



PRACTICE ADVISORY

Understanding Changes to Article 60 II: Dual Regime Cases, Qualifying Offenses, and Mandatory Minimum Sentences

Background

As discussed in the [Military Justice Branch Practice Advisory 2-14](#) (JMJ PA 2-14), Section 1702 of the Fiscal Year 2014 National Defense Authorization Act (FY14 NDAA) significantly curtailed the power of a Convening Authority (CA) to modify adjudged findings and sentences under Article 60, Uniform Code of Military Justice (UCMJ). For the new statutory category of “other than qualifying” offenses (see Fig. 1), CAs may not disapprove the guilty findings or change specifications to lesser included offenses. Additionally, CAs must justify in writing any action on the sentence for other than qualifying offenses; however, CAs are specifically prohibited from disapproving, commuting, or suspending adjudged confinement over six months or adjudged punitive discharges. Pre-trial agreements and trial counsel memoranda of substantial assistance provide the only exceptions to these general limitations. See [JMJ PA 2-14](#).

This Practice Advisory provides additional guidance on the trickier aspects of the new Article 60. Because application of the new rules depends on whether the offenses at issue **occurred on or after 24 June 2014**, there will be cases that have offenses falling under two distinct Article 60 regimes. Further, Article 60 as amended creates a distinction between qualifying and non-qualifying offenses that can have easily missed effects on CAs’ authority to modify sentences of confinement. Finally, Section 1705 of the FY14 NDAA established mandatory minimum sentences for certain sex offenses, which also affect the post-trial action options. When providing advice in these special situations, Staff Judge Advocates (SJAs) must take particular care to ensure their CAs understand the new Article 60 rules and limitations on their authority to take action.

Dual Regime Cases Generally

The new Article 60 limits available post-trial action on findings, confinement, and punitive discharges for any offenses committed after 23 June 2014, while offenses committed prior to 24 June 2014 still fall under the old Article 60 regime. For pre-24 June 2014 offenses, clemency and remedies for legal error are available for the findings and sentence attributable to those offenses. Therefore, in dual regime cases, determining available post-trial action becomes a per-offense analysis.

When a CA wants to modify **findings** in a case, the analysis is fairly straightforward. For every offense that occurred before 24 June 2014, the CA has the authority to modify findings of guilty, e.g., for clemency or to remedy legal error. Post-23 June 2014 offenses fall into two categories of offenses: “qualifying” and “other than qualifying” (see Fig. 1). For **qualifying** offenses, CAs retain the identical authority to modify findings that they have for pre-24 June 14 offenses. For **other than qualifying** offenses, CAs may not disapprove findings of guilty or change such findings to findings of guilty of lesser included offenses. CAs may make changes to a specification that do not upset a guilty finding or result in a finding of guilty for a lesser included offense. For example, if the specification is factually deficient and the CA wants to strike some language that leaves the specification viable, the CA may do so; however, the

Other than Qualifying Offenses

Offenses occurring after 23 June 14 AND

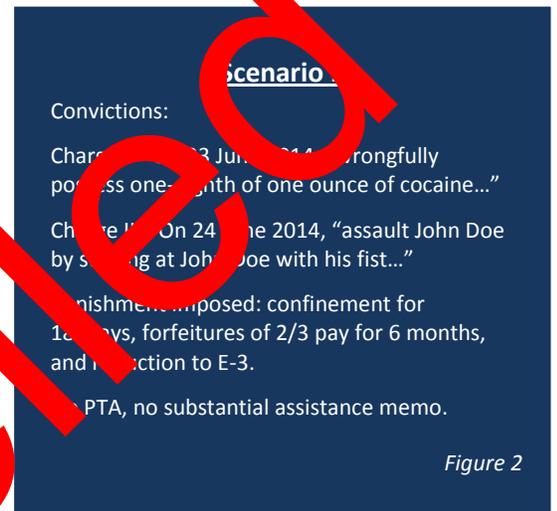
- Charged under **Article 120b; Sections (a) or (b) of Article 120; Article 125**; or an offense specified by the Secretary of Defense (none have been specified to date); OR
- For which the maximum authorized punishment, as listed in the Manual for Courts-Martial (MCM), **exceeds two years** (see Manual for Courts-Martial, Appendix 12, Maximum Punishment Chart); OR
- For which the adjudged sentence includes **confinement for more than six months**; OR
- For which the adjudged sentence includes a **punitive discharge** (Dismissal, Dishonorable Discharge, or Bad Conduct Discharge).

Figure 1

CA must explain this action in writing and make it part of the Record of Trial (ROT). Flowchart 1 (FC 1, attached) illustrates the analysis for findings in dual regime cases. Importantly, the new limitations on post-trial action do not distinguish between action for clemency and action to correct legal error.

Modification of **sentences** is trickier. Even with a single specification case, each component of an adjudged sentence requires separate analysis. The attached flowcharts show the steps for analyzing authority to act on confinement (FC 2) and discharges (FC 3) in dual regime cases. The flowcharts can help ascertain the limit of possible action available for a particular sentence by highlighting the **maximum** possible proportion of adjudged confinement attributable to an offense eligible for post-trial action. However, the process for determining the **actual** proportion of the adjudged confinement attributable to an offense eligible for post-trial action is not reducible to a chart. Because of the military justice practice of unitary sentencing, SJAs may have to use sentencing principles from case law and RULE FOR COURTS-MARTIAL 1107(d)(2) (except that clemency would not be a consideration for post-23 June 2014 offenses) to help CAs assess the post-trial action available for a particular offense. Additionally, CAs must explain in writing any action on other portions of the sentence (e.g., suspension of forfeitures, or deferral of any punishments) attributable to a post-23 June 2014 offense. This explanation must be included in the ROT.

To illustrate, take the case of a Marine convicted at court-martial for two charges: a simple assault and wrongful possession of cocaine (see Fig. 2). In this example, the dates of the two offenses—23 June 2014 and 24 June 2014—and the punishment imposed—confinement for more than 6 months—mean that analysis under both the old and the new Article 60 is required for post-trial action in this case. If a Convening Authority wanted to grant clemency in this example, she could do so for both offenses.



Here's why: A quick run through the confinement flowchart (FC 2) shows that the maximum possible post-trial action on the confinement component of a sentence for a pre-24 June 2014 Article 112a possession offense is 5 years. If the CA wanted to disapprove the finding of guilt on the Article 112a offense due to a legal error, she could do so since it occurred prior to 24 June 2014. Of course, it is unlikely that the entire adjudged confinement is attributable to the Article 112a offense, so analysis of sentencing principles in case law and RCM 1107(d)(2) is necessary to determine the range of available post-trial action on the confinement. Because the maximum punishment for Charge II (Simple Assault) is confinement for 3 months, the appropriate range of post-trial action on the adjudged confinement should be somewhere between 91 days and 181 days. Case law may have examples of sentence modification when a possession offense is at issue, which may provide an even narrower range. Any action, including action on the forfeitures or reduction or deferral of any part of the sentence would require the CA's written explanation attached to the ROT.

Now, switch the dates so that the assault occurred on 23 June 2014 and the possession offense occurred on 24 June 2014. Regardless of any perceived legal error, the CA could not disapprove the possession charge under the new rules since Article 112a, with a five year maximum sentence, is an other than qualifying offense under the new Article 60. A run through the confinement flowchart (FC 2) indicates maximum post-trial action on the pre-24 June 2014 assault charge is 3 months. It is plausible that available post-trial action on the confinement for the assault charge is at least 1 day, and up to 3 months, which also suggests that the confinement attributable to the drug offense is not greater than 6 months (181 days adjudged, less 1 day attributable to the assault equals not more than 6 months). Therefore, the CA could disapprove the entire period of confinement, if appropriate. Because Article 112a is an other than qualifying offense the CA would have to explain this action in writing and append the explanation to the ROT.

Qualifying & Other than Qualifying Offenses

The last scenario highlights an easy-to-miss distinction between limitations vis-à-vis sentencing for other than qualifying offenses (Article 60(c)(2)(C)), and specifically prohibited post-trial actions on sentencing under Article

60(c)(4)(A). For findings, CAs are barred from disapproving or downgrading other than qualifying offenses to lesser included offenses. For sentencing, CAs must explain any actions on adjudged sentences for other than qualifying offenses, but may still take such action. Article 60(c)(4)(A), however, prohibits CAs from disapproving, commuting, or suspending both confinement greater than six months and punitive discharges, regardless of whether the offense has a maximum confinement sentence greater than two years (although the rule still only applies to post-23 June 2014 offenses). These rules are easily confused because the criteria for qualifying offenses partly overlap with those of Article 60(c)(4)(A). They are distinct rules, though. The difference between them is why an other than qualifying offense (e.g., an offense punishable by more than 2 years of confinement) with an adjudged sentence of confinement for 6 months is eligible for post-trial action (with the CA's explanation attached to the ROT), but a qualifying offense with an adjudged sentence of confinement for 181 days is not eligible for post-trial action on the confinement.

Mandatory Minimum Sentences

The FY14 NDAA created a minimum sentence of Dishonorable Discharge or Dismissal for the following offenses:

- **Sections (a) or (b) of Article 120 (penetrative sex offenses);**
- **Sections (a) or (b) of Article 120b (penetrative child sex offenses);**
- **Section (a) of Article 125 as amended (forcible sodomy);** and
- **Attempts of the preceding offenses charged under Article 80**

The other offenses with mandatory minimum sentences are Article 106 (Spying), with the mandatory sentence of death, and Article 118 (1) or (4) (Premeditated or Felony Murder), with the mandatory minimum of imprisonment for life.

These new mandatory minimum sentences affect Article 60 analysis in two key ways. First, the penetrative sex offenses and attempts thereof will always be subject to the limitations of action on punitive discharges. Second, the only exceptions to the mandatory minimum sentences are either a pre-trial agreement or a trial counsel memorandum recommending clemency due to the accused's substantial assistance in another case.

The trial counsel memo exception permits a CA to take action on a sentence (not findings) regardless of mandatory minimum sentences. Such action could include disapproving, commuting, or suspending a sentence in whole or in part, although the CA would still have to attach a written explanation of the action to the ROT.

The pre-trial agreement exception to the mandatory minimum only applies to the penetrative sex offenses (not Articles 106 or 118), and allows a CA to convert a Dishonorable Discharge to a Bad Conduct Discharge.

Clearly, Article 60 as amended complicates command advice in cases in which CAs wish to take some post-trial action. JMJ is currently developing temporary SJARs to account for these and other changes to post-trial procedure. Other changes include documentation of victim input on post-trial action, provision of recordings of Article 32 preliminary hearings to sexual assault victims after case disposition, and more.

Points of Contact

Military justice policy questions may be directed to the Head, JMJ, LtCol Angela Wissman, USMCR, at angela.wissman@usmc.mil or 703-693-9005; or the Deputy Head (Policy and Legislation), JMJ, Maj Ben Robles, USMC, at benjamin.robles@usmc.mil or 703-614-4250.

Summary

- Dual regime cases require offense by offense, punishment by punishment analysis.

-SJAs may use sentencing principles from RCM 1107 and case law to determine the limitations of their CA's authority to take post-trial action.

--Clemency on portions of sentences other than punitive discharges and confinement over six months is still generally available. Written justification may be required.

--Authority to act on findings (FC 1), confinement (FC 2), discharges (FC 3), and other punishments should be analyzed separately.

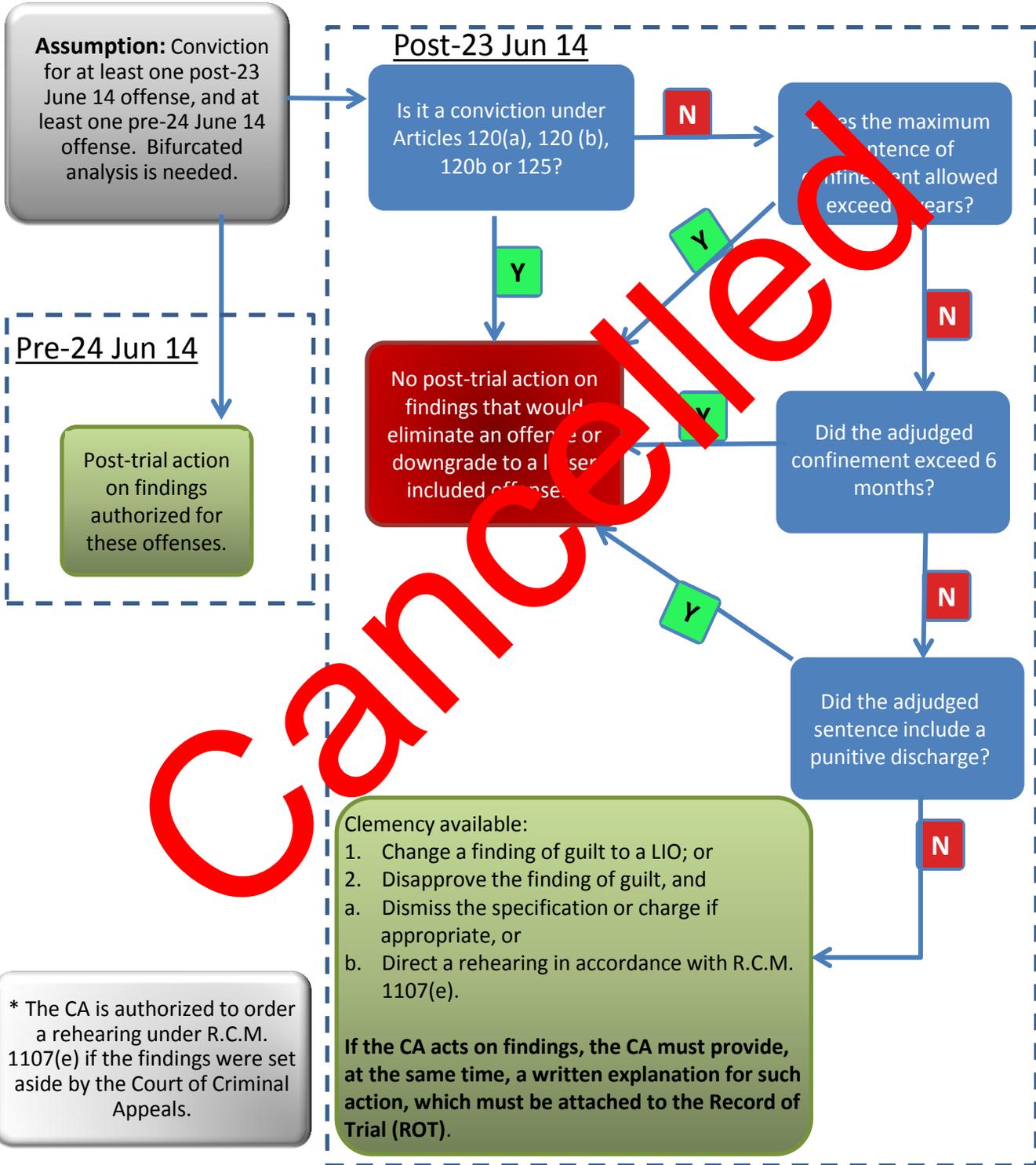
--The new rules do not provide exceptions for post-trial agreements or remedy of legal error.

--Mandatory minimum sentences bring all penetrative sexual assaults into the new regime.

Figure 3



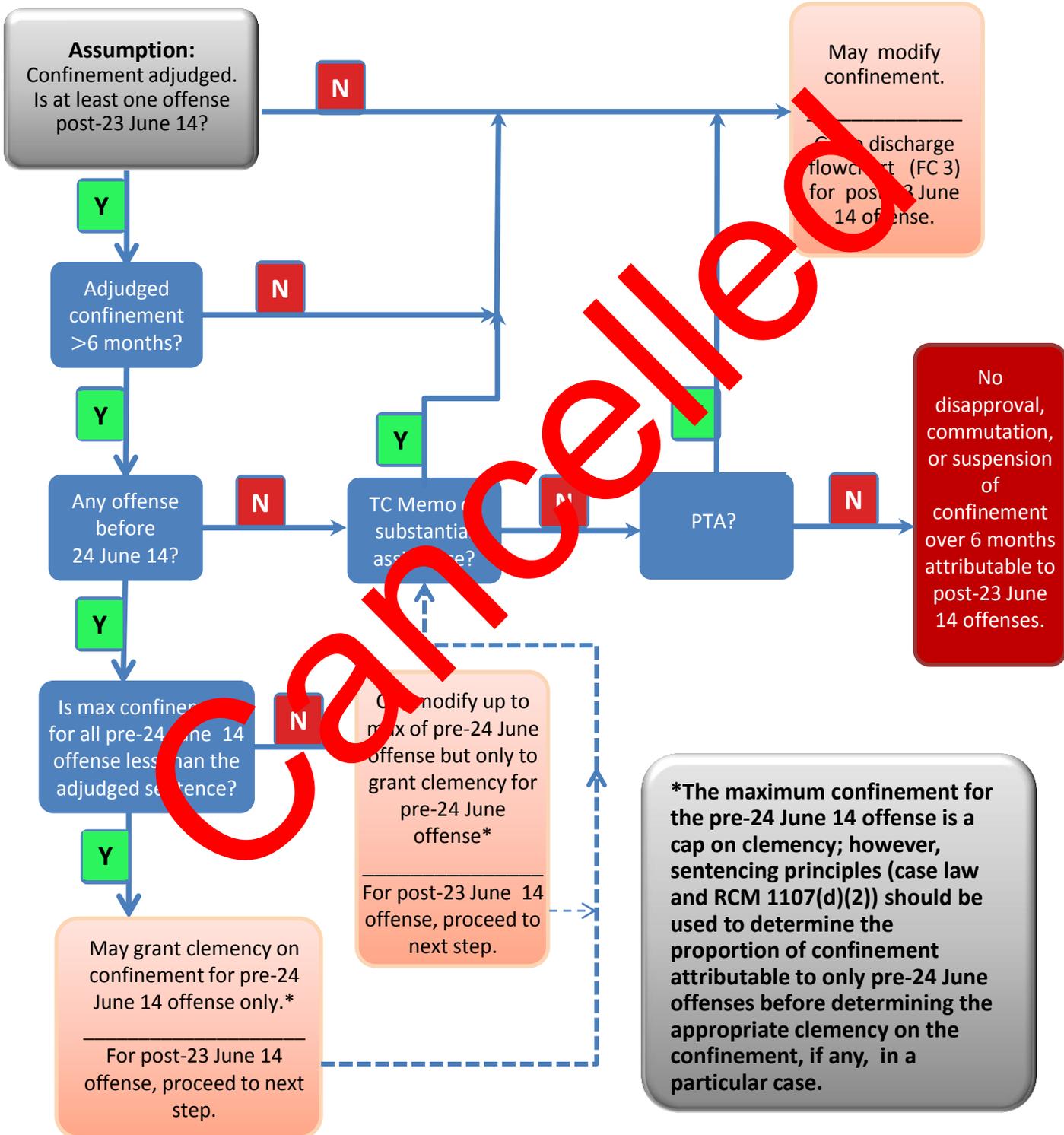
FINDINGS



Cancelled



CONFINEMENT

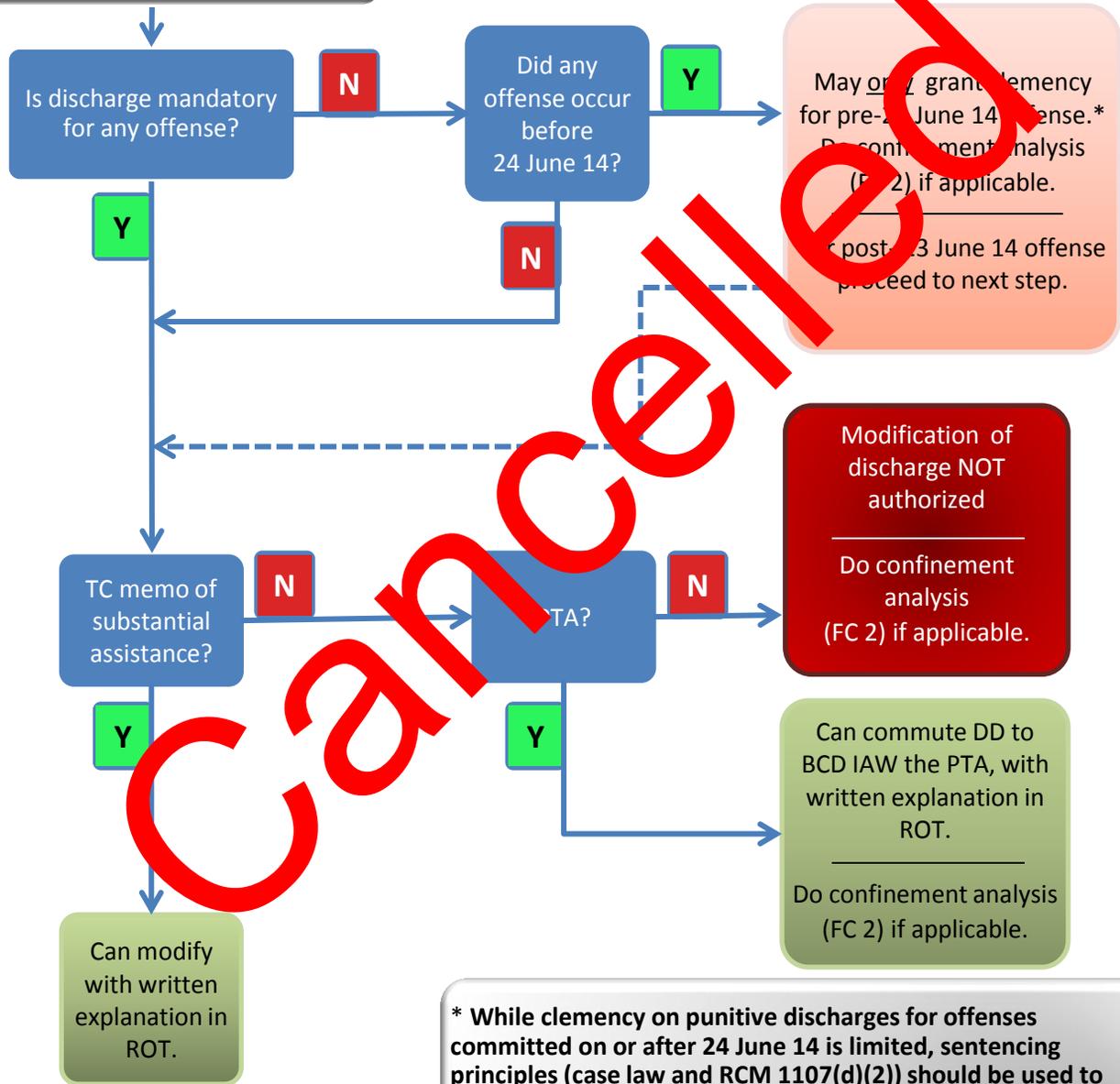


Cancelled



DISCHARGE

Assumption: Punitive discharge imposed by court-martial with post-23 June 14 offense.



Cancelled

* While clemency on punitive discharges for offenses committed on or after 24 June 14 is limited, sentencing principles (case law and RCM 1107(d)(2)) should be used to determine whether an adjudged punitive discharge is attributable to only pre-24 June offense(s) before determining whether clemency on the discharge is available in a particular case.