

to request that the detailed appellate defense counsel be replaced by another appellate defense counsel.

*See also* R.C.M. 1204(b)(1) concerning detailing counsel with respect to the right to petition the Court of Appeals for the Armed Forces for review.

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### **Rule 1203. Review by a Court of Criminal Appeals**

(a) *In general.* Each Judge Advocate General shall establish a Court of Criminal Appeals composed of appellate military judges.

#### **Discussion**

*See* Article 66 concerning the composition of the Courts of Criminal Appeals, the qualifications of appellate military judges, the grounds for their ineligibility, and restrictions upon the official relationship of the members of the court to other members. Uniform rules of court for the Courts of Criminal Appeals prescribed by the Judge Advocates General.

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(b) *Cases reviewed by a Court of Criminal Appeals.* A Court of Criminal Appeals shall review cases referred to it by the Judge Advocate General under R.C.M. 1201(a) or (b)(1).

#### **Discussion**

*See* R.C.M. 1110 concerning withdrawal of a case pending before a Court of Criminal Appeals.

*See* R.C.M. 908 concerning procedures for interlocutory appeals by the Government.

In cases referred to it under R.C.M. 1201, a Court of Criminal Appeals may act only with respect to the findings and sentence as approved by proper authority. It may affirm only such findings of guilty or such part of a finding of guilty as includes an included offense, as it finds correct in law and fact and determines on the basis of the entire record should be approved. A Court of Criminal Appeals has generally the same powers as the convening authority to modify a sentence (*see* R.C.M. 1107), but it may not suspend all or part of a sentence. However, it may reduce the period of a suspension prescribed by a convening authority. It may not defer service of a sentence to confinement. (*see* R.C.M. 1101(c)). It may, however, review a decision by a convening authority concerning deferral, to determine whether that decision was an abuse of the convening authority's discretion.

In considering the record of a case referred to it under R.C.M. 1201, a Court of Criminal Appeals may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the court-martial saw and heard the evidence. A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless

the error materially prejudices the substantial rights of the accused. Article 59(a).

If a Court of Criminal Appeals sets aside any findings of guilty or the sentence, it may, except as to findings set aside for lack of sufficient evidence in the record to support the findings, order an appropriate type of rehearing or reassess the sentence as appropriate. *See* R.C.M. 810 concerning rehearings. If the Court of Criminal Appeals sets aside all the findings and the sentence and does not order a rehearing, it must order the charges dismissed. *See* Articles 59(a) and 66.

A Court of Criminal Appeals may on petition for extraordinary relief issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law. Any party may petition a Court of Criminal Appeals for extraordinary relief.

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### **(c) Action on cases reviewed by a Court of Criminal Appeals.**

(1) *Forwarding by the Judge Advocate General to the Court of Appeals for the Armed Forces.* The Judge Advocate General may forward the decision of the Court of Criminal Appeals to the Court of Appeals for the Armed Forces for review with respect to any matter of law. In such a case, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals and the order forwarding the case to be served on the accused and on appellate defense counsel. While a review of a forwarded case is pending, the Secretary concerned may defer further service of a sentence to confinement that has been ordered executed in such a case.

(2) *Action when sentence is set aside.* In a case reviewed by it under this rule in which the Court of Criminal Appeals has set aside the sentence and which is not forwarded to the Court of Appeals for the Armed Forces under subsection (c)(1) of this rule, the Judge Advocate General shall instruct an appropriate convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing, the record shall be sent to an appropriate convening authority. If that convening authority finds a rehearing impracticable that convening authority may dismiss the charges.

#### **Discussion**

If charges are dismissed, *see* R.C.M. 1208 concerning resto-

ration of rights, privileges, and property. See R.C.M. 1114 concerning promulgating orders.

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(3) *Action when sentence is affirmed in whole or part.*

(A) *Sentence requiring approval by the President.* If the Court of Criminal Appeals affirms any sentence which includes death, the Judge Advocate General shall transmit the record of trial and the decision of the Court of Criminal Appeals directly to the Court of Appeals for the Armed Forces when any period for reconsideration provided by the rules of the Courts of Criminal Appeals has expired.

(B) *Other cases.* If the Court of Criminal Appeals affirms any sentence other than one which includes death, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals to be served on the accused in accordance with subsection (d) of this rule.

(4) *Remission or suspension.* If the Judge Advocate General believes that a sentence as affirmed by the Court of Criminal Appeals, other than one which includes death, should be remitted or suspended in whole or part, the Judge Advocate General may, before taking action under subsections (c)(1) or (3) of this rule, transmit the record of trial and the decision of the Court of Criminal Appeals to the secretary concerned with a recommendation for action under Article 74 or may take such action as may be authorized by the Secretary concerned under Article 74(a).

### Discussion

See R.C.M. 1201(c); 1206.

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(5) *Action when accused lacks mental capacity.* An appellate authority may not affirm the proceedings while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the appellate authority may direct that the record be forwarded to an appropriate authority for an exami-

nation of the accused in accordance with R.C.M. 706, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the appellate proceedings. The order of the appellate authority will instruct the appropriate authority as to permissible actions that may be taken to dispose of the matter. If the record is thereafter returned to the appellate authority, the appellate authority may affirm part or all of the findings or sentence unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity. If the accused does not have the requisite mental capacity, the appellate authority shall stay the proceedings until the accused regains appropriate capacity, or take other appropriate action. Nothing in this subsection shall prohibit the appellate authority from making a determination in favor of the accused which will result in the setting aside of a conviction.

(d) *Notification to accused.*

(1) *Notification of decision.* The accused shall be notified of the decision of the Court of Criminal Appeals in accordance with regulations of the Secretary concerned.

### Discussion

The accused may be notified personally, or a copy of the decision may be sent, after service on appellate counsel of record, if any, by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the accused's official service record.

If the Judge Advocate General has forwarded the case to the Court of Appeals for the Armed Forces, the accused should be so notified. See subsection (c)(1) of this rule.

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(2) *Notification of right to petition the Court of Appeals for the Armed Forces for review.* If the accused has the right to petition the Court of Appeals for the Armed Forces for review, the accused shall be provided with a copy of the decision of the Court of Criminal Appeals bearing an endorsement notifying the accused of this right. The endorsement shall inform the accused that such a petition:

(A) May be filed only within 60 days from the time the accused was in fact notified of the decision of the Court of Criminal Appeals or the mailed copy of the decision was postmarked, whichever is earlier; and