appeals.”
- (4) “United States Coast Guard Court of Criminal Appeals.”

(b) Each Court is authorized a seal in the discretion of the Judge Advocate General concerned. The design of such seal shall include the title of the Court.

(c) Consistent with Article 66(a), Uniform Code of Military Justice (UCMJ), and Rule for Courts-Martial (R.C.M.) 1203(a), the Judge Advocate General of each service shall certify individuals as qualified for duty as appellate military judges and assign them to the Court for a minimum of three years, except under any of the following circumstances:

(1) The appellate military judge voluntarily requests to be reassigned to other duties, and the Judge Advocate General approves such reassignment;

(2) The appellate military judge is selected for promotion to the next higher grade and is reassigned to duties commensurate with that grade by the Judge Advocate General or the Commandant of the Marine Corps;

(3) The appellate military judge retires or otherwise separates from military or federal civil service;

(4) The Judge Advocate General grants a written exception to this policy and the appellate military judge is reassigned to other duties based on compelling needs of the service; or

(5) The Judge Advocate General revokes the appellate military judge’s certification for good cause.

Rule 2. SCOPE OF RULES; TITLE

(a) These rules prescribe uniform procedures for the service Courts of Criminal Appeals pursuant to Article 66(h), UCMJ. Practice before each Court must also comport with rules issued under Rule 3.

(b) These rules are to be known as the Joint Rules of Appellate Procedure for Courts of Criminal Appeals or “JRAP.”

Rule 3. SERVICE COURT RULES

The Chief Judge of each Court may prescribe rules governing that Court's practice. These will be referred to hereinafter as "Service Court rules." Unless these rules provide otherwise, Service Court rules may not be inconsistent with these rules.

Rule 4. EFFECTIVE DATE

These rules shall apply to any case docketed with the Court on or after 1 January 2019 and shall not be construed to diminish the substantive rights of any party to a court-martial referred to trial prior to that date.

Rule 5. JURISDICTION

(a) *Effect of Rules on Jurisdiction.* While this Rule provides a synopsis, nothing in these rules shall be construed to extend or limit the jurisdiction of the Courts of Criminal Appeals.

(b) The jurisdiction of the Court is as follows:

(1) *Automatic Review.* Pursuant to Article 66, UCMJ, courts-martial in which the sentence as entered in the judgment under Article 60c, UCMJ, includes:

(A) death;

(B) dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge; or

(C) confinement for two years or more.

(2) *Appeal by the Accused.* Pursuant to Article 66, UCMJ, in cases not subject to automatic review under paragraph (1), upon timely appeal by the accused, courts-martial in which:

(A) the sentence as entered in the judgment under Article 60c, UCMJ, includes confinement for more than six months;

(B) the United States previously filed an appeal under Article 62, UCMJ; or

(C) the Judge Advocate General has sent the case to the Court for review of the sentence under Article 56(d), UCMJ.

(3) *Application by the Accused.* Pursuant to Article 66, UCMJ, cases in which the Judge Advocate General has taken action and the Court has granted an accused's timely application for review under Article 69(d)(1)(B), UCMJ.

(4) *Review by Order of the Judge Advocate General.* Courts-martial in which:

(A) there has been a finding of guilty and a sentence that is not reviewed under Article 66, UCMJ;

(B) the Judge Advocate General has taken action under Article 69, UCMJ; and

(C) the Judge Advocate General orders the case sent to the Court for review pursuant to Article 69(d), UCMJ.

(5) *Appeal by the United States under Article 62, UCMJ.* In all general or special courts-martial or pretrial proceedings under Article 30a, UCMJ, cases in which the United States, after providing timely written notice, appeals in accordance with R.C.M. 908:

(A) an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification;

(B) an order or ruling that excludes evidence that is substantial proof of a fact material in the proceeding;

(C) an order or ruling that directs the disclosure of classified information;

(D) an order or ruling that imposes sanctions for nondisclosure of classified information;

(E) a refusal of the military judge to issue or enforce a protective order sought by the United States to prevent disclosure of classified information;

(F) an order or ruling of the military judge entering a finding of not guilty with respect to a charge or specification following the return of a finding of guilty by the members; or

(G) a ruling or order of a military magistrate in the same manner as had the ruling or order been made by a military judge, except that the issue shall first be presented to the military judge who designated the military magistrate or to a military judge detailed to hear the issue.

(6) *Petition for a New Trial.* Petitions for a new trial in cases of trial by court-martial that are referred to the Court by the Judge Advocate General under Article 73, UCMJ.

(7) *Sentence Appeal by the United States.* Sentences of a court-martial in which the Judge Advocate General has approved timely appeal by the United States under Article 56(d), UCMJ.

(8) *Review of Punishment for Contempt.* Punishments for contempt imposed by a military judge or military magistrate under Article 48, UCMJ.

(9) *Extraordinary Writs.* The Court may, in its discretion, entertain petitions for extraordinary relief including, but not limited to, writs of *mandamus*, prohibition, *habeas corpus*, and *error coram nobis*. The Court shall, to the extent practicable, give priority to the consideration of writs of *mandamus* filed by crime victims under Article 6b, UCMJ.

(c) *Waiver and Withdrawal.* In all courts-martial other than those that include a sentence of death, the Court shall not have jurisdiction to hear an appeal in which appellate review was properly waived or withdrawn. The Court shall have jurisdiction to determine the threshold issue of whether the appeal was properly waived or withdrawn pursuant to Rule 16.

Rule 6. COMPOSITION OF THE RECORD ON APPEAL

(a) Except as provided by subsection (b) below, in any case referred to the Court for review, the record shall be as follows:

(1) In any case which is reviewed under Rule 5(b)(1) or (2), the record shall be the contents described in R.C.M. 1112(b) and as certified under R.C.M. 1112(c).

(2) In any case reviewed under Rule 5(b)(3) or (4), the record shall be the contents described in R.C.M. 1112(b) and as certified under R.C.M. 1112(c) as well as any action of the Judge Advocate General in the case.

(3) In any case in which the United States filed an appeal under Rule 5(b)(5), the record shall be that described in R.C.M. 908(b)(5).

(4) In any case in which the accused files a petition for a new trial under Rule 5(b)(6), the record shall be those portions of the record as described in R.C.M. 1112(b) that the parties submit as necessary for the Court's review as well as any new matter submitted under subsection (c) of this rule.

(5) In any case in which the United States filed an appeal under Rule 5(b)(7), the record shall be that described in R.C.M. 1117.

(6) In any case in which a punishment for contempt is reviewed under Rule 5(b)(8), the record shall be the contents described in R.C.M. 1112(b) of both the court-martial and the contempt proceeding that the parties determine are necessary for the Court's review.

(7) In the case of a petition for extraordinary relief, the record shall be as described in Rule 19(b)(3).

(8) In any case in which the record of trial was created and authenticated under R.C.M. 1104(a) of the 2016 edition of the Manual for Courts-Martial, the record of trial shall be the contents described in R.C.M. 1103(b)(2).

(b) In any case reviewed by the Court, the Court may consider matters not contained in the record of trial, as defined in Rule 6(a), if authorized by law to consider such matter, and:

(1) By agreement or stipulation of the parties;

(2) Upon taking judicial notice;

(3) When, upon motion filed in compliance with Rule 23, the Court determines the matters are relevant and necessary to determine an issue before it; or

(4) When, upon its own motion, the Court determines that it is necessary to consider matter contained outside the record. Prior to considering matter under this paragraph the Court shall provide the parties notice and an opportunity to object.

(c) *Correction of the Record.* Any party may move the Court to correct any substantial error in the record of trial, to include correcting a transcription of a court-martial proceeding that

is attached to the record of trial. When necessary, the Court may order an Article 66(f) proceeding to resolve questions regarding the correctness of the record of trial.

Rule 7. QUORUM

(a) When sitting in panel, a majority of the judges assigned to that panel shall constitute a quorum. When sitting *en banc*, a majority of the judges in regular active service with the Court shall constitute a quorum.

(b) The concurrence of a majority of such judges, whether present and voting or voting telephonically or electronically, shall be required for a final resolution of any matter before the panel or Court *en banc*, subject to subsections (c), (d), and (e).

(c) Unless defined differently pursuant to Rule 7(d), a judge assigned to the Court shall be deemed to be in regular active service for the purposes of these rules if: (1) in the active component of the armed forces; (2) in the reserve component of the armed forces and serving on active duty with the Court for a period of more than 30 consecutive days; or (3) a civilian judge who is a full-time employee of the agency from which appointed. Also, when a reserve component military judge who does not meet the above criteria is duly assigned to a matter, that judge shall be deemed to be in regular active service with respect to that matter.

(d) Each service may establish its own definition of “regular active service” in its Service Court rules even if inconsistent with Rule 7(c).

(e) Notwithstanding Rule 7(b), a judge on the panel or Court considering a matter may, acting alone, issue all necessary orders, to include temporary orders or stays, provided the orders do not finally dispose of a petition, appeal, or case. A Court may delegate to its Clerk of the Court or other designated staff the authority to act on motions regarding procedural matters.

Rule 8. AMENDMENTS

Proposed amendments to these rules may be submitted to the Chief Judge of any Court named in Rule 1 or to any Judge Advocate General. Before acting on any proposed amendment not received from the Chief Judges, the Judge Advocates General shall refer the proposal to the Chief Judges for comment. The Chief Judges shall confer on any proposed amendments and shall report to the Judge Advocates General as to the suitability of the proposals and their impact on the operation of the courts and military justice.

II. ATTORNEYS

Rule 9. QUALIFICATION OF COUNSEL

(a) *All Counsel.* Counsel in any case before the Court shall be a member in good standing of the bar of a federal court or the highest court of a state, territory, commonwealth, or possession of the United States.

(b) *Military Counsel.* Assigned military appellate counsel shall, in addition, be certified and detailed in accordance with Article 27(b) and, as applicable, Article 70(a), UCMJ.

(c) *Admission.* Each Court may admit counsel to appear before it. Otherwise, upon entering an appearance, counsel shall be deemed admitted *pro hac vice*, subject to filing a certificate setting forth required qualifications if directed by the Court.

(d) *Suspension.* No counsel may appear in any proceeding before the Court while suspended from practice by the Judge Advocate General supervising the Court.

Rule 10. CONDUCT OF COUNSEL

The conduct of counsel appearing before the Court shall be in accordance with rules of conduct prescribed pursuant to R.C.M. 109 by the Judge Advocate General of the service concerned. The Court, however, retains its authority to regulate counsel appearing before it, including the power to remove counsel from a particular case for misconduct in relation to that case or to punish counsel for contempt in accordance with Article 48, UCMJ, and Rule 28. Conduct deemed by the Court to warrant consideration of suspension from practice or other professional discipline shall be reported by the Court to the Judge Advocate General concerned.

Rule 11. ASSIGNMENT OF COUNSEL

(a) Upon receipt of a notice that an appeal pursuant to Article 48, 56(d), 62, 66, 69(d), or 73, UCMJ, has been docketed with the Court, the appropriate Judge Advocate General or designee shall, unless already done, designate appellate military counsel to represent the parties and, as appropriate, victims as defined by Article 6b, UCMJ. In a case involving a petition for extraordinary relief when the United States is represented by counsel or when an accused has been denominated as the real party in interest by a filing party or by the Court, the Judge Advocate General or his designee shall also designate appellate military counsel to represent such accused. Nothing in this Rule creates a right to counsel beyond that required by regulation or law.

(b) When civilian counsel represents an accused before the Court, the Court will notify counsel when the record of trial is received. If both civilian and assigned appellate defense counsel represent the accused, the Court will regard civilian counsel as primary counsel

unless notified otherwise. Ordinarily, civilian counsel will use the accused's copy of the record. Unless otherwise prohibited by the Court, civilian counsel may reproduce, at no expense to the government, appellate defense counsel's copy of the record.

Rule 12. NOTICE OF APPEARANCE AND WITHDRAWAL OF COUNSEL

(a) Military and civilian appellate counsel shall file a written notice of appearance with the Court. The filing of any pleading relative to a case which contains the signature of counsel pursuant to Rule 14 constitutes notice of appearance of such counsel.

(b) Leave to withdraw by any counsel who has entered an appearance under subsection (a) must be requested by motion in accordance with Rule 23. A motion by an appellate defense counsel must indicate whether the accused consents or objects to the withdrawal, the reasons for the withdrawal, and the provisions that have been made for continued representation of the accused. A copy of a motion filed by an appellate defense counsel shall be delivered or mailed to the accused by the moving counsel.

III. PRACTICE BEFORE THE COURT

Rule 13. FILING AND SERVICE

(a) A notice of appearance, pleading, or other paper required or permitted to be filed with the Court must be filed with the Clerk of that Court in such place and manner as may be required by Service Court rules.

(b) At or before the filing of any pleading or other paper relative to a case, a copy thereof shall be served on all counsel of record, including *amicus curiae* counsel.

(c) Service by electronic means is complete upon transmission. If transmitted by mail or by other non-electronic means, service is complete upon receipt.

Rule 14. SIGNING OF PAPERS

All formal papers shall be signed, either by hand or electronically, and shall include, at a minimum, the signer's name, military grade (if applicable), email address, and the capacity in which the paper is signed. Such signature constitutes a certification that the statements made therein are true and correct to the best of the knowledge, information, and belief of the person or persons signing the paper and that the paper is filed in good faith and not for purposes of unnecessary delay.

Rule 15. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, order of the Court, or any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, or a day on which the Court is closed when the act to be done is the filing of a paper with the Court, in which event the period runs until the end of the next day that is not a Saturday, Sunday, holiday, or day on which the Court is closed. Unless specified otherwise, “days” indicates calendar days.

Rule 16. WAIVER OR WITHDRAWAL OF APPELLATE REVIEW

Once a case has been received by the Court for appellate review, a waiver or withdrawal of appellate review filed in accordance with R.C.M. 1115 will be referred to the Court for consideration. At its discretion, the Court may require the filing of a motion for waiver or withdrawal, issue a show-cause order, or grant or deny the waiver or withdrawal without any further action. Once a waiver or withdrawal is granted, the Court will return the record of trial to the Judge Advocate General.

Rule 17. BRIEFS

Except as otherwise expressly provided in these rules, form, content, and space limitations for pleadings and briefs shall be pursuant to Service Court rules. Chief Judges shall confer with one another and endeavor to make such rules as consistent among the services as practicable.

Rule 18. APPEALS BY THE ACCUSED

(a) *Assignments of Error*. Appellate counsel for the accused may file assignments of error, setting forth separately each error asserted.

(b) *Grostefon Issues*. Issues raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), shall comply with Service Court rules and counsel shall articulate *Grostefon* issues with particularity.

(c) *Pro Se Submissions*. A litigant who is representing him or herself is known as a “*pro se*” litigant.

(1) *In General*. All litigants are expected to follow the rules that govern the practice of law and be familiar with these rules and any Service Court Rules established under Rule 3.

(2) An accused who is represented by counsel who has made an appearance in a matter before the Court may not file *pro se* submissions.

(d) *Time for Filing and Number of Briefs.* Any brief for an accused shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court. If the Judge Advocate General has directed appellate government counsel to represent the United States, such counsel shall file an answer on behalf of the United States within 30 days after any brief and assignments of error have been filed on behalf of the accused. Appellate counsel for an accused may file a reply brief no later than 7 days after the filing of a response brief on behalf of the United States. If no brief is filed on behalf of an accused, a brief on behalf of the United States may be filed within 30 days after expiration of the time allowed for the filing of a brief on behalf of the accused.

(e) *Appendix.* The brief of either party may include an appendix. If an unpublished opinion is cited in the brief, a copy may be attached in an appendix. The appendix may also include extracts of statutes, rules, or regulations. A motion must be filed under Rule 23 to attach any other matter.

Rule 19. EXTRAORDINARY RELIEF

(a) *Applicability.* This rule applies to petitions for extraordinary relief filed pursuant to 28 U.S.C. § 1651 and pursuant to Article 6b, UCMJ.

(b) *Petition for Extraordinary Relief*

(1) A petition for extraordinary relief shall be filed as soon as possible but, in any event, no later than 20 days after the petitioner learns of the action complained of. This does not, however, apply to petitions for writs of *habeas corpus* or *error coram nobis*, which may be filed at any time.

(2) A petition for extraordinary relief shall contain, at a minimum, the following:

(A) A history of the case including whether prior actions have been filed or are pending for the same relief in the Court or any other court and the disposition or status of such actions;

(B) A concise and objective statement of all facts relevant to the issue presented and of any pertinent opinion, order, or ruling;

(C) A copy of any order or opinion or any parts of the record that may be essential to understand the matters set forth in the petition;

(D) A statement of the issue(s);

(E) The specific relief sought;

(F) In the case of a petition filed in the course of an ongoing proceeding, a statement of whether a stay of proceedings is requested. A proceeding is considered ongoing until it is docketed for appellate review pursuant to Article 66, UCMJ;

(G) Reasons for granting the relief requested;

(H) The jurisdictional basis for relief sought and the reasons why the relief sought cannot be obtained during the ordinary course of appellate review; and

(I) If necessary and authorized under Article 70, UCMJ, a request for appointment of appellate counsel.

(3) The petition for extraordinary relief shall be captioned “In Re [name of Petitioner].”

(c) *Filing and Service.* A petitioner for extraordinary relief shall serve a copy of the petition on all respondents, to include any military judge whose decision, judgment, or order is the subject of the petition.

(d) *Notice to the Judge Advocate General.* Immediately upon the Court’s receipt of any petition, the Clerk of the Court shall forward a copy of the petition for extraordinary relief to the appropriate Judge Advocate General or designee.

(e) *Initial Action by the Court.* The Court may dismiss or deny the petition without answer, order the respondent to show cause and file an answer, or take whatever other action it deems appropriate.

(f) *Answer*

(1) The respondent may not file a response to a writ petition unless the Court issues an order directing the respondent to show cause or granting leave to file a response. In such cases, unless otherwise specified, the respondent may file an answer within 20 days of receipt of the order and the petitioner may file a reply to the answer within 7 days of receipt of the answer.

(2) When the Court directs that an answer be filed, two or more respondents may answer jointly.

(3) The Court may invite or order any military judge whose decision, judgment, or order is the subject of the petition to respond or may invite any *amicus curiae* to do so. A military judge may request permission to respond but may not respond unless invited or ordered to do so by the Court.

(g) *Oral Argument and Final Action.* The Court may set the matter for oral argument. However, on the basis of the pleadings alone, the Court may grant or deny the relief sought or make such other order in the case as the circumstances require.

Rule 20. APPEALS BY THE UNITED STATES

(a) *Restricted Filing*

(1) Only a representative of the United States designated by the Judge Advocate General concerned may file an appeal by the United States under Article 62, UCMJ.

(2) Only the Judge Advocate General may approve the filing of an appeal of a sentence by the United States under Article 56(d), UCMJ.

(b) *Form of Appeal*

(1) An appeal under Article 62, UCMJ must comply with R.C.M. 908, these rules, and Service Court rules. The appeal shall include the Notice of Appeal described in R.C.M. 908(b)(3). The Notice of Appeal must reflect the date and time of the military judge's ruling or order from which the appeal is taken and the date and time of service upon the military judge.

(2) An appeal under Article 56(d), UCMJ must comply with R.C.M. 1117, these rules, and Service Court rules.

(c) *Time for Filing.* All procedural rules shall apply except as follows:

(1) *Appeal Under Article 62, UCMJ*

(A) The trial counsel shall have 20 days from the date of the Notice of Appeal to forward the appeal, including the record, to the representative of the United States designated by the Judge Advocate General. The person designated by the Judge Advocate General shall, within 5 days of receipt, file the original record with the Court with a copy to opposing counsel. Appellate government counsel shall have 20 days from the date the appeal is filed with the Court to file a supporting brief. Should the United States decide to withdraw the appeal after it is received by the Court, appellate government counsel shall notify the Court in writing.

(B) Appellee shall have 20 days from the date the United States' brief is filed to file an answer.

(C) The United States shall have 7 days from the date Appellee's answer is filed to file a reply brief.

(2) Pursuant to R.C.M. 1117, an appeal under Article 56(d), UCMJ must be filed within 60 days after the date on which the judgment of the court-martial is entered into the record.

(d) The parties shall give appeals under Article 62, UCMJ priority over all other proceedings where practicable.

Rule 21. PETITIONS FOR NEW TRIAL

(a) Whether submitted to the Judge Advocate General by the accused in *propria persona* or by counsel for the accused, a timely petition for a new trial submitted under Article 73, UCMJ, while the accused's case is pending before a Court of Criminal Appeals shall be filed in accordance with these and Service Court rules and shall comply with R.C.M. 1210(c).

(b) Upon receipt of a petition for new trial submitted by other than appellate defense counsel, the Court will notify all appellate counsel of record of such fact.

(c) A petition for new trial shall explicitly state whether the petitioner intends to file a separate brief in support of the petition. Unless the petition specifically states that the petitioner intends to file a supplemental brief, the petition shall be construed as incorporating

a brief in support of the petition and the respondent may file an answer within 30 days after filing of the petition. If, alternatively, the petition indicates intent to file a separate brief in support of the petition, the petitioner shall have 30 days from filing the petition to file the brief in support of the petition and the respondent may file an answer within 30 days after filing of the brief. A reply may be filed no later than 7 days after the filing of the respondent's answer.

Rule 22. AMICUS CURIAE BRIEFS

(a) A brief of an *amicus curiae* may be filed (1) by invitation of the Court; or (2) by motion for leave to file granted by the Court.

(b) Only an attorney admitted to practice as a member of the Bar of the Court or an attorney appearing *pro hac vice* may file an *amicus curiae* brief.

(c) All motions and briefs filed under Rule 22(a)(2) must contain a statement of the movant's interest and why the matters asserted are relevant to the disposition of the case. *Amicus curiae* briefs filed pursuant to Rule 22(a)(2) that bring relevant matter to the attention of the Court not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored. Unless the movant is a victim of an offense as defined by Article 6b, UCMJ, the motion must also provide a statement as to whether the parties consent to the filing of the *amicus curiae* brief.

Rule 23. MOTIONS

(a) *Content.* All motions, unless made during the course of a hearing, shall state with particularity the relief sought and the grounds therefor.

(b) *Motions to Attach Documents.* If a party desires to attach a statement of a person to the record for consideration by the Court on any matter, such statement shall be made either as an affidavit or as an unsworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746. All documents containing language other than English shall have attached a certified English translation.

(c) *Opposition.* Unless prescribed otherwise by Service Court rules, any opposition to a motion shall be filed within 7 days after receipt of the motion by the opposing party.

(d) *Leave to File.* Any pleading not authorized or required by these or Service Court rules shall be accompanied by a motion for leave to file such pleading. A motion for leave to file the pleading and the pleading may be combined in the same document.

IV. PROCEEDINGS OF THE COURT

Rule 24. EXTENSIONS OF TIME AND INTERLOCUTORY MATTERS

Except as otherwise provided in Rule 31(d), the Court, in its discretion, may extend any time limits prescribed and may dispose of any interlocutory or other appropriate matter not specifically covered by these rules, in such manner as may appear to be required for a full, fair, and expeditious consideration of the case.

Rule 25. ORAL ARGUMENTS

Oral arguments may be heard in the discretion of the Court upon motion by either party or when otherwise ordered by the Court. The motion of a party for oral argument shall be made no later than 7 days after the filing of an answer to an appellant's brief. Such motion shall identify the issue(s) upon which counsel seek argument. The Court may, on its own motion, identify the issue(s) upon which it wishes argument.

Rule 26. RECORDING, PHOTOGRAPHING, BROADCASTING, OR TELECASTING OF HEARINGS

The recording, photographing, broadcasting, or televising of any session of the Court or other activity relating thereto is prohibited unless specifically authorized by the Court.

Rule 27. EN BANC PROCEEDINGS

(a) A majority of judges who are in regular active service, as defined in Rule 7 or Service Court rules, and not disqualified may, *sua sponte* or in response to a suggestion, order that an appeal or any other proceeding be considered or reconsidered by the Court *en banc*. *En banc* consideration or reconsideration is not favored and ordinarily will not be ordered unless: (1) necessary to secure or maintain uniformity of the Court's decisions; (2) the opinion overrules a binding precedent of the Court; (3) the proceeding involves a question of exceptional importance; or (4) a sentence being reviewed pursuant to Article 66, UCMJ, extends to death.

(b) A party may suggest consideration or reconsideration of a proceeding *en banc*. In cases being reviewed pursuant to Article 66, UCMJ, a suggestion for *en banc* consideration must be filed with the Court within 7 days after the United States files its answer to the assignments of error, or the appellant files a reply under Rule 18(d). In other proceedings, the suggestion must be filed with the party's initial pleading, or within 7 days after the response thereto is filed. A suggestion for *en banc* reconsideration must be made within the time prescribed by Rule 31 for filing a motion for reconsideration. No response may be filed to a suggestion for *en banc* consideration or reconsideration unless the Court so orders.

(c) A suggestion for *en banc* consideration or reconsideration shall be transmitted to each judge of the Court who is in regular active service and not disqualified, but a vote need not be taken to determine whether the case shall be considered or reconsidered *en banc* unless a judge requests a vote.

(d) Although only the Court *en banc* may overrule a binding precedent, a party may argue, in its brief and oral argument, to overrule a binding precedent without petitioning for hearing *en banc*. The panel will decide whether to ask the remaining judges to consider hearing the case *en banc*.

Rule 28. CONTEMPT

(a) Contempt Proceedings

(1) Under Article 48, UCMJ, any judge of the Court may punish any person for contempt.

(2) *Summary Disposition.* A judge of the Court may summarily punish contempt when the judge directly witnesses the contemptuous conduct during the course of an appellate proceeding. Prior to holding a person in contempt, the judge shall provide the alleged offender with an opportunity to make a statement. If the alleged offender declines to make a statement, no negative inference will be drawn. If a contempt is punished summarily, the judge shall ensure there is an adequate record accurately reflecting the misconduct that the judge directly witnessed.

(3) *Disposition upon Notice and Hearing.* If the judge did not personally witness the contemptuous conduct at issue, the alleged offender shall be provided written notice of the alleged contempt and given a reasonable opportunity to respond and to present evidence before the Court. The written notice shall include notice that the alleged offender has the right to be represented by counsel and that no negative inference will be drawn from failure to respond and to present evidence. The government shall provide military alleged offenders counsel at no expense to them. The contempt must be proved beyond a reasonable doubt before it may be punished.

(4) *Appeal.* A person found in contempt by the Court shall be notified of their right to appeal the contempt findings and sentence to the United States Court of Appeals for the Armed Forces in accordance with that Court's rules and Article 48, UCMJ.

(5) *Stays.* Upon written request or upon its own motion, the Court may stay the imposition of punishment pending an appeal.

(b) Appeals from Contempt Proceedings Below

(1) *Notice of Appeal.* Any person found in contempt by a military judge or military magistrate may appeal the punishment by filing a notice of appeal with the Clerk of the Court within 20 days of being found in contempt. The notice of appeal must:

(A) be titled *In Re [Contempt-Appellant]*;

(B) specify the person taking the appeal;

(C) list the parties to the proceeding, the name of the judicial officer who made the contempt finding, any alleged victims as defined under Article 6b, UCMJ, and the punishment awarded;

(D) list the names and addresses of counsel for all parties to the proceeding and any alleged victims; and

(E) indicate whether the contempt-appellant requests a stay of unexecuted punishment.

(2) *Action by United States upon Service.* Within 20 days of receiving or filing a notice of appeal, the trial counsel shall forward a record of the contempt proceedings to appellate counsel for the United States. Appellate counsel for the United States shall promptly file the original record with the Clerk of the Court and forward copies to opposing counsel.

(3) *Action by Court upon Service.* Upon receipt of any notice of appeal, the Clerk will docket the case and forward a copy of the notice to the appropriate Judge Advocate General or designee.

(4) *Resolution of Appeal*

(A) *Briefing.* A contempt-appellant must file a brief in support of his or her appeal within 30 days of being served with a copy of the record under subsection (b)(2) of this rule. Opposing counsel may respond within 20 days of receiving the contempt-appellant's brief. If the appellate government division is conflicted or elects not to respond, the Court may direct the Judge Advocate General to detail appellate counsel to defend the finding of contempt and punishment.

(B) *Argument.* The Court may, in its discretion, order oral argument.

(C) *Final action.* An appeal of a finding of contempt will be reviewed for an abuse of discretion. The Court may affirm or set aside the finding or the punishment, in whole or in part, or make any other order in the case as the circumstances require.

Rule 29. ARTICLE 66(F) PROCEEDINGS

(a) *In General.* The Court may, upon motion by any party or *sua sponte*, order a remand under Article 66(f)(3), UCMJ for further proceedings. Such orders shall be directed to the Chief Trial Judge. The Judge Advocate General or designee shall designate a general court-martial convening authority who shall provide support for the hearing. Although within the discretion of the Court, remand is generally not appropriate to determine facts or investigate matters which could, through a party's exercise of reasonable diligence, have been investigated or considered at trial, or to resolve post-trial claims that are:

(1) inadequate on their face;

(2) facially adequate but appellate filings and the record as a whole compellingly demonstrate their improbability;

(3) uncontested; or

(4) based on statements or documents not included in the record of trial and

(A) the statement is unsworn or not filed in compliance with Rule 23(b); or

(B) the statement is made by a person who lacks personal knowledge of the material facts that the Court is asked to rely on.

(b) *Jurisdiction*. The Court ordering remand retains jurisdiction unless it expressly dismisses the appellate proceeding.

(1) *Remand When Court Retains Jurisdiction*. When a Court remands but does not dismiss the appellate proceeding, such as for fact-finding or issuance of a certificate of correction, the remand does not return jurisdiction over the case to the court-martial and military judge. Rather, the Court retains jurisdiction over the case throughout the Article 66(f) proceeding. Such a remand is an appellate proceeding conducted on behalf of the Court but presided over by a military judge or magistrate. Any finding or recommendation arising out of a proceeding shall be forwarded to the Court for consideration and action.

(2) *Remand When Court Dismisses Appellate Proceeding and Returns Jurisdiction*. A remand of a case that returns jurisdiction over the case to the military judge and court-martial will specifically state the scope of the remand and the range of actions that may be taken. If an action during a remand terminates the case, an appellate attorney authorized to act on behalf of the United States shall so inform the Court. Such a remand may be appropriate, for instance, when a matter in the case requires corrective action by the trial court such as to correct an error in the judgment or to address an inconsistency or omission in the factual basis of an accused's plea.

(c) *Remand Impracticable*. The general court-martial convening authority designated to provide support for the proceeding pursuant to R.C.M. 810(f)(1) may determine that the proceeding is impracticable. In such a case, an appellate attorney authorized to act on behalf of the United States shall forward this determination, accompanied by an explanation for the determination, to the Court. The Court may direct that the proceeding continue. If the Court does not direct that the proceeding continue, the Court may take any other action authorized by law that does not materially prejudice the substantial rights of the accused.

(d) *Article 66(f) Hearings*. The military judge detailed to an Article 66(f) proceeding may order one or more Article 66(f) hearings as may be necessary to fulfill the purpose of the remand. The following procedural rules shall apply at Article 66(f) hearings directed under this rule:

(1) A record of the proceedings shall be created and certified in substantial compliance with R.C.M. 1112.

(2) The parties may question and challenge the military judge as provided by R.C.M. 902.

(3) In the case of a remand in which the Court has returned jurisdiction over the case under subsection (a)(2) the rules applicable to the conduct of a post-trial Article 39(a) shall apply.

(4) In the case of a remand in which the Court has maintained jurisdiction over the case under subsection (a)(1) the following rules shall apply:

(A) The Judge Advocate General shall provide the accused with the same right to counsel as would be had at a post-trial Article 39(a) session.

(B) The accused's right to personally be present at a proceeding shall generally be the same as for similar proceedings held in United States District Courts. The military judge may authorize remote appearances of witnesses and parties as provided by R.C.M. 914A and 914B.

(C) The military judge may apply any other Rule for Courts-Martial which the military judge determines is appropriate to apply to a post-conviction fact-finding hearing for the just determination of the issues involved. In applying such a rule, the military judge shall construe the rule to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Rule 30. ORDERS AND DECISIONS OF THE COURT

The Court shall give notice of its orders and decisions by promptly serving them, when rendered, on appellate counsel, including civilian counsel, if any, and the Judge Advocate General, or designee, as appropriate.

Rule 31. RECONSIDERATION

(a) The Court may, in its discretion and on its own motion, enter an order announcing its intent to reconsider its decision or order in any case not later than 30 days after service of such decision or order on the appellate defense counsel or on the appellant, if the appellant is not represented by counsel, provided a petition for grant of review or certificate of review has not been filed with the United States Court of Appeals for the Armed Forces, or a record of trial for review under Article 67(b) has not been received by that Court. No briefs or arguments shall be received unless the order so directs.

(b) Provided a petition for grant of review or certificate for review has not been filed with the United States Court of Appeals for the Armed Forces, and a record of trial for review under Article 67(b) or writ appeal has not been received by the United States Court of Appeals for the Armed Forces, the Court may, in its discretion, reconsider its decision or order in any case upon motion filed either by appellate counsel within 30 days after receipt by counsel, or by the appellant if the appellant is not represented by counsel, of a decision or order.

(c) A motion for reconsideration shall briefly and directly state the grounds for reconsideration, including a statement of facts showing jurisdiction in the Court. A reply to

the motion for reconsideration will be received by the Court only if filed within 7 days of receipt of a copy of the motion. Oral arguments shall not be heard on a motion for reconsideration unless ordered by the Court. The original of the motion filed with the Court shall indicate the date of receipt of a copy of the same by opposing counsel.

(d) The time limitations prescribed by this rule shall not be extended under the authority of Rule 24 or Rule 32 beyond the expiration of the time for filing a petition for review or writ appeal with the United States Court of Appeals for the Armed Forces, except that the time for filing briefs by either party may be extended for good cause.

Rule 32. SUSPENSION OF RULES

For good cause shown, the Court acting *en banc* or in panel may suspend the requirements or provisions of any of these rules in a particular case on a motion of any party or *sua sponte* and may order proceedings in accordance with its direction.

**BY ORDER OF THE JUDGE ADVOCATES GENERAL OF THE ARMY, NAVY, AIR
FORCE, AND COAST GUARD**



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The Judge Advocate General



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