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**When Mandatory Isn't Required:  
Mandatory Sentences Under the UCMJ**

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## When Mandatory Isn't Required: Mandatory Sentences Under the UCMJ

By David J. R. Frakt, Lt Col, USAFR<sup>1</sup>

### I. Introduction

Unlike the federal guidelines system, and many state sentencing regimes, the UCMJ typically vests unfettered discretion with the sentencing authority,<sup>2</sup> limited only by the statutorily authorized maximum for the offenses of which the accused is convicted. Indeed, “no punishment” is an authorized punishment for virtually every offense under the UCMJ, and the members are advised of this option in the standard jury instructions.<sup>3</sup> There are two exceptions to this general rule of broad sentencing discretion. The UCMJ prescribes a mandatory sentence for one crime, and a mandatory minimum sentence for two other offenses. Specifically, the UCMJ imposes a mandatory death penalty for a conviction of Article 106, Spies,<sup>4</sup> and a mandatory minimum of a life sentence with the possibility of parole for a violation of Article 118, subsection (1) premeditated murder, or subsection (4) felony murder.<sup>5</sup> In this article, I explore how these “mandatory” sentencing terms operate in practice, and consider the various pathways around the statutorily mandated sentences. While no person has yet been convicted under Article 106,<sup>6</sup> Article 118 (1) and (4) charges arise with sufficient frequency that this discussion may be of practical value to the military justice practitioner.

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<sup>2</sup> The accused has the option to be tried by a military judge sitting alone, or by a panel of military court-members (see, R.C.M. 903). except in cases which are referred to courts-martial empowered to impose capital punishment, in which case the accused must be tried by court-members (see, R.C.M. 201(f)(1)(c).

<sup>3</sup> DA Pam 27-9 Military Judges' Benchbook Instruction 2-5-22 Types of Punishment “(NO PUNISHMENT:) MJ: Finally, if you wish, this court may sentence the accused to no punishment.”

<sup>4</sup> “Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death” 10 U.S.C. § 906.

<sup>5</sup> “Any person subject to this chapter, who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

. . .

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.” 10 U.S.C. § 918.

<sup>6</sup> My search of reported military justice decisions found no convictions under Article 106 since it was enacted in 1950. For a discussion of the historic origins of this article see, David A. Anderson, *Spying in Violation of Article 106, UCMJ; The Offense and The Constitutionality of Its Mandatory Death Penalty*, 127 Mil. L. R. 1, 4-11 (1990).

## II. Article 106

If someone were to be prosecuted under Article 106 as a spy, what special rules and procedures would apply, and would the death penalty really be mandatory?

To answer this question, it is helpful to compare the special rules that apply to Article 106 in the Manual for Courts-Martial (MCM) to the rules that apply in non-mandatory capital cases, that is, where death is an authorized but not required punishment under Part IV of the MCM or the law of war.<sup>7</sup>

### A. Pretrial

There are three specific pretrial requirements in capital cases. First, where the death penalty is an authorized punishment for one or more of the charged offenses, if the Convening Authority wants the court to have the option of imposing the death penalty, he or she must refer the charges to a capital court-martial “by including a special instruction in the referral block of the charge sheet.”<sup>8</sup> Second, the Convening Authority must appoint a minimum of twelve members to the court (as opposed to the usual minimum of five in a general court-martial).<sup>9</sup> The accused does not have the option of requesting a trial by military judge alone in a capital case.<sup>10</sup> Third, the trial counsel must, prior to arraignment, give notice of the aggravating factors the prosecution intends to prove at trial.<sup>11</sup>

In a spying<sup>12</sup> case, one of these three requirements applies, one doesn’t, and the application of the third is unclear. The requirement of twelve members clearly applies. The requirement to provide notice of aggravating factors clearly does not apply. Because the death sentence is mandatory, no aggravating factors need be found. Indeed, as explained below, there is no opportunity for the members to vote on

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<sup>7</sup> See, R.C.M. 103(2) and (3) for definitions of “Capital case” and “Capital offense.” Capital offenses under the UCMJ include Articles: 85 (desertion, in time of war) 90 (assaulting or willfully disobeying superior commissioned officer, in time of war), Article 94 (mutiny & sedition), 99-102 (misbehavior before enemy, subordinate compelling surrender, improper use of countersign and forcing safeguard), 104 (aiding the enemy), 106a (espionage), 110 (willfully and wrongfully hazarding a vessel) 113 (misbehavior of sentinel or lookout in time of war), 118 clauses (1) and (4) (premeditated and felony murder), and 120 (rape or rape of a child). The Supreme Court has held the punishment of death for the rape of an adult woman where the victim was not killed is unconstitutional. *Coker v. Georgia*, 433 U.S. 584 (1977).

<sup>8</sup> See, R.C.M. 1004(b)(1)(A). See also, R.C.M. 201(f)(1)(A)(iii) “Notwithstanding any other rule, the death penalty may not be adjudged if: (b) The case has not been referred with a special instruction that the case is to be tried as capital.” See also, R.C.M. 601(e)(1) *Discussion*.

<sup>9</sup> “In all capital cases, general courts-martial shall consist of a military judge and no fewer than 12 members, unless 12 members are not reasonably available because of physical conditions or military exigencies.” R.C.M. 501(a)(1)(B). It seems exceedingly unlikely that any condition or exigency would preclude the appointment of 12 members. However, if fewer than 12 members were detailed to the court, the rule requires the Convening Authority to provide a “detailed written statement. . . stating why a greater number of members were not reasonably available.” Article 25a, UCMJ. If, through challenges during the court-member selection process under R.C.M. 912(f) and (g), the number of members drops below 12, additional members would have to be appointed for the court-martial to remain empowered to adjudge the death penalty.

<sup>10</sup> R.C.M. 201(f)(1)(C) “A general court-martial composed only of a military judge does not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been referred to trial as noncapital.” See also, R.C.M. 903(a)(2) *Request for trial by military judge* and *Discussion* thereto.

<sup>11</sup> R.C.M. 1004(b)(1)(B).

<sup>12</sup> The word “spying” is used to differentiate Article 106a “Spies” from Article 106a “Espionage”.

aggravating factors. As to the requirement of a capital referral, it is unclear if this rule applies. One argument would be that since the death penalty is mandatory for Article 106, the Convening Authority need not specifically authorize it. Under this view, there could be no such thing as a non-capital Article 106 case. Perhaps the better view is that the capital instruction is required. Under this theory, the Convening Authority could evade the mandatory death sentence of Article 106 by referring charges to a non-capital court-martial. There is textual support for this argument. R.C.M. 201(f)(2)(C)(i) states that a capital offense for which there is prescribed a mandatory punishment cannot be referred to a special court-martial because the mandatory punishment is “beyond the punitive power of a special court-martial.” This suggests a recognition that where there is a mandatory death penalty, it should be referred to a court specifically empowered by the Convening Authority pursuant to R.C.M. 1004(b)(1)(A) to adjudge death. Furthermore, R.C.M. 201(f)(1)(A)(iii) states “Notwithstanding any other rule, the death penalty may not be adjudged if: (b) The case has not been referred with a special instruction that the case is to be tried as capital.” This language “notwithstanding any other rule” suggests that where there is a conflict between the mandatory death penalty rule of Article 106 (as reflected in R.C.M. 1004(d)), and the requirement of a capital referral before death can be adjudged, the latter rule would prevail. A counter argument is that the mandatory death penalty provision of Article 106 is statutory, and cannot be overridden by a regulation created by Executive Order. However, Article 18 of the UCMJ, Jurisdiction of General Courts-Martial, specifically states that a general court-martial may adjudge the penalty of death “under such limitations as the President may prescribe.” The requirement of a capital referral could be viewed as one such limitation. It is at least arguable that the Convening Authority could properly refer an Article 106 charge to a non-capital General Court-Martial and that the court-martial would then be empowered to adjudge any sentence other than death, following standard procedures. Even if it were improper to do so, it is unclear what the remedy would be if the accused were to be convicted and sentenced to a punishment other than death. The defense is certainly unlikely to object to such a referral, as the alternative would be a capital referral and mandatory death sentence upon conviction.

### *B. Findings*

The primary difference between a capital and non-capital trial is in the court’s deliberations on findings. Ordinarily, in order to convict of any charged offense, concurrence of at least two-thirds of the panel members is required.<sup>13</sup> However, in order for the death penalty to be an authorized option in sentencing, the accused must be convicted of a death-eligible offense by a unanimous court panel.<sup>14</sup> This rule specifically applies to Article 106 spying cases. According to R.C.M. 921(c)(2)(A), “A finding of guilty of an offense for which the death penalty is mandatory results only if all members present vote for a finding of guilty.” For a non-mandatory death-eligible offense, such as an Article 118(1) or (4) charge, the judge’s instructions and the accompanying findings worksheet would provide the panels with three separate options for each death-eligible offense: a finding of not-guilty, a non-unanimous finding of guilty (by two-thirds or more of the members), and a unanimous finding of guilty. However, in

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<sup>13</sup> R.C.M. 921(B)

<sup>14</sup> R.C.M. 1004(a)(2) “The accused was convicted. . . by the concurrence of all the members of the court present at the time the vote was taken.”

an Article 106 case, because the death penalty is (theoretically) mandatory, the option of a non-unanimous verdict does not exist, and the worksheet would only have the not-guilty and unanimous guilty finding options. A tailored instruction on findings would explain the options to the members.<sup>15</sup>

### C. Sentencing

In the non-mandatory death case, assuming the accused was found guilty of a capital offense by a unanimous jury, there are still three additional “gates” which the prosecution must go through in order for a death sentence to be adjudged. These procedural protections were designed to respond to Supreme Court guidance on the death penalty to ensure that the military death penalty system is constitutional.<sup>16</sup> First, the prosecution must prove the presence of at least one aggravating factor (of which the defense was previously placed on notice<sup>17</sup>) identified in R.C.M. 1004(c). Thus, before voting on the sentence itself during deliberations, the members must vote on the presence of the aggravating factor(s). The members must unanimously agree that the aggravating factor exists. If more than one aggravating factor is alleged, the members vote separately on the existence of each aggravating factor, but there must be unanimous concurrence on at least one of the aggravating factors.<sup>18</sup> If there is unanimous concurrence on the existence of one or more aggravating factors, the members then vote separately on whether the “extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances.”<sup>19</sup> If there is unanimous concurrence that the aggravating circumstances substantially outweigh the extenuating and mitigating circumstances, then one or more of the members may propose a sentence that includes death. Members may also propose sentences that do not include death. Assuming that no lesser proposed sentence gains the required concurrence,<sup>20</sup>

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<sup>15</sup> See, AR 27-6 Military Judge’s Benchbook, Instruction 3-30-1. Spying (Article 106) Note 2

<sup>16</sup> Kevin K. Spradling and Kevin P. Murphy, *Capital Punishment, The Constitution, and the Uniform Code of Military Justice*, 32 Air Force L. Rev. 415 (explaining how the post 1984 military death penalty system was developed in response to U.S. Supreme Court precedents including *Furman v. Georgia*, 408 U.S. 238 (1972)(per curiam) *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976) and *Jurek v. Texas*, 428 U.S. 262 (1976)). For an analysis of the military death penalty system, including its constitutionality, see generally, Dwight Sullivan, *A Matter of Life and Death: Examining the Military Death Penalty’s Fairness*, 45 Fed Lawyer 38 (June 1988); Michael I. Spak, *It’s Time to Put the Military Death Penalty to Sleep*, 49 Cleveland State L. Rev 41 (2001); see also, Captain Douglas L. Simon, *Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law*, 184 Mil. L. Rev. 66 (2005).

<sup>17</sup> R.C.M. 1004(b)(4)(B).

<sup>18</sup> R.C.M. 1004(b)(4)(A) and (B). It is not enough that each member votes that an aggravating factor exists, there must be unanimity on a single aggravating factor.

<sup>19</sup> R.C.M. 1004(b)(4)(C). The rule specifies that the “Accused shall be given broad latitude to present evidence in extenuation and mitigation.” R.C.M. 1004(b)(3).

<sup>20</sup> Panels are required to vote on sentences from the least severe to the most severe, and to stop voting when a sentence is adopted. R.C.M. 1006(d)(3)(a). Normally, two-thirds concurrence is required to adopt a sentence. R.C.M. 1006(d)(4)(C). For sentences including confinement greater than ten years (including a life sentence), three-fourths of the panel members must concur. R.C.M. 1006(d)(4)(B).

the members will vote on the sentence proposal(s) that include death. A unanimous vote is required to adopt a sentence that includes death.<sup>21</sup>

According to the MCM, **none** of these procedures apply in an Article 106 case. According to R.C.M. 1004(d) :

If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.<sup>22</sup>

If the military judge is simply going to announce that a death penalty has been adjudged, then why have a sentencing proceeding at all? What purpose is served by holding such a hearing? While the rules do not explain the purpose of the hearing, I believe the reason for holding such a hearing relates to the fact that the death penalty really isn't mandatory, as explained below. The Convening Authority, courts of appeal, and the President all have the power to reduce a death sentence. Having a fully-developed trial record containing both aggravation evidence and mitigation and extenuation evidence will enable those reviewing the record to better evaluate the appropriateness of a death sentence.

#### *D. Clemency*

While there is some question as to whether the convening authority could avoid having a mandatory death penalty **adjudged** by referring an Article 106 charge to a non-capital court-martial, it is clear that even if a mandatory death penalty were adjudged, the convening authority has the power to disregard the mandatory death penalty provision of Article 106 and impose any lesser sentence, under his or her clemency powers. Article 60, UCMJ, makes clear that that the authority "to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority."<sup>23</sup> The convening authority, "in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part."<sup>24</sup> According to R.C.M. 1107(d)(2) "[w]hen the court-martial has adjudged a mandatory punishment, the convening authority may nevertheless approve a lesser sentence." The sole limitation on this power is that the Convening Authority may not suspend a death sentence.<sup>25</sup> Since the Convening Authority is directed to "approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused," and will be provided

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<sup>21</sup> R.C.M. 1004(b)(4)(A).

<sup>22</sup> By law, the imposition of the death penalty also triggers other mandatory punishments. According to R.C.M. 1004(e), the imposition of a death sentence automatically includes either a dismissal (for officers) or dishonorable discharge (for enlisted). For enlisted spies, the dishonorable discharge will, in turn, result in reduction to E-1, by operation of Article 58a, UCMJ.

<sup>23</sup> Article 60(c)(1)

<sup>24</sup> R.C.M. 1107(d)(1). Of course, the convening authority may also set aside the finding completely, or change the finding of guilty to a finding of guilty to a lesser included offense. R.C.M. 1107(c). However, there are no listed lesser included offenses to Article 106 in the MCM.

<sup>25</sup> See, Article 71(c), UCMJ, R.C.M. 1108(b)

the record of trial and “may consider” it before taking action,<sup>26</sup> it makes sense to have a full sentencing hearing, even though the members don’t get to vote on a sentence. The members are also free to make either a collective or individual recommendation to the convening authority to grant clemency after observing the sentencing hearing, either of their own volition, or at the request of the defense as part of the defense clemency submission. A personal recommendation from the officers (and possibly NCOs)<sup>27</sup> hand-picked by the Convening Authority for court-martial duty may be helpful to the Convening Authority in determining an appropriate sentence.

Even if the convening authority approves a finding of guilt and the accompanying mandatory death sentence for an Article 106 violation, there is no guarantee that the death penalty will be carried out.

#### *E. Post-Trial*

Anyone accused of an Article 106 violation is virtually certain to contest the constitutionality of the mandatory death penalty, and this issue will undoubtedly be among the issues to be considered on appeal. A person sentenced to death is guaranteed a minimum of two appeals, first to the service court of criminal appeals, and then (assuming the relief requested wasn’t granted by the first court of appeals) to the U.S. Court of Appeals for the Armed Forces.<sup>28</sup> Appeal to the Supreme Court of the United States via a writ of certiorari is discretionary.<sup>29</sup> Although the Supreme Court rarely hears military cases, a case involving a mandatory death penalty would seem to be a likely candidate for Supreme Court review.

What would be the likely outcome of an appeal of a mandatory death sentence? Regardless of the individual merits of a particular Article 106 prosecution, there are substantial grounds to believe that a conviction under this statute would not survive appellate review. The constitutionality of a mandatory death sentence for any crime is particularly dubious.<sup>30</sup> The Supreme Court has repeatedly rejected criminal statutes with mandatory death sentences on the grounds that they do not provide any opportunity to consider mitigating factors, and do not provide for an individualized sentence

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<sup>26</sup> R.C.M. 1107(b)(3)(B)(i) The convening authority is required only to consider the result of trial, the SJA recommendation (and defense response thereto, if any), and clemency matters submitted by the accused. R.C.M. 1107(b)(3)(A), but may consider the entire record of trial, the accused’s personnel records, and “other matters as the convening authority deems appropriate.”

<sup>27</sup> An enlisted accused may elect to be tried by a mixed panel of officers and enlisted members. R.C.M. 903(a)(1) and 503(a)(2). Unless unavoidable, the enlisted members must outrank the accused. Article 25 (d)(1), UCMJ. Typically, only non-commissioned officers are selected to serve as enlisted court-members.

<sup>28</sup> See, R.C.M. 1204(a)(1), mandating review by CAAF for cases in which a death sentence was affirmed by a service court of appeals. For an overview of appellate challenges to the military death penalty, see Colonel Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 Mil. L. Rev 1 (2006)

<sup>29</sup> R.C.M. 1205.

<sup>30</sup> U.S. v. Matthews, 13, M.J. 501, 525 (ACMR 1982) (Noting that one of the “broad conclusions” which “may be drawn from Supreme Court decisions regarding the death penalty” is that “a mandatory death penalty is impermissible.” The court specifically noted Article 106, observing ““Whether the Supreme Court would uphold a mandatory death penalty in wartime, based upon military exigency or some other special justification, is uncertain.” *Id.* n. 16.

determination, among other reasons.<sup>31</sup> As one commentator concluded more than twenty years ago, “In light of recent U.S. Supreme Court decisions rejecting mandatory capital punishment. . .the mandatory death provision in article 106 is certainly unconstitutional.”<sup>32</sup> Nothing in the Supreme Court’s jurisprudence since 1990 has undermined this well-founded conclusion.<sup>33</sup>

Because of the likelihood that the mandatory death penalty provision will be deemed unconstitutional on appellate review, in the event that an Article 106 charge is referred to trial, I recommend that the Convening Authority, the prosecution and the military judge follow the exact same pretrial, findings and sentencing procedures that would be done in a non-mandatory capital court-martial, such as for an Article 106a espionage case, including explicit referral to a capital court-martial, providing notice of aggravating factors<sup>34</sup> prior to arraignment, and requiring a unanimous verdict. There should be a full sentencing hearing with the government offering proof of the aggravating factor(s) previously noticed. After the sentencing hearing, the military judge should advise the members that the statute mandates a death sentence, but that the constitutionality of this provision is suspect, and that therefore the members should consider the full range of sentencing options, and choose the sentence that they believe is “warranted by the circumstances of the offense and appropriate for the accused.”<sup>35</sup> The members should also be required to go through the three gates of unanimous findings to reach a death verdict. After the announcement of the adjudged sentence by the members, if the adjudged sentence were something other than death, the court should then announce that by operation of law the court was adjudging a death penalty, but that the recommendation of the members would be provided to the Convening Authority, who would have the power to reduce the sentence in accordance with the member’s recommended sentence. If the members did adjudge a death penalty, no further comment by the military judge would be required. Utilizing this procedure would provide the best chances that the death sentence would withstand an appeal. Even if the mandatory death penalty provision were challenged and found unconstitutional, as it likely would be, it would be impossible for the accused to show prejudice if he were sentenced under the identical procedures utilized for non-mandatory capital cases. Of course, if the members adjudged less than death, and the Convening Authority’s action was to impose a death sentence anyway, the appellate courts, could, as a remedy for the unconstitutional mandatory death penalty provision, reduce the sentence to the sentence selected by the members.

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<sup>31</sup> See, *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976) *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (per curiam).

*Sumner v. Shuman*, 483 U.S. 66 (1987)

<sup>32</sup> David A. Anderson, *Spying in Violation of Article 106, UCMJ; The Offense and The Constitutionality of Its Mandatory Death Penalty*, 127 Mil. L. R. 1 (1990)

<sup>33</sup> Indeed, subsequent cases have strengthened the likelihood that the Supreme Court would reject a mandatory death penalty statute See, e.g., *Ring v. Arizona*, 536 U.S. 584 (2002) (requiring a jury to find aggravating factors necessary for imposing the death penalty).

<sup>34</sup> There are three factors listed in R.C.M. 1004(c) that could potentially apply to a spying case, including that the accused: (2)(A) “Knowingly created a grave risk of substantial damage to the national security of the United States”; (2)(B) “Knowingly created a grave risk of substantial damage to a mission, system or function of the United States”; and (3) “caused substantial damage to the national security of the United States.”

<sup>35</sup> This language is taken from R.C.M. 1107(d)(2) which directs that the convening authority “shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused.”

Even if the members did unanimously vote for death and the Convening Authority's action included a death sentence, and the appellate courts were convinced that the adjudged death penalty met constitutional requirements, both the service court of criminal appeals and the Court of Appeals for the Armed Forces could mitigate the death penalty. According to the discussion to R.C.M. 1203, "a Court of Criminal Appeals has generally the same powers as the convening authority to modify a sentence."<sup>36</sup>

Assuming that the findings and sentence of death were to be maintained throughout the appellate process, including surviving legal challenges to the constitutionality of the mandatory death provision, the death sentence would still have to be personally approved by the President.<sup>37</sup> Under his statutory and constitutional powers, the President could commute a death sentence or take any other action in the nature of clemency, up to and including a full pardon.

### III. Article 118(1) and (4) Premeditated murder and felony murder

The other crimes for which a mandatory sentence is prescribed by the UCMJ are found in Article 118. There are actually two distinct offenses within this article which carry mandatory sentences, premeditated murder and felony murder. Both offenses carry a mandatory minimum sentence of life imprisonment. Because the MCM has two different life imprisonment options – with or without the possibility of parole,<sup>38</sup> the mandatory minimum is actually the more lenient of these two options, life with the possibility of parole. As with the mandatory sentence of Article 106, there are several scenarios under which an accused could be convicted of premeditated murder or felony murder and receive a lighter punishment than the statutory mandatory minimum. These possibilities will be discussed in the order that they may arise during the trial.

#### A. Pretrial

Generally, there is no difference in pretrial processing of Article 118 (1) or (4) charges compared to any other general court-martial offenses. Of course, as death is an authorized option for these offenses, the convening authority may choose to refer the charges to a capital general court-martial. If s/he does so, the other capital requirements discussed *supra* apply (twelve member jury, notice of aggravating factors). The Convening Authority may not avoid the mandatory minimum sentence by referring 118(1) or (4) charges to a Special Court-Martial, as these are capital offenses.<sup>39</sup> However, the mandatory minimum can be nullified through the negotiation of a pretrial agreement. In a pretrial agreement, the

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<sup>36</sup> See, Article 66 and 67, UCMJ. See also, U.S. v. Healy, 26 M.J. 395 (C.M.A. 1988).

<sup>37</sup> R.C.M. 1207. Article 71(a), UCMJ. For an analysis of this Article see, Major Joshua M. Toman, *Time to Kill: Euthanizing the Requirement for Presidential Approval of Military Death Sentences to Restore Finality of Legal Review*, 195 Mil. L. Rev. 1 (2008)

<sup>38</sup> R.C.M. 1003(b)(7) "When confinement for life is authorized, it may be with or without eligibility for parole."

<sup>39</sup> R.C.M. 201(f)(2)(C)(1). The term "capital offense" refers to a crime for which death is an authorized punishment under the MCM, regardless of whether referred capital. See, R.C.M. 103(3).

Convening Authority may agree to approve a sentence less than confinement for life, even though the court will be obligated to adjudge a sentence which includes confinement for life.<sup>40</sup>

### B. Findings

There is nothing unique about the procedures for the findings phase of the trial, or the findings instructions required in a 118 (1) or (4) case.<sup>41</sup> However, the defense counsel may wish to argue in closing or otherwise inform the members about the mandatory life sentence if they convict. In, *U.S. v. Jefferson*,<sup>42</sup> the Court of Military Appeals held that such an argument is “not inappropriate” “[t]o the extent the argument may impress upon the members the seriousness of their decision on findings.”<sup>43</sup> Of course, an additional reason the defense may wish to emphasize the mandatory minimum life sentence is in the hope of jury nullification – that the members will refuse to convict of a crime of which the accused’s guilt has been proven beyond a reasonable doubt because they consider the punishment inappropriately severe.<sup>44</sup> It was likely for this reason that the trial counsel made a motion *in limine* in *Jefferson* to preclude the defense counsel from mentioning the mandatory minimum sentence for felony-murder, which motion was granted by the trial judge.<sup>45</sup> One possible compromise that would impress upon the members the seriousness of the decision on findings without necessarily raising the specter of jury nullification would be to have the judge provide a brief instruction to the members, for example, “you are advised that a finding of guilty of Article 118 (1) or (4) will result in a statutory mandatory minimum sentence of confinement for life, with or without the possibility of parole.” Efforts to inform the members about the mandatory life sentence during voir dire have been rejected by military courts of appeal as irrelevant to the purposes of exercising challenges.<sup>46</sup>

### C. Sentencing

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<sup>40</sup> R.C.M. 705 (b)(2)(E) and R.C.M. 1007 (d)(2) “When the court-martial has adjudged a mandatory punishment, the convening authority may nevertheless approve a lesser sentence.”

<sup>41</sup> A list of the required findings instructions are found in R.C.M. 920(e). Standard pattern jury instructions for all offenses under the UCMJ are found in DA Pamphlet 27-9, Military Judges’ Benchbook. However, such instructions are neither infallible nor binding, and must be tailored to the circumstances of the case, as the Benchbook itself notes in paragraph 1-3 “Necessity for Tailoring” and 1-1(b) (“The pattern instructions are intended only as guides from which the actual instructions are to be drafted.”) Either party may request and/or propose additional or special instructions. R.C.M. 920(c).

<sup>42</sup> 22 M.J. 315 (C.M.A. 1986).

<sup>43</sup> *Id.* at 329. See also, *U.S. v. Smith*, 27 M.J. 25, 29 (CMA 1988) (Everett, C.J. concurring: “I am convinced that. . . the military judge may permit reference by counsel to a mandatory sentence for a crime when counsel has some purpose other than to invite the factfinders to disregard their responsibility to follow the judge’s instructions on the law.”

<sup>44</sup> See generally, Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 Mil Law R. 68(2002) (discussing jury nullification in courts-martial and arguing that defense counsel should be able to overtly seek nullification and that members should be advised of the right of jury nullification).

<sup>45</sup> *Id.*

<sup>46</sup> *U.S. v. Smith* 24, MJ 859, 862-3 (ACMR 1987)

The primary difference between a conviction under Article 118(1) or (4) and other offenses in which a life sentence is an authorized but not mandatory punishment (e.g. Article 118 clauses (2) and (3))<sup>47</sup> is in the sentencing instructions provided to the members and in their sentencing deliberations. There are several specific instructions in the Military Judges' Benchbook<sup>48</sup> ("Benchbook") related to mandatory minimum sentences, including instruction 8-30-3 F "Confinement", and 8-3-40 "Concluding Sentencing Instructions." Instruction 2-5-22 "Types of Punishment" is perhaps the clearest and most succinct suggested instruction:

MJ: You are advised that the law imposes a mandatory minimum sentence of confinement for life for the offense(s) of which the accused has been convicted. Accordingly, the sentence you adjudge must include a term of confinement for life. You have the discretion to determine whether that confinement will be "with eligibility for parole" or "without eligibility for parole."

The Benchbook also advises that the sentence worksheet provided to the members list only the confinement options authorized by law:

In cases in which there is a mandatory sentence for certain elements, that sentence element should be the only one placed on the Sentence Worksheet. For example, in a case in which the accused has been convicted of Article 118(1) or (4), the confinement element should read: To be confined for (life with eligibility for parole) (life without eligibility for parole). In such cases, the restriction and hard labor without confinement elements should be removed.<sup>49</sup>

Do these instructions guarantee that the members will, in fact, adjudge a sentence which includes the mandatory minimum sentence? Perhaps not. There are two different scenarios in which the members might fail to do so. The first scenario under which the members could fail to adjudge the mandatory minimum sentence is if they failed to agree on a sentence at all. A life sentence may be adjudged "only if at least three-fourths of the members present vote for that sentence." If the members were split more or less evenly on life with the possibility of parole and life without parole, they might fail to reach the required concurrence. In a capital case, where the members might have the third option of a death penalty (assuming all the previous "gates" had been fulfilled), the panel might conceivably be split between a death sentence and a life sentence. Or there might be members who simply refused to vote for any proposed sentence. In such a case, a mistrial on sentence would be declared and the case returned to the Convening Authority.<sup>50</sup> The Convening Authority would then order a rehearing on sentence with a new panel of court-members.<sup>51</sup>

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<sup>47</sup> Article 118(2) is an unpremeditated killing with intent to kill or inflict great bodily harm. Article 118(3) is killing resulting from an act inherently dangerous to another accompanied by a wanton disregard for human life.

<sup>48</sup> Department of the Army Pamphlet 27-9

<sup>49</sup> *Id.* at Appendix C, para 2.b.

<sup>50</sup> R.C.M. 1007(d)(6) *Effect of Failure to Agree*

<sup>51</sup> *Id.* The rule also gives the Convening Authority the option in the event of a mistrial on sentence to "order that a sentence of no punishment be imposed." This option seems extremely unlikely after a conviction for premeditated or felony murder.

The other scenario under which the members might not adjudge the mandatory minimum sentence is jury nullification. If the jury decided to ignore the judge's instructions, they might conceivably vote for a lesser sentence and pencil it in on the sentencing worksheet. The Court of Military Appeals acknowledged this possibility in a 1988 opinion. According to the court, "Admittedly since the court members must vote on the sentence, they can engage in "jury nullification" and can adjudge a sentence of less than the minimum confinement prescribed by the Code."<sup>52</sup> This possibility seems extremely far-fetched, particularly given that the Court of Appeals for the Armed Forces has now precluded the members from being instructed on jury nullification, and the members are sworn to follow the judge's instructions.<sup>53</sup> However, in the unlikely event that it did occur, the lesser sentence adjudged by the members would not bind the Convening Authority. The Convening Authority could simply order a rehearing on sentence in front of a new panel, which would not be informed of the prior sentence or limited by it. The usual rule that a sentence may not be increased on rehearing explicitly does not apply when there is a mandatory minimum sentence.<sup>54</sup>

While direct jury nullification is hard to imagine, what is relatively foreseeable is a situation where members seek clarification from the military judge on whether they have any discretion to decline to impose a mandatory life sentence or where the president informs the court that the members are having difficulty reaching an agreement on sentence where a mandatory minimum is involved. In such a case, the defense might wish to consider requesting a special instruction to the members. If the defense is hoping for a mistrial on sentence (perhaps under the belief that after a mistrial they might be able to work out a favorable plea agreement with the convening authority), s/he might request an instruction along the following lines:

MJ: Members, I have previously advised you that any sentence that you adjudge must include the statutory mandatory minimum term of confinement for life with the possibility of parole. Therefore, any sentence that any individual member proposes must include, at a minimum, this element. I have also instructed you that it is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. However, you are under no obligation to vote for any particular sentence. You should only vote for a sentence that you believe is "warranted by the circumstances of the offense and appropriate for the accused."<sup>55</sup>

Another option for the military judge, with or without a specific request for the defense, it is to advise the members of their right to make a clemency recommendation to the convening authority. Such an instruction already exists in the Benchbook. However, I would recommend tailoring this instruction (as indicated by the italicized language) specifically to address the mandatory minimum issue, as follows:

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<sup>52</sup> U.S. v. Shroeder, 27 M.J.87 (CMA 1988).

<sup>53</sup> U.S. v. Hardy, 46 M.J. 67 (CAAF 1997).

<sup>54</sup> "Upon a rehearing. . . no sentence in excess of or more severe than the original sentence may be approved, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory." 10 U.S.C. § 863. *See also*, R.C.M. 810(d). The Convening Authority could also approve the sentence adjudged, or reduce it further.

<sup>55</sup> The quoted language is taken from R.C.M. 1107(d)(2).

## 2-7-17. CLEMENCY

MJ: It is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. However, if any or all of you wish to recommend clemency, it is within your authority to do so after the sentence is announced. *In that regard, you should be advised that the convening authority and higher authorities are not bound by the statutory mandatory minimum term of confinement for life with the possibility of parole, and may approve a sentence which does not include such a term.* However, your responsibility is to adjudge a sentence that you regard as fair and just at the time it is imposed and not a sentence that will become fair and just only if the mitigating action recommended in your clemency recommendation is adopted by the convening or higher authority who is in no way obligated to accept your recommendation.

The defense might also request that the sentencing worksheet specifically include some blank lines under the sentence options with a heading such as “Clemency Recommendation” to highlight this option for the members. Although the instruction makes it clear that a recommendation for clemency is not binding, members who were reluctant to adjudge a life sentence might conceivably be more willing to do so if they could couple the sentence with a specific recommendation not to approve it, trusting that the Convening Authority would strongly consider the recommendation. In at least one reported case, this is exactly what occurred. According to the Court of Military Appeals:

The mandatory minimum sentence does not entirely deprive the court members of a role in determining what confinement the accused will serve. As in this case, they are free to recommend that clemency be granted as to the mandatory life sentence; and this recommendation was considered by the convening authority—who exercised his unreviewable discretion to grant clemency—as well as by the Court of Military Review and by clemency and parole officials.<sup>56</sup>

### *D. Clemency and Post-Trial*

As previously noted, the Convening Authority is not bound by the statutory minimum and could approve any lesser sentence, including no punishment.<sup>57</sup> Similarly, the service Court of Criminal Appeals may also mitigate a mandatory life sentence if warranted.<sup>58</sup>

## IV. Conclusion

Commanders and Judge Advocate prize the military justice system for its tremendous flexibility, particularly in the ability to fashion an appropriate sentence for the individual and the crime. The

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<sup>56</sup> U.S. v. Shroder, 27 M.J. 87, 90 (CMA 1988).

<sup>57</sup> R.C.M. 1107(d)(2).

<sup>58</sup> Review by the Court of Criminal Appeals is automatic for all cases in which there was a sentence of confinement for one year or longer unless the accused waives appellate review. R.C.M. 1201(a)(2)(A).

stringency of the statutory mandatory sentences for spying, premeditated murder, and felony murder in the UCMJ would appear, at first glance, to be inconsistent with this great virtue of military justice. But on closer inspection, the mandatory sentences aren't really mandatory in the traditional sense of the word. Rather, they are a type of default sentencing, while considerable flexibility in reaching an appropriate sentence remains firmly in the hands of the Convening Authority and higher reviewing authorities. Having mandatory sentences that aren't actually required is just one fascinating feature of our unique military justice system.