



Practice Advisory

Understanding Changes to Article 60

Background

Section 1702 of the FY 2014 National Defense Authorization Act (NDAA) significantly curtailed the power of a Convening Authority (CA) to modify the findings and sentence under Article 60 in a certain class of cases. This change applies to cases that involve an offense **committed on or after 24 June 2014** where:

- 1) the accused has been convicted of an offense charged under Sections (a) or (b) of Article 120; Article 120b, Article 125; or an offense specified by the Secretary of Defense (none have been specified to date); or
- 2) the accused has been convicted of an offense for which the maximum authorized punishment, as listed in the Manual for Courts-Martial (MCM), exceeds two years; or
- 3) the adjudged sentence includes confinement for more than six months or
- 4) The adjudged sentence includes a punitive discharge (Dismissal, Dishonorable Discharge, or Bad Conduct Discharge).

The Secretary of the Navy implemented Section 1702 in paragraph 4 of NAVM 11/14, but inadvertently omitted the limitation of Section 1702's Article 60 provisions to offenses committed on or after 24 June 2014. This omission may require corrective action as discussed on page 2.

Dual Regimes

With the changes to Article 60 only applying to a certain class of cases involving offenses occurring on or after 24 June 2014, you will see cases that have offenses falling under two distinct Article 60 regimes. In such cases, Staff Judge Advocates (SJAs) must take particular care when providing advice under Article 60(d) to ensure the CA understands the rules and limitations when taking action in the case. Military Justice Branch (JMJ) judge advocates are available to discuss the particular challenges of these cases.

Key Provisions

Findings – A CA cannot modify the finding for an offense committed on or after 24 June 2014 and (1) charged under Sections (a) or (b) of Article 120, Article 120b, or Article 125; or (2) for which the maximum authorized punishment, as listed in the MCM, exceeds two years; or (3) when the adjudged sentence includes confinement for more than six months or a punitive discharge. A CA may still direct a rehearing for these offenses under RCM 1107(e). In the limited class of cases where a CA can modify the findings and elects to do so, the CA must provide a written explanation for taking such action at the time the action is taken.

Sentences – A CA cannot modify the relevant portion of a sentence for an offense committed after 24 June 2014 if the adjudged sentence includes confinement for more than six months, a punitive discharge, or is a mandatory minimum sentence. A CA can modify, in whole or in part, any portion of an adjudged sentence not explicitly prohibited by this rule, to include reduction in pay grade, forfeitures of pay and allowances, fines, reprimands, restrictions, and hard labor without confinement. In the very limited cases where a CA can modify the sentence and elects to do so, the CA must provide a written explanation for taking such action at the time the action is taken.

Pre-trial Agreement Exception – If acting pursuant to a pretrial agreement, a CA can modify the sentence in any case except those with a mandatory minimum sentence. For cases with a mandatory minimum sentence, the CA may only commute a dishonorable discharge to a bad conduct discharge and may not modify any other mandatory minimum sentence.

Substantial Assistance Exception – If the trial counsel recommends clemency in recognition of substantial assistance by the accused in the investigation or prosecution of another person, the CA may modify the adjudged sentence in whole or in part. The trial counsel recommendation to the CA can come at any time before the CA acts on the sentence.

The attached flow charts show when and how a CA can grant clemency or otherwise disapprove, commute, or suspend the findings or sentence of a court-martial under the new Article 60.

ALNAV 051/14

As noted above, the limitation of Section 1702's Article 60 provisions to offenses committed on or after 24 June 2014 was left out of paragraph 4 of ALNAV 051/14. We anticipate that a new ALNAV will be released soon that will cancel ALNAV 051/14 and clarify that Section 1702 applies to offenses occurring on or after 24 June 2014.

Until ALNAV 051/14 is cancelled, we recommend that all SJARs for cases that only involve offenses occurring before 24 June 2014 contain the following language:

"The limitations on a CA's ability to modify the findings and sentence announced in reference (x) [ALNAV 051/14] do not apply in this case because all offenses occurred before 24 June 2014."

For cases in which an SJAR has already been issued and that SJAR did not specifically advise the CA that the Section 1702 limitations did not apply, the corrective action required depends on the procedural posture of the case.

—If the CA has not yet taken action:

An addendum SJAR should be issued that specifically advises the CA that the 1702/ALNAV 051 limitations do not apply in the case by including corrective language such as: "In reference (x) [original SJAR], I advised you that your ability to modify the findings and sentence in this case were limited by reference (y) [presumably ALNAV 051/14]; that advice was incorrect and you must ignore it. You may, within your sole discretion, modify the findings and sentence in this case."

—If the CA has taken action and the case has not been forwarded for review under RCM 1111 or the judge advocate review under RCM 1112 has not been completed:

The CA's Action (CAA) should be recalled under RCM 1107(f)(2). A new addendum SJAR should be prepared and served on the defense counsel or accused under RCM 1106 before the CA takes action under RCM 1107. The new addendum SJAR should contain language such as "In reference (x) [your original SJAR], I advised that your ability to modify the findings and sentence in this case were limited by reference (y) [presumably ALNAV 051/14]; that advice was incorrect and you must ignore it. You may, within your sole discretion, modify the findings and sentence in this case." The new CAA should contain language such as: "In reference (x) [original SJAR], I was advised that my ability to modify the findings and sentence in this case was limited by reference (y). I have disregarded that erroneous advice and understand that I may, in my sole discretion, modify the findings and sentence in this case."

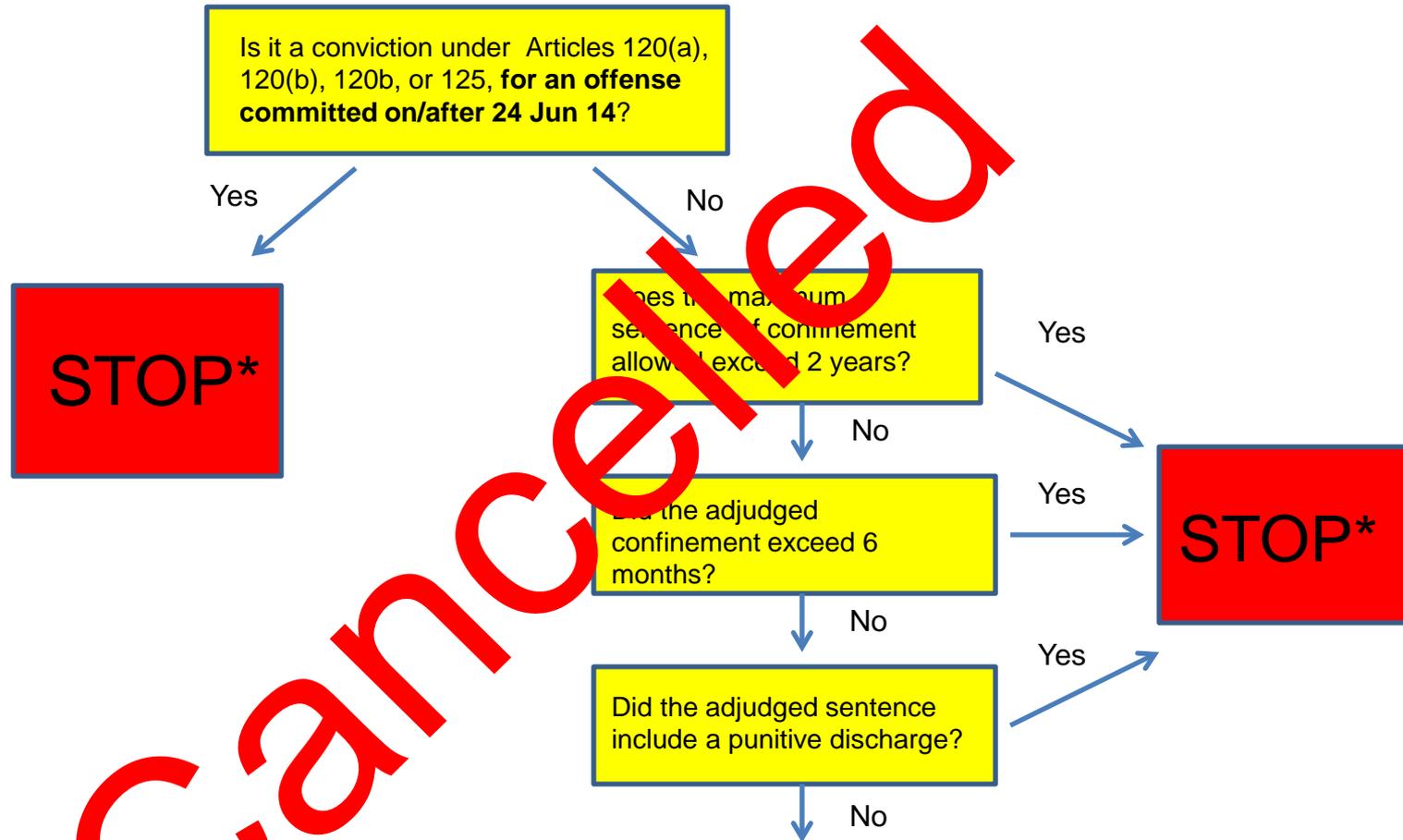
—If the case has been forwarded for review under RCM 1111 or review has been completed under RCM 1112.

Please send us the case name and convening authority so we can pass that information to OJAG.

Points of Contact

Military Justice policy questions may be directed to our new Head, JMJ, LtCol Angela Wissman, USMCR, at angela.wissman@usmc.mil or 571-256-4716; or the Deputy Head (Policy and Legislation), JMJ, Major Ben Robles, USMC, at benjamin.robles@usmc.mil or 703-614-4250.

Article 60(c)(3) Findings



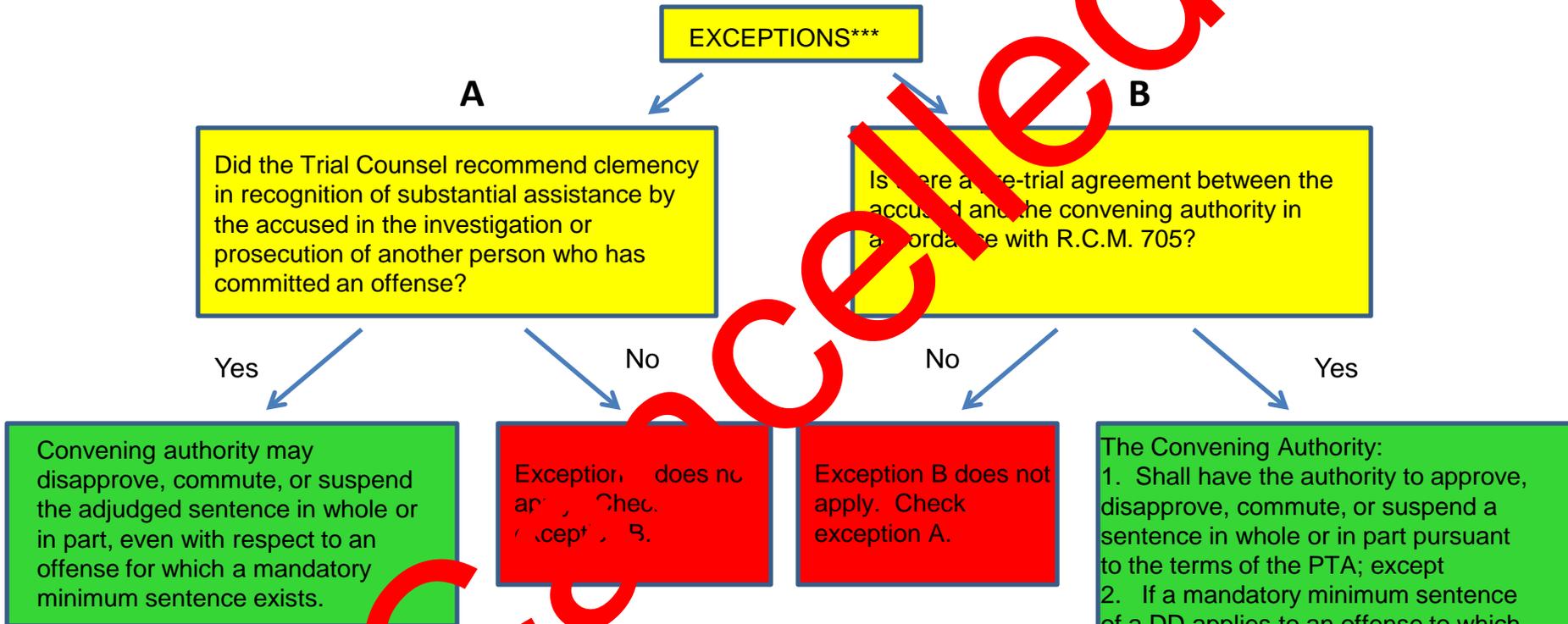
Cancelled

*The CA is authorized to order a rehearing under R.C.M. 1107(e) if the findings were set aside by the Court of Criminal Appeals.

Convening authority may:
1. Change a finding of guilt to a LIO; or
2. Disapprove the finding of guilt and
a. Dismiss the specification or charge if appropriate, or
b. Direct a rehearing in accordance with R.C.M. 1107(e)
If the CA acts on findings, the CA shall provide, at the same time, a written explanation for such action.

Article 60(c)(2) Sentence

General Rule*: For offenses committed on/after 24 June 2014 – regardless of the offenses charged – the CA may not disapprove, commute, or suspend in whole or in part** an adjudged sentence of confinement for more than 6 months or a punitive discharge, unless a below exception applies. Note that convening authorities retain sole discretion to grant clemency on those portions of a sentence other than confinement and punitive discharges.



*The CA may order a sentence rehearing under R.C.M. 1107(e) if the CA is authorized to set aside the findings or sentence or if the findings or sentence were set aside by CCA.

**Evaluate each piece of the sentence individually (e.g. confinement, discharge, reduction, forfeitures) If the CA disapproves, commutes, or suspends the sentence, the CA must provide written explanation of the reasons for such action.

***An accused can have the benefit of a PTA and/or TC recommendation for clemency for substantial assistance. If both apply, the accused has the benefit of the greater exception.

The Convening Authority:
1. Shall have the authority to approve, disapprove, commute, or suspend a sentence in whole or in part pursuant to the terms of the PTA; except
2. If a mandatory minimum sentence of a DD applies to an offense to which the accused has been convicted, the CA may only commute the DD to a BCD pursuant to the PTA (further action may be authorized based on the TC recommendation in recognition of substantial assistance)(See exception A)