

A Whole Other Matter: The New Article 60(d) and Handling Victim Submissions During Clemency

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“In any case in which findings and sentence have been adjudged for an offense that involved a victim, the victim shall be provided an opportunity to submit matters for consideration by the convening authority or by another person authorized to act under this section before the convening authority or such other person takes action under this section.”¹

I. Introduction

Welcome to Post-Trial! If you are reading this, you have probably just begun your new job as a Chief of Military Justice.² Speaking for the many who have walked in those shoes, congratulations and deepest sympathies. Gone now are the days when, as a trial counsel, you closed your file at the end of a successful trial, walked triumphantly back to your office, and began working on your next legal conquest, blissfully unaware that courts-martial do not end at the last tap of the gavel. Instead, you are now responsible for the next phase of the court-martial process,³ a phase that is extremely important,⁴ little understood, closely scrutinized,⁵

and quickly changing.⁶ So, roll up your sleeves and get to work!

Called an accused’s best opportunity for sentence relief,⁷ post-trial practice gives the convening authority the ability to take action on the outcome of a court-martial.⁸ So important is post-trial processing that the Court of Appeals for the Armed Forces (CAAF) has treated it with equal importance to that of pre-trial processing and created a presumption of unreasonable delay when initial action occurs more than 120 days after trial.⁹

Prior to the enactment of the National Defense Authorization Act for Fiscal Year 2014 (2014 NDAA)¹⁰ and its changes to Article 60, Uniform Code of Military Justice (UCMJ),¹¹ convening authorities took action on court-martial sentences after considering input from the Staff Judge Advocate,¹² and any written matters submitted by an accused.¹³ Now, convening authorities must provide the victims of offenses the opportunity to submit matters for their consideration,¹⁴ and they must consider matters

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¹ UCMJ art. 60(d)(1) (2013).

² Although this article is designed to assist Chiefs of Military Justice in implementing the addition of Article 60(d), UCMJ and RCM 1105A into post-trial processing, the information contained in this article may also assist trial and defense counsel, special victim counsel, staff judge advocates, or any other military justice practitioner understand this new procedure.

³ See Stephen J. Carpenter Jr., *Federal Criminal Practice: A Military Justice Primer*, WASH. ST. BAR NEWS (Sept. 2005). As the Military Justice Manager, the Chief of Military Justice is also responsible for the responsibilities of the Trial Counsel. See generally, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(d)(5), 502(f) discussion, 1103(b)(1) (2012) [hereinafter MCM].

⁴ U.S. ARMY COURT OF CRIMINAL APPEALS, THE POST-TRIAL HANDBOOK, Forword (2012).

⁵ See *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); see also *United States v. Johnson*, 51 M.J. 227 (C.A.A.F. 1999).

⁶ See Major Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ*, ARMY LAW., July 2014, at 23, 24.

⁷ *Johnson*, 51 M.J. at 229.

⁸ 10 U.S.C. §860(c)(2) (2012). Although convening authorities must only specifically act on the sentence adjudged, they may also disapprove or mitigate some findings made during trial. 10 U.S.C. §860(c)(3) (2012).

⁹ *Moreno*, 63 M.J. at 140. The court held that under the 120-day standard, it will presume that any delay from completion of trial until time of initial action over 120 days is unreasonable, which triggers the four-part analysis of *Barker v. Wingo*, 404 U.S. 514, 530 (1972). *Id.* The presumption is rebuttable so long as the government presents evidence that proves the delay in processing is reasonable. *Id.* Also indicative of the importance of post-trial processing, the court established, in addition to the 120-day trial to action standard, a more stringent, 30-day standard for delay from initial action until mailing to the Court of Criminal Appeals. *Id.*

¹⁰ National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, 127 Stat. 672 (2013) [hereinafter 2014 NDAA].

¹¹ *Id.* at §1702.

¹² MCM, *supra* note 3, R.C.M. 1107(b)(3)(A)(ii).

¹³ MCM, *supra* note 3, R.C.M. 1107(b)(3)(A)(iii). The convening authority was permitted to consider any matter, even those outside the Record of Trial, in determining the appropriateness of the sentence adjudged. MCM, *supra* note 3, R.C.M. 1107(3)(B)(iii).

¹⁴ 2014 NDAA, *supra* note 10, §1706. Pursuant to the newly drafted RCM 1005A, which implements the changes in Article 60(d), the trial counsel is

submitted by a victim¹⁵ prior to taking action on those offenses. This new requirement adds at least one more player to the post-trial arena, creates another timeline to calculate, and forces government counsel to consider a variety of additional factors, all without easing or adjusting the 120-day standard created by *United States v. Moreno*.¹⁶

This paper will provide background on the new Article 60(d), UCMJ, explain the requirements of this new victim right, and discuss potential standard operating procedures (SOPs) to follow in successfully implementing these changes without greatly increasing the amount of time to take action on a court-martial. Although this new change has the ability to extend the amount of time required to get a case from authentication to action, establishing procedures to handle these new types of submissions efficiently will help mitigate this potential setback and ensure timely post-trial processing.

II. The New Article 60(d)

A. What?

The new Article 60(d) was enacted as part of the 2014 NDAA.¹⁷ The change represented a compromise between separate House of Representatives and Senate proposals to amend Article 60 to guarantee victims the right to participate in the court-martial post-trial process.¹⁸ Because of time constraints the compromise came without an opportunity for any substantive amendments or substantial floor debate.¹⁹

responsible for making all reasonable efforts to inform crime victims of this new right. Exec. Order No. 13669, 79 Fed. Reg. 34999 (June 18, 2014) [hereinafter Exec. Order].

¹⁵ *Id.*

¹⁶ 63 M.J. at 140. The court noted in its *Moreno* opinion that its establishment of the timeliness standard did not circumvent the President's ability to establish rules for courts-martial pursuant to Article 36, UCMJ. *Id.* at 141. Since *Moreno*, neither the court nor the President has modified the appellate standard created by *Moreno*. For more information on this topic see Major Jennifer L Venghaus, *Seven Years Later: The Struggle with Moreno Continues*, 217 Mil. L. Rev. 1 (Fall 2013).

¹⁷ 2014 NDAA, *supra* note 10.

¹⁸ See 159 Cong. Rec. §8548 (daily ed. Dec. 9, 2013). The Senate proposal was more broad, requiring the "complaining witness an opportunity to respond to any clemency matters submitted by an accused to the convening authority that referred to the complaining witness" as well as "an opportunity to submit matters to the convening authority in any case in which findings and sentence have been adjudged for an offense involving the complaining witness." S. Rep. No. 113-44 at 80 (2013). The House proposal was more narrow, requiring only "the complaining witness shall be provided an opportunity to submit matters for consideration by the convening authority or by another person authorized to act under this section before the convening authority or such other person takes action . . ." 113 H.R. 1960 at 110 (2013).

¹⁹ See 159 Cong. Rec. §8548 (daily ed. Dec. 9, 2013).

Consequently, practitioners can glean little guidance from the statute on how to implement this new provision.²⁰

Because crime victims have always had the ability to submit matters for consideration during the post-trial process,²¹ some commentators have called the change inconsequential, referring to parts of the new Article 60(d) as "merely a partial codification of a convening authority's existing ability to consider matters beyond the record of trial."²² However, this change did create an affirmative duty for the government to seek victim input where one did not previously exist.²³

B. Why?

The push for amendments to Article 60 began with concerns raised by recent Air Force sexual assault cases wherein convening authorities disapproved the findings and sentence in two separate courts-martial.²⁴ In the case of *United States v. Wilkerson*, the convening authority, Lieutenant General Craig Franklin set aside the conviction of an Air Force Wing Inspector General, months after a panel's findings.²⁵ Lieutenant Colonel James Wilkerson was

²⁰ Zachary D. Spilman, *2013 Changes to the UCMJ – Part 5: Post Trial Matters*, NIMBLOG-CAAFLOG (Jan. 9, 2014), <http://www.caaflg.com/2014/01/09/2013-changes-to-the-ucmj-part-5-post-trial-matters/>. It was actually necessary to make changes in the National Defense Authorization Act for 2015 to correct technical errors contained in the 2014 version of the statute. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 §531, 128 Stat. 3292, (2014) [hereinafter 2015 NDAA].

²¹ MCM, *supra* note 3, R.C.M. 1107(b)(3)(B)(iii); see also Zachary D. Spilman, *Not Helping: How Congressional Tinkering Harms Victims During the Post-Trial Phase of a Court-Martial*, 114 COLUM. LAW REV. 70, 70 (2014).

²² Spilman, *supra* note 21, at 78.

²³ 2014 NDAA, *supra* note 10, §1706(a). Previously, the rule, as stated in the Rules for Court-Martial (RCM), allowed convening authorities to consider any matter they considered relevant. MCM, *supra* note 3, R.C.M. 1107(b)(3)(B)(iii). However, there was nothing in either the rule or the prior version of the Uniform Code of Military Justice (UCMJ) specifically requiring that the victim of a crime be permitted to submit matters to the convening authority for consideration. See 10 U.S.C. §860 (2012); MCM, *supra* note 3, R.C.M. 1107.

²⁴ See Michael Doyle and Marisa Taylor, *Military Sexual Assault Case Triggers Political Furor*, MCCLATCHY NEWSPAPERS, Mar. 8, 2013, <http://mcclatchydc.com/2013/03/08/185271/military-sexual-assault-case-triggers.html>.

²⁵ Nancy Montgomery, *Case Dismissed Against Aviano IG Convicted of Sexual Assault*, STARS AND STRIPES, Feb. 27, 2013, <http://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797> (last visited Mar. 13, 2015). Originally, the convening authority refused to provide an explanation for his decision. *Id.* However, later, the convening authority provided a six-page memorandum detailing his decision. Memorandum from Lt. Gen. Craig A. Franklin to Sec. Air Force Michael B. Donley (Mar. 12, 2013), available at <http://www.foia.af.mil/reading/thewilkersonfoiacase.asp> (follow "Gen Franklin's Memo" link) (last visited Mar. 13, 2015).

found guilty of abusive sexual contact, aggravated sexual assault, and conduct unbecoming an officer and a gentlemen following a sexual encounter with a female house guest while she was substantially incapacitated from alcohol.²⁶ A military panel sentenced him to confinement for one year, total forfeiture of pay and allowances, and dismissal from the service.²⁷ In a separate case, Lieutenant General Susan Helms set aside a sexual assault conviction in the case of *United States v. Herrera* months after the completion of that court-martial.²⁸ Captain Matthew Herrera was convicted of sexual assault of a female lieutenant and sentenced to 60 days of confinement, a reprimand, forfeiture of \$2,500 a month for two months, and a dismissal from the service.²⁹ He was acquitted, at the same court-martial, of a similar charge against a female staff sergeant.³⁰

One concern of lawmakers following these decisions was ensuring that victims' voices were heard when commanders were taking action on the results of a court-martial.³¹ Although the debate largely focused on victims of sexual assault, ultimately, the law applies to victims of all crimes in cases where a finding of guilt and a sentence has been adjudged.³²

C. Who?

Under Article 60(d), a victim is:

[A] person who has suffered a direct physical, emotional, or pecuniary harm as a result of a

commission of an offense under this chapter (the Uniform Code of Military Justice) and on which the convening authority or other person authorized to take action under this section is taking action under this section.³³

At first glance, this definition appears relatively clear. However, while the statute defines a victim as a "person" who suffers a "harm," it does not define the terms "person" or "harm."³⁴ Additionally, there is little guidance in case law, legislative history, or the new Rule for Courts-Martial (RCM) 1105A on the definition of these terms; therefore, in order to formulate a basic understanding of their meaning, one place to begin is *Black's Law Dictionary*.³⁵

Black's defines a "person" as "a human being"³⁶ or "natural person,"³⁷ or as a legal person—"an entity such as a corporation, created by law and given certain legal rights and duties of a human being."³⁸ Therefore, under the statute, input could be submitted by a single individual, a small business, or a large corporation, and government counsel now have an obligation to provide that opportunity.³⁹

²⁶ Kristin Davis, *Former Aviano IG Received 1 Year Sentence*, AIR FORCE TIMES, Nov 5, 2012, <http://www.airforcetimes.com/article/20121105/NEWS/211050301/Former-Aviano-IG-Receives-1-year-Sentence>.

²⁷ Montgomery, *supra* note 25.

²⁸ Memorandum for Record from Lt. Gen. Susan J. Helms (Feb. 24, 2013), available at <http://www.foia.af.mil/reading/> (follow "Herrera MFR / U.S. v. Herrera Part 1 hyperlink") (last visited Mar. 13, 2015).

²⁹ Kristin Davis, *Court-Martial, Then Clemency: Is This Justice?*, ARMY TIMES, Mar. 11, 2013, <http://www.armytimes.com/apps/pbcs.dll/article?AID=20133303110001>.

³⁰ *Id.*

³¹ See, *Department of Defense Authorization for Appropriations for Fiscal Year 2014 and The Future Years Defense Program: Hearing on S. 1197 Before the Comm. on Armed Forces*, 113 S. Hrg. 108 at 910 (2013) [hereinafter *Comm. On Armed Forces Hearings*]. During these hearings, Senator Claire McCaskill (D-Mo.) questioned General Mark A. Welch, III, Chief of Staff, U.S. Air Force, about the convening authority actions in *Wilkerson* and *Herrera*, pointing out that Lieutenant General Helms did not consider the input of the victim in making her decision on the case, although she was permitted to consider any matter prior to taking action on the court-martial, opining that victims of offenses would likely want to have input into the decision making process in cases such as this. *Id.*

³² 2014 NDAA, *supra* note 10, §1706.

³³ 2015 NDAA, *supra* note 20. The original definition of "victim" in the 2014 NDAA included the term "loss" instead of "harm" in the description of the injury required to be a victim under the statute. 2014 NDAA, *supra* note 3, §1706. This language created an ambiguity because, of the five definitions of "victim" contained in the 2014 NDAA, including the one contained in the new Special Victim Statute, it was the only one that used the word "loss" instead of "harm." Zachary D. Spilman, *2013 Changes to the UCMJ – Part 6: Practice Notes*, NIMJBLOG-CAAFLOG (Jan. 10, 2014), <http://www.caaflg.com/2014/01/10/2013-changes-to-the-ucmj-part-6-practice-notes/>.

³⁴ 2014 NDAA, *supra* note 10, §1706; 2015 NDAA, *supra* note 20, §531(a)(3)(B). The newly drafted RCM 1105A explains the definition of "victim" in a slightly clearer way, stating, "For the purposes of this rule, a crime victim is a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty, and on which the convening authority is taking action under RCM 1107." Exec. Order, *supra* note 14. The rule goes on to specify that for victims "under 18 years of age, incompetent, incapacitated, or deceased, the term includes one of the following (in order of precedence): a spouse, legal guardian, parent, child, sibling, or similarly situated family member." *Id.* Additionally, the Rule states, "For a victim that is an institutional entity, the term includes an authorized representative of the entity." *Id.*

³⁵ BLACK'S LAW DICTIONARY (9th ed. 2009).

³⁶ *Id.* at 1257 (9th ed. 2009).

³⁷ *Id.*

³⁸ *Id.* at 1258. In the 2015 NDAA, Congress limited the definition of "victim" under the Crime Victims' Rights Article, Article 6(b), UCMJ, to "individual" to exclude corporations and other such entities, but it did not modify the definition in any of the other provisions which defined "victim," including Article 60(d). 2015 NDAA, *supra* note 20, §531(f)(1).

³⁹ 2014 NDAA, *supra* note 10, §1706.

Likewise, *Black's* defines a "harm" as, "injury, loss, damage; material or tangible detriment."⁴⁰ Under the statute, however, only victims who suffer a "direct physical, emotional, or pecuniary harm" are entitled to submit matters.⁴¹ A "physical harm" is "any physical injury or impairment of land, chattels, or the human body."⁴² An "emotional harm," is a type of mental reaction "that results from another person's conduct."⁴³ A "pecuniary harm" is one "of or relating to money; monetary."⁴⁴ Finally, a harm is "direct" when it is "free from extraneous influence; immediate."⁴⁵

There is no requirement that "victims" actually participate in the prosecution of an alleged offense or that they be named in the specification of the offense to be entitled to submit matters.⁴⁶ Additionally, there is no qualifier that the loss be "directly relating to or resulting from the offense for which the accused has been found guilty" as is required to present evidence during presentencing.⁴⁷ Consequently, the door seems to have been opened to the multitudes who could call themselves "victims."⁴⁸ For instance, have the parents, spouse, or siblings of an individual against whom a criminal act is committed suffered a harm? What about someone who witnesses a crime occurring? Have they suffered an emotional harm? The spouse sharing the bank account of a Soldier who is named in a specification of larceny—has she suffered a pecuniary harm? Unfortunately, because there is little guidance in the statute on how to properly define the terms used in the definition of "victim" under the new Article 60(d) and RCM 1105A, appellate courts may have to provide the answers.⁴⁹ What is important to note, however, is that there are, theoretically, multiple persons who could fit

the definition of "victim" within any charged offense. Therefore, it is imperative you have a procedure to manage what could potentially be a daunting undertaking. D. How?

Paragraphs (d)(2)(A) and (B) of Article 60, provide time requirements for victim submissions during the post-trial process.⁵⁰ Essentially, a victim who desires to present matters for consideration by a convening authority must do so within ten days of receiving the later of "the authenticated record of trial in accordance with Article 54 (e), UCMJ"⁵¹ or "the recommendation of the staff judge advocate or legal officer."⁵² This time limit may be extended, by the convening authority or other person taking action, for not more than an additional twenty days upon a victim making a showing of good cause that additional time is required to submit matters.⁵³

III. Handling Victim Input During the Post-Trial Process

A. Post-Trial Begins Pre-Trial

Establishing a good SOP for handling victim submissions will make managing government timelines in light of this new requirement much easier. A good SOP will require identifying and communicating with these new players long before findings and sentence are announced. However you decide to accomplish the mission, locating and notifying victims early, even prior to trial, will help in managing the collection of matters later when the clock is ticking.

1. Locating "Victims"

Once you have grasped the definition of "victim," determining who is entitled to submit matters during the post-trial process should be relatively easy. Because the statute does not limit "victims" to those specifically listed in the charged specification,⁵⁴ the more difficult task becomes identifying and locating each "victim."⁵⁵

Locating these persons and notifying them of their new right to submit matters for consideration during clemency

⁴⁰ BLACK'S LAW DICTIONARY, *supra* note 35, at 784.

⁴¹ 2014 NDAA, *supra* note 10, §1706.

⁴² BLACK'S LAW DICTIONARY, *supra* note 35, at 784.

⁴³ BLACK'S LAW DICTIONARY, *supra* note 35, at 601.

⁴⁴ BLACK'S LAW DICTIONARY, *supra* note 35, at 1245.

⁴⁵ BLACK'S LAW DICTIONARY, *supra* note 35, at 525.

⁴⁶ 2014 NDAA, *supra* note 10, §1706.

⁴⁷ MCM, *supra* note 3, R.C.M. 1001(b)(4). Unlike the victim impact evidence permitted under RCM 1001, the definition of "victim" under Article 60(d) only requires that the loss be direct to the person rather than related to the offense. 2014 NDAA, *supra* note 10, §1706. Conversely, "crime victim" under the proposed RCM 1001A, which will provide the opportunity for victims to provide an unsworn statement during presentencing proceedings, only requires that the harm be directly to the victim rather than the offense. <https://www.federalregister.gov/articles/2015/02/04/2015-02149/manual-for-courts-martial-proposed-amendments#p-36>.

⁴⁸ Spilman, *supra* note 33.

⁴⁹ *Id.*

⁵⁰ 2014 NDAA, *supra* note 10, §1706.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Compare 2014 NDAA, *supra* note 10, §1706, with 2014 NDAA, *supra* note 10, §1701, and 10 U.S.C. §854(e) (2012).

⁵⁵ See Spilman, *supra* note 20.

can start before trial is complete.⁵⁶ During the pretrial process, military justice shops should begin investigating, identifying, and locating victims while they prepare their case for trial, even if those victims are unlikely to testify during the trial.⁵⁷

Identifying and locating victims is a task that a paralegal can easily undertake⁵⁸—reviewing the case file and the charge sheet to determine whether or not there are unnamed persons who may fit into the class of persons entitled to submit matters. They should work to locate them using available methods such as public records searches via Westlaw or LexisNexis,⁵⁹ criminal investigations records, or reports such as the Child Victim Identification Report provided in child pornography cases by the National Center for Missing and Exploited Children.⁶⁰

Immediately following trial, when it is clear who is entitled to make submissions, the trial counsel can begin contacting those persons previously identified and explaining to them the timeline to submit matters.⁶¹ This can be done while waiting for the record of trial to be transcribed.⁶² At the same time they are notified of their right to submit matters, victims may be asked if they are interested in exercising that right or if they would like to waive it. Should a victim choose to waive, that waiver must be in writing, signed by the victim, and attached to the final

record of trial.⁶³ Appendices A and B contain sample pre- and post-trial notification letters for your use. Having these conversations early will help you get a grasp of how many submissions you will be managing later.

2. Categories of “Victims”

Beyond the definition contained in Article 60(d), there are generally three categories of “victims” with whom you will be communicating. This categorization is important because of those representation rights, service considerations, and professional responsibility requirements.

a. Sexual Assault Victims Entitled to Special Victim Counsel

The 2014 NDAA required the service secretaries to “designate legal counsel (to be known as ‘Special Victims’ Counsel’) for the purpose of providing legal assistance” to qualifying victims of specified sexual offenses.⁶⁴ Under this statute, victims of alleged offenses under Articles 120, 120a, 120b, 120c, 125, UCMJ or attempts thereof under Article 88, UCMJ who are entitled to Legal Assistance pursuant to 10 U.S.C. §1044 are entitled to representation by Special Victims’ Counsel (SVC).⁶⁵ Special Victims’ Counsel provide victims with legal assistance representation in criminal contexts.⁶⁶ Additionally, SVCs advocate on behalf of their clients throughout the military justice process, including post-trial.⁶⁷ For this reason, victims remain represented by their SVCs from appointment until initial

⁵⁶ 2014 NDAA, *supra* note 10, §1706. A case must reach findings and a sentence for the right to actually exist. *Id.* The statute does not prohibit notifying persons of a right to which they may become entitled. *Id.* Because a “victim” is only permitted to submit matters in cases where a conviction and sentence has been entered to the specification which applies to them, the notification should include notice of that requirement.

⁵⁷ Compare MCM, *supra* note 3, R.C.M. 1001 (requiring evidence presented during presentencing to directly relate to or result from an offense), with Exec. Order, *supra* note 15 (requiring the harm to the victim be direct).

⁵⁸ See U.S. DEP’T OF ARMY, PAM. 600-25, U.S. ARMY NONCOMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT GUIDE para. 12-1c(8) (28 July 2008) (approved revision 11 Aug 2011). The Office of the Staff Judge Advocate, Headquarters, Fort Bragg, assigns this responsibility to their Victim Witness Liaison. OSJA CL-FORM, OFFICE OF THE STAFF JUDGE ADVOCATE, HEADQUARTERS, FORT BRAGG, N.C. (on file with the author). Other installations assign this duty to their post-trial paralegal. OFFICE OF THE STAFF JUDGE ADVOCATE, FIRST CAVALRY DIVISION, STANDARD OPERATING PROCEDURES FOR MILITARY JUSTICE 19 (June 2014) [hereinafter 1CD MJ SOP] (on file with author).

⁵⁹ See LEXIS ADVANCE, <https://advance.lexis.com/publicrecordshome/?pdmfid=1000200&crd=9796f1c7-a561-449e-bac0-c51b3ad5b842&ecomp=c45g&prid=25c6a096-5e40-4f72-bd58-623d343e6a80> (last visited Mar. 13, 2015).

⁶⁰ See NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, <http://www.missingkids.com/CVIP> (last visited Mar. 13, 2015).

⁶¹ Exec. Order, *supra* note 14.

⁶² MCM, *supra* note 3, R.C.M. 1103(a), 1103(b)(2)(B), 1103(c)(1).

⁶³ Exec. Order, *supra* note 14; MCM, *supra* note 4, R.C.M. 1103(b)(3)(I).

⁶⁴ 2014 NDAA, *supra* note 10, §1716. Prior to the enactment of this statute, the Secretary of Defense General Counsel issued a memo entitled “Legal Assistance to Victims of Sexual Assault” opining that 10 U.S.C. §§ 1044 and 1565b “authorized, and certainly does not prohibit” judge advocates from providing legal advice and representation, including legal assistance in criminal contexts to victims of sexual assault. THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, SVP HANDBOOK Background (Nov. 1, 2013) [hereinafter JA SVC HANDBOOK]. The Army formally implemented the Special Victim Counsel Program on 1 November 2013. TJAG Policy Memorandum #14-01, The Office of the Judge Advocate Gen., U.S. ARMY, Subject: Office of the Judge Advocate General Policy Memorandum# 14-01, Special Victim Counsel (Nov. 1, 2013), available at http://jpp.whs.mil/Public/docs/RFI/Set_1/Encl13-25/RFI_Enclosure_Q16_USA.pdf.

⁶⁵ 10 U.S.C. §1044 (2012); 2014 NDAA, *supra* note 10. Although the definition of “victim” under this statute was originally different from the definition of “victim” contained in the provisions relating to Article 60(d), as discussed above, the 2015 NDAA corrected the discrepancy and now, with the exception of the entitlement to legal assistance requirement contained in 10 U.S.C. §1044e, the definitions of “victim” is the same. 2015 NDAA, *supra* note 21, §531.

⁶⁶ JA SVC HANDBOOK, *supra* note 64, para 4-1a.

⁶⁷ *Id.*

action by the convening authority, unless the victim releases the SVC sooner.⁶⁸

Because the rules applicable to SVC representation are relatively clear, matters involving victims who fall within this category are easier to manage. Once a victim of a qualifying offense has accepted SVC representation, post-trial documents should be served on the victim as well as the SVC, and all communication with the victim regarding submission of matters should be done through that SVC.⁶⁹

b. Non-Sexual-Assault Crime Victims Entitled to Legal Assistance

A second category of victims is those who are entitled to the services of a legal assistance attorney but who are not entitled to representation by an SVC.⁷⁰ These individuals are not likely to be represented by counsel during trial or when it comes time to serve post-trial documents. Therefore, serving these individuals will usually only require providing them with the required post-trial documents and informing them of their opportunity to submit matters and the timeline for such submissions.⁷¹

Because they are not automatically provided an attorney to represent them, these victims will have likely primarily worked with the trial counsel throughout the court-martial process. The familiarity gained through this often close coordination will likely lead victims to trust the trial counsel. Consequently, these victims may look to the trial counsel for assistance in submitting matters. Because trial counsel represent the government, they should not be assisting victims with preparation of their post-trial submissions.⁷² As the Chief of Justice, it is your responsibility to ensure that your counsel know and stay within their ethical bounds.⁷³

A good procedure to establish in these cases is to refer these victims to their servicing legal assistance office for help in preparing and submitting their matters.⁷⁴ Once

⁶⁸ *Id.*

⁶⁹ U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 4.2 (1 May 1992) [hereinafter AR 27-26].

⁷⁰ 10 U.S.C. §1044 (2012). While §1044 establishes entitlement for legal assistance services, §1044e narrows that category regarding SVCs. 2014 NDAA, *supra* note 10, §1716.

⁷¹ AR 27-26, *supra* note 69, Rule 4.2; *but see id.*, Rule 4.3.

⁷² *See* MCM, *supra* note 3, R.C.M. 502(d)(5). Because the trial counsel prosecutes cases on behalf of the United States and not the crime victim, it is possible that a conflict could arise between the interests of those two parties. AR 27-26, *supra* note 69, Rule 1.13.

⁷³ AR 27-26, *supra* note 70, Rule 5.1.

⁷⁴ *See* 10 U.S.C. §1044 (2012). The assistance required in these situations would be the types that are provided for within the Army legal assistance

victims have been referred to legal assistance, however, it will become important to ascertain whether or not they are represented by counsel when communicating with them about their post-trial submissions.⁷⁵

c. Victims Not Entitled to Special Victims' Counsel or Legal Assistance

The final category of victims likely encountered during the post-trial process is those who are entitled to neither SVC representation nor legal assistance services. Generally, these persons are not represented either at trial or later, so when it comes time to serve them with post-trial documents, they alone will need to be served. Additionally, unless these individuals seek civilian counsel, they will not be represented while preparing submissions, so you will be able to communicate with them directly.⁷⁶ Like those victims not entitled to SVC representation, these victims may potentially look to the trial counsel for guidance and assistance. Again, trial counsel should not blur the lines of their representation of the government by assisting the victim in submitting matters.⁷⁷ Instead, after providing them with notice, these victims should be advised to seek private counsel for legal advice or should be referred to their Victim-Witness Liaison for further assistance.⁷⁸

B. The Authenticated Record of Trial and Staff Judge Advocate's Post-Trial Recommendation

Under Article 60(d), the victim's 10 days to submit matters to the convening authority begin upon the later service of the authenticated record of trial or the staff judge advocate's post-trial recommendation (SJAR).⁷⁹

Article 54(e), UCMJ states:

In the case of a general or special court-martial involving a sexual assault or other offense covered by section 920 of this title (Article 120), a copy of all prepared records of the proceedings of the court-martial shall be given to the victim of the offense if the victim testified during the proceedings. The records

program. *See* U.S. DEP'T ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM paras. 2-1, 3-7 (Feb. 21, 1996) (RAR Sept. 13, 2011).

⁷⁵ AR 27-26, *supra* note 69, Rule 4.2.

⁷⁶ *Id.* at Rule 4.3.

⁷⁷ *Id.* at Rule 3.8.

⁷⁸ *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE Chapter 17 (3 Oct. 2011).

⁷⁹ 2014 NDAA, *supra* note 10, §1706.

of the proceedings shall be provided without charge and as soon as the records are authenticated. The victim shall be notified of the opportunity to receive the records of the proceedings.⁸⁰

Based on the plain language of the statute, not all crime victims are entitled to a free copy of the authenticated record of trial.⁸¹ Additionally, the National Defense Authorization Act for Fiscal Year 2015 (2015 NDAA) clarified that not all “victims” covered under Article 60(d) are entitled to a free record of proceedings.⁸² Specifically, to be entitled to a free, authenticated copy of the record, the following criteria must be met: “(1) a general or special court-martial; (2) involving a sexual assault or other Article 120 offense; and (3) when the victim testified during the proceedings.”⁸³ Conversely, all “victims” under Article 60(d) are entitled to a copy of the SJAR when a convening authority is taking action on their related offenses.⁸⁴

The distinction regarding entitlement to a free copy of the authenticated record of trial can create an opportunity in

servicing victims and managing their submissions. Because trial counsel are required in all special and general courts-martial to examine the record of trial prior to authentication,⁸⁵ in many jurisdictions, counsel are provided an unauthenticated version of the record of proceedings for this review.⁸⁶ So long as there are no substantial errors in this unauthenticated version, all of the information required to be contained in the SJAR is available, and there appears to be no prohibition to using it to draft the initial post-trial recommendation for serving victims.⁸⁷ Therefore, for cases where the victim is only entitled to the SJAR, consider drafting this document early using an unauthenticated version of the record and giving it to the victim while you are awaiting the record of trial to be authenticated. This will allow victim submissions to be received and ready to serve on the accused immediately upon authentication, resulting in saved government time.

C. Calculating Submission Time

1. Counting Victim Days

Pursuant to the statute, victim submissions are due within ten days of their later receipt of the record of trial or the SJAR.⁸⁸ The statute is silent on what is considered a “day.” The Rules for Courts-Martial state, however, “when a period of time is expressed in a number of days, the period shall be in calendar days, unless otherwise specified.”⁸⁹ Similar to practice in providing these documents to the accused and counsel, a good SOP will require a method for documenting exactly when this service occurs, such as registered mail or other signed receipt, so days can be accurately calculated.⁹⁰

2. Providing Victims Additional Time

⁸⁰ UCMJ art. 54(e) (2012).

⁸¹ *Id.* Because of the rule, it is possible that a person could be entitled to a free copy of the authenticated record of trial and not be entitled to submit matters to the convening authority for consideration. Specifically, unlike Article 60(d), Article 54(e) does not require that the accused be found guilty of the offense in which they are the “victim.” *Id.* Therefore, if an accused is acquitted of the Article 120 offense, the “victim” will be entitled to a no-cost copy of the authenticated record of trial; however, the “victim” will not be entitled to submit matters during post-trial. Compare 2014 NDAA, *supra* note 11, §1706 (requiring a finding of guilt and sentence on relevant offenses to be entitled to submit matters to the convening authority), with UCMJ art. 54(e) (only requiring cooperating in the prosecution of sexual offense related charges).

⁸² 2015 NDAA, *supra* note 20, §531. The 2014 NDAA generated confusion regarding whether or not it was intended that all “victims” receive an authenticated record of trial. 2014 NDAA, *supra* note 10, §1706. That ambiguity was clarified in the 2015 NDAA by the inclusion of the words “if applicable” in the provisions pertaining to the record of proceedings. 2015 NDAA, *supra* note 20, §531.

⁸³ Information paper from The Joint Service Committee on Military Justice, DOD, subject: Implementation Guidance for Article 54(e), UCMJ (28 June 2012). Because of the way the statute was written, it is possible that a victim in a sexual assault case can become entitled to a free copy of the record of trial even if they are not entitled to submit matters during clemency. Compare 2014 NDAA, *supra* note 10, §1706 (requiring a finding of guilt and sentence on relevant offenses to be entitled to submit matters to the convening authority), with UCMJ art. 54(e) (only requiring cooperating in the prosecution of sexual offense related charges). For example, a person named in a sexual assault allegation in a case where there is an acquittal on that specification is entitled to a free record of trial in accordance with Article 54(e), but would not likely be entitled under Article 60(d) to submit matters during post-trial. *Id.*

⁸⁴ 2014 NDAA, *supra* note 10, §1706. This right was also clarified by the 2015 NDAA by removing the words “if applicable” from the paragraph which discussed the service of the Staff Judge Advocate’s recommendation, which had been included in the 2014 version of the NDAA. 2015 NDAA, *supra* note 20, §531.

⁸⁵ MCM, *supra* note 3, R.C.M. 1103(i)(1)(A). Defense counsel should be permitted to examine the record prior to authentication, unless such will cause unreasonable delay; however, defense counsel are not required to examine the record prior to authentication. *Id.* R.C.M. 1103(i)(1)(B).

⁸⁶ This assertion is based on the author’s professional experience as trial counsel for 3d Infantry Division from March 2007 to June 2009, as defense counsel for U.S. Army Trial Defense Service from July 2009 to May 2011, as senior trial counsel for both Combined Joint Task Force-1 and 1st Cavalry Division from July 2011 to June 2013 and as chief, military justice for 1st Cavalry Division from June 2013 to July 2014 [hereinafter Professional Experience].

⁸⁷ MCM, *supra* note 3, R.C.M. 1106(d)(2).

⁸⁸ 2014 NDAA, *supra* note 10, §1706. This time limit is reduced to seven days for cases arising out of summary courts-martial. *Id.*

⁸⁹ MCM, *supra* note 3, R.C.M. 103(9).

⁹⁰ See generally *id.*, RCM 1106(f)(1). These documents should also be attached to the Record of Trial. *Id.* R.C.M. 1103(b)(3)(I).

Like the rule applying to accused post-trial submissions, convening authorities, for good cause, may grant victims not more than an additional 20 days to submit their matters upon a showing by a victim that additional time is required.⁹¹ Also like the provisions that apply to an accused's post-trial submissions, there is no specific definition of "good cause" in the statute.⁹² "Good cause" is defined as a "legally sufficient reason."⁹³ When discussing whether or not a convening authority should grant an accused's request for extension of time to file post-trial matters, appellate courts have urged staff judge advocates to routinely grant reasonable extension requests "in absence of compelling reasons to the contrary."⁹⁴ This same standard can arguably be used in determining whether to grant additional time for victim submissions, although, because SVCs have fewer procedural obligations than defense counsel (no errata, deferral requests, etc.), this standard could also be made more stringent. Interestingly, although RCM 1105 states "[f]or the purpose of this rule, good cause for an extension ordinarily does not include the need for securing matters which could reasonable have been presented at the court-martial,"⁹⁵ that same explanation is not provided in RCM 1105A, which applies to victim post trial submissions.⁹⁶ However, because a victim's right to submit matters during post-trial is a procedural one, rather than a constitutional one (like the accused's right to speedy post-trial processing), a victim's request for additional time should be considered in light of favoring speedy post-trial.⁹⁷

D. Providing Victim Submissions to the Accused

1. Is It a "New Matter"?

The RCM allow SJAs to amend an original post-trial recommendation following receipt and review of an accused's submissions.⁹⁸ Importantly, if information

⁹¹ 2014 NDAA, *supra* note 10, §1703.

⁹² UCMJ art. 60 (2013).

⁹³ BLACK'S, *supra* note 35, at 251.

⁹⁴ *United States v. Pearson*, 15 M.J. 888, 889 (A.C.M.R. 1983).

⁹⁵ MCM, *supra* note 3, R.C.M. 1105(c)(4).

⁹⁶ Exec. Order, *supra* note 14.

⁹⁷ See *United States v. Skaar*, 20 M.J. 836, 838 (N-M.C.M.R. 1985) (noting that submitting matters for consideration during post-trial was a procedural and not a constitutional right and requiring a showing of specific prejudice where a convening authority takes action prior to the expiration of the time provided by RCM 1105). The Court of Military Appeals later agreed with the Navy-Marine Court of Military Review (NMCMR) that the accused should make a showing prior to being provided relief for failure to follow the guidelines established in RCM 1105 and Article 60, UCMJ. See *United States v. DeGrocco*, 23 M.J. 146, 148 (C.M.A. 1987).

⁹⁸ MCM, *supra* note 3, R.C.M. 1106(f)(7).

provided to a convening authority through this addendum or other source contains matters not included in the SJA's original recommendation served upon the accused, that information must be provided to the accused and defense counsel, allowing them the opportunity to respond to the new information.⁹⁹ Such "new matters" include "discussion of the effect of new decisions on issues in the case, matters from outside the record of trial, and issues not previously discussed."¹⁰⁰ "[New matter] does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the case."¹⁰¹

Whether or not an addendum to the post-trial recommendation contains a "new matter" is an issue reviewed on appeal *de novo*.¹⁰² Appellate courts have considered several cases on this issue, thereby providing some guidance on what is considered a "new matter."¹⁰³ For example, in *United States v. Jones*, the CAAF held that "new matter" includes any "information which is not contained in the record of trial."¹⁰⁴ In *United States v. Leal*, the court clarified that not everything that is "between the blue covers"¹⁰⁵ is considered "contained in the record of trial,"¹⁰⁶ noting the difference between documents that are marked as exhibits and entered during trial and those that are marked as exhibits but not admitted, later to be included in the Record of Trial to assist in appellate review.¹⁰⁷ Finally, in *United States v. Buler*, the CAAF determined that even "neutral" or "trivial" information should be considered "new" for purposes of submission to the convening authority and

⁹⁹ *Id.*, R.C.M. 1106 (f)(7).

¹⁰⁰ *Id.*, RCM 1106(f)(7) discussion.

¹⁰¹ *Id.*

¹⁰² *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997).

¹⁰³ See *United States v. Del Carmen Scott*, 66 M.J. 1 (C.A.A.F. 2008) (SJA's addendum that contains no new information and that is not "erroneous, inadequate, or misleading" does not contain new matter); *United States v. Chatman*, 46 M.J. 321 (C.A.A.F. 1997) (where information contained in the addendum injects facts not previously discussed, the addendum contains new matter); *United States v. Leal*, 44 M.J. 242 (C.A.A.F. 1996) (addendum that mentioned reprimand which had been offered into evidence but not admitted contained new matter and required defense notice); *United States v. Spears*, 48 M.J. 768 (A.F.C.C.A. 1998) (rule regarding new matter prevents SJA from having the last say to the convening authority without the defense knowing about it); *United States v. Haynes*, 28 M.J. 881 (A.F.C.M.A. 1989) (SJAs should err on the side of caution and provide matters to the defense where there is any doubt regarding new matter in the addendum).

¹⁰⁴ *United States v. Jones*, 44 M.J. 242 (C.A.A.F. 1996) (quoting RCM 1106 (f) (7)).

¹⁰⁵ *Leal*, 44 M.J. at 236.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

provided, first, to the accused for response.¹⁰⁸ The court favored this practice because even neutral information could be used to an accused's detriment.¹⁰⁹

The content of victim submissions are likely to vary greatly, as the only standard for the submissions is that they be in writing, signed by the victim, and not include video, audio, or other media beyond photographs.¹¹⁰ Some submissions may address the continuing impact of the crime on the victim since the time of trial and would clearly contain "new matters." Others may appear to be a reiteration of any testimony the victim provided during the court-martial. Because "[t]he dividing line between what is and is not 'matter from outside the record of trial' can be wafer thin,"¹¹¹ the term "new matter" should be construed liberally.¹¹² Therefore, a good SOP should require all matters submitted by a victim, regardless of their content, be provided to the accused and defense counsel for consideration and possible response prior to going to the convening authority for action.¹¹³

2. When Will You Serve the Accused?

Once you are prepared to serve the accused and defense counsel with their copy of the record of trial and SJAR, you will need to establish a procedure to determine how you will best manage the government time. There are three possible scenarios to accomplish serving an accused, depending on the entitlements of the victim: (1) obtain victim submissions before the record is authenticated and serve them on the accused when serving the authenticated record and SJAR; (2) serve the victim and the accused with an authenticated record and SJAR at the same time and later serve the accused with the victim's submissions when they are received; or (3) serve the victim with the authenticated record of trial and SJAR, wait for submissions, and then serve the accused the authenticated record of trial, SJAR, and victim submissions all at once. Appendix C contains visual depictions of each process.

¹⁰⁸ United States v. Buler, 46 M.J. 468 (C.A.A.F. 1997).

¹⁰⁹ *Id.* at 469.

¹¹⁰ See 2014 NDAA, *supra* note 10, §1706, Exec. Order, *supra* note 14.

¹¹¹ Haynes, 28 M.J. at 882 (A.F.C.M.A. 1989).

¹¹² *Id.*

¹¹³ See Leal, 44 M.J. at 237. "The essence of post-trial practice is fair play—notice and an opportunity to respond." *Id.* The Office of the Staff Judge Advocate, Headquarters U.S. Army Joint Readiness Training Center and Fort Polk, suggests annotating whether or not the victim has submitted matters in the SJA's addendum to the post-trial recommendation, thereby creating a "new matter" in the addendum and requiring service and opportunity to respond to the accused and counsel. Victim Participation in Post-Trial Process at Slide 7 (Mar. 12, 2014) (unpublished PowerPoint presentation) (on file with author).

a. Victim Not Entitled to Authenticated Record of Trial

If no victim is entitled to the authenticated record of trial and you have drafted the SJAR from the unauthenticated version of the record, you should have the victim's submission prior to receiving the authenticated record. If so, you can serve the accused and counsel and move through post-trial submission management as before the change in Article 60(d).

b. Victim Entitled to Authenticated Record of Trial

If a victim is entitled to the authenticated record of trial, you must decide when to serve the accused based on when you serve the victim. There are two options here: (1) serve the victim and the accused at the same time and then later serve the accused with the victim's submissions; or (2) serve the victim first and then serve the accused after receiving the victim's submissions.

If you decide to serve the victim and the accused at the same time, you will need to calculate the submission deadlines for each victim and for the accused. Once you receive a victim's submission, you should immediately serve it on the accused and defense counsel, giving them the required amount of time to respond to the "new matter," meaning you will either have to calculate a separate submission deadline or extend the current submission deadline by ten days.¹¹⁴

This method seems easier because you are managing victim submission timelines as if the victim were another accused. Importantly, however, this method has the potential to lengthen the time it takes to get the case to the convening authority for action, should the victim and accused each use their entire allotted time, particularly when each are granted a 20-day extension. Additionally, because it is possible that more than one "victim" can exist for every charged specification, you may be faced with calculating a new submission deadline each time an accused is served with another victim submission.

The process can be streamlined by providing the victim with the authenticated record and the SJAR, waiting for the victim's submission and then providing all documents, at one time, to the accused for consideration.¹¹⁵ This method will allow you to collect all victim submissions and serve them on the accused at one time. This is the preferred

¹¹⁴ MCM, *supra* note 3, R.C.M. 1106(f)(7).

¹¹⁵ Professional Experience, *supra* note 86. A good enforcer of your timeline is to include in your SOP a maximum amount of time (generally 48 hours) that the military justice office will have victim submissions prior to ensuring that they are served on the accused. See ICD MJ SOP, *supra* note 58, at 19.

method, as it is more manageable in handling new matters and is likely to result in less time required for accuseds to submit post-trial submissions because they are able to prepare those submissions while responding to any pertinent victim submissions. As the chief of justice, you gain more control over the timeliness of receiving victim and accused submissions. The accused and defense counsel gain clarity on how to best respond to all information going to the convening authority.¹¹⁶

IV. Conclusion

The area of post-trial is rapidly changing as Congress tries to balance the interests of crime victims and those of criminal accused.¹¹⁷ As a chief of justice, you are the military justice manager and, therefore, on the frontlines of this battle. The addition of the new Article 60(d) is a substantial step in ensuring that crime victims are given a voice throughout the entire court-martial process. At all stages of the process, and especially after the government has proven its burden beyond a reasonable doubt, victims must be consulted and given the opportunity to provide input. It must always be remembered, however, that the clemency process was established primarily for the accused,¹¹⁸ and that the accused has the right to speedy trial processing, rooted in the Constitution.¹¹⁹ Because of this, where the rights of victims to an opportunity to provide their perspective conflicts with the accused's rights, the scale should balance in favor of the accused's right to speedy trial and appeal.

The addition of victims and possibly their attorneys into the post-trial process creates hurdles for you and your team. The changes to post-trial processing have the potential for extending the amount of government time in an already stringent timeline.¹²⁰ Having a strong SOP will help you manage the new requirements without wasting precious government processing time and will ensure that the rights of both victims and the accused are protected. Now go get 'em! Good Luck!

¹¹⁶ One of the generally accepted sentencing philosophies is rehabilitation of the accused. *See* MCM, *supra* note 3, R.C.M. 1001(g). As a defense counsel, when drafting post-trial submissions, my clients would want to share with the convening authority the things they had done to rehabilitate themselves, including the training they had completed and their acknowledgement of the impact of their action on their victims. Articulating that the accused had considered that impact by reviewing the victim's submissions would be beneficial to an accused. Professional Experience, *supra* note 87.

¹¹⁷ *See* 2014 NDAA, *supra* note 11, §1702, §1706. *See also* *Comm. on Armed Services Hearings*, *supra* note 31.

¹¹⁸ *See* Goodwin, *supra* note 6, at 24.

¹¹⁹ *Toohey v. United States*, 60 M.J. 100, 101 (C.A.A.F. 2004).

¹²⁰ *Moreno*, 63 M.J. at 140.

Appendix A

SAMPLE LETTER FOR NOTIFICATION OF IDENTIFICATION AS "VICTIM"

March 16, 2015

Dear _____:

You have been identified, pursuant to Article 60(d), Uniform Code of Military Justice, as having suffered a physical, emotional, or pecuniary loss because of a charged offense in the case of United States v. Private John Snuffy.

Private Snuffy's case is currently scheduled to go to trial on January 1, 2016. Should the court adjudge findings or a sentence in the above case, you will be entitled to submit matters for the convening authority to consider when deciding whether to grant clemency in the case.

Upon completion of the trial, this office will notify you of whether or not you are entitled to submit matters to the convening authority. Should you be entitled, this office will notify you of the process for doing so.

Should you wish, you may waive your right to submit matters to the convening authority. You may choose to waive that right now, or later when you are notified of the outcome of the trial. If you choose to waive your prospective right at this time, you will not be notified of the outcome of the trial.

Please complete, sign, and return the attached certificate of receipt in the enclosed stamped envelope. If you have any questions prior to making your election, please feel free to contact this office at (555) 555-5555, or ima.d.chief.mil@mail.mil. We are unable to provide legal advice to you; however, we may be able to assist you in determining whether or not you may be entitled to legal advice relating to this case.

Sincerely,

Ima D. Chief
Major, U.S. Army
Chief, Military Justice

I have received the letter dated March 16, 2015, identifying me as having suffered a physical, emotional, or pecuniary loss because of a charged offense(s) in the case of United States v. Private John Snuffy.

_____ I would like to waive my right to submit matters to the convening authority should the court adjudge findings and sentence.

_____ I DO NOT wish to be notified of the outcome of the trial.

OR

_____ I DO wish to be notified of the outcome of trial.

Date

Signature

Printed Name

Appendix B

POST-TRIAL NOTIFICATION AND WAIVER

In the matter of: US v. _____, U.S. Army, _____, _____ CM

**Convened by Commander, Headquarters, Fort Hooah
Fort Hooah, NC**

Name: _____

Address: _____

City, State, Zip: _____

Phone Number: _____

In the court-martial listed above, I testified as a victim who suffered a direct physical, emotional, or pecuniary harm as a result of an offense committed under Article 120, Article 120b, Article 120c, Article 125, or any attempt to commit such offense in violation of Article 80, Uniform Code of Military Justice (UCMJ).

I acknowledge that under 10 U.S.C. §854 (Article 54, UCMJ) I am entitled to receive a copy of the authenticated record of proceedings of the court-martial as soon as practicable.

I request a copy of the authenticated record of proceedings when the record is authenticated. I understand that no expense will be incurred on my part to receive a copy of the record of the proceedings of the court-martial. I further understand that I am responsible for providing my updated contact information to OSJA, Criminal Law Division, ATTN: Victim Witness Liaison, 2175 Reilly Road, Stop A, 3rd Floor, Fort Hooah, NC 28310.

I do not wish to receive a copy of the authenticated record of the proceedings of the above entitled court-martial.

I acknowledge that under 10 USC §860 (Article 60, UCMJ) I have an opportunity to submit matters for consideration by the convening authority. (Fill out bottom portion only, if applicable).

I wish to submit matters in writing to the convening authority within ten days of receipt of the Authenticated Record of Proceeding and the Staff Judge Advocate Recommendation (SJAR).

I wish to waive my right to submit matters in writing to the convening authority.

Date

Signature

This document prepared in accordance with 10 U.S.C. §854 & 10 U.S.C. §860 (Articles 54 & 60, UCMJ)

POST-TRIAL NOTIFICATION AND WAIVER (VERSION 2)

In the matter of: US v. _____, US Army, _____, _____CM

Convened by Commander, Fort Swampy
Fort Swampy, Louisiana 71459

Name: _____

Address: _____

City, State, Zip: _____

CITY

STATE

ZIP

Phone Number: _____

I was a victim in the above entitled court-martial. I acknowledged under Article 60(d), UCMJ, I am entitled to receive a copy of the authenticated record of proceedings of the court-martial. I am also entitled to submit matters to the convening authority taking action on this case before such action is taken.

_____ I understand that a copy of the authenticated record of trial and Staff Judge Advocate's post trial recommendation will be served on me or, if I so request, will be forwarded to my Special Victim Counsel, _____ (name of counsel).

_____ I (authorize) (do not authorize) my Special Victim Counsel to accept service of the authenticated record of trial and Staff Judge Advocate's post trial recommendation on my behalf.

_____ I understand that if I have matters that I wish the convening authority to consider, or matters in response to the Staff Judge Advocate's recommendation, such matters must be submitted within 10 days after I receive a copy of the record of trial or the recommendation of the Staff Judge Advocate, whichever occurs earlier. If I authorized service to my Special Victim Counsel, the 10-day period begins to run after my counsel receives the record of trial or the recommendation of the Staff Judge Advocate, whichever occurs later.

_____ I understand that I may request an extension of up to 20 additional days, if necessary, for good cause.

_____ I understand that my matters and any request for extension should be submitted to the Military Justice Office, ATTN: Victim Witness Liaison, 1234 Any Street, Building 1454, Fort Swampy, Louisiana 71459.

_____ I understand that if I fail to submit matters within the time allotted, the convening authority will proceed to take action on the case.

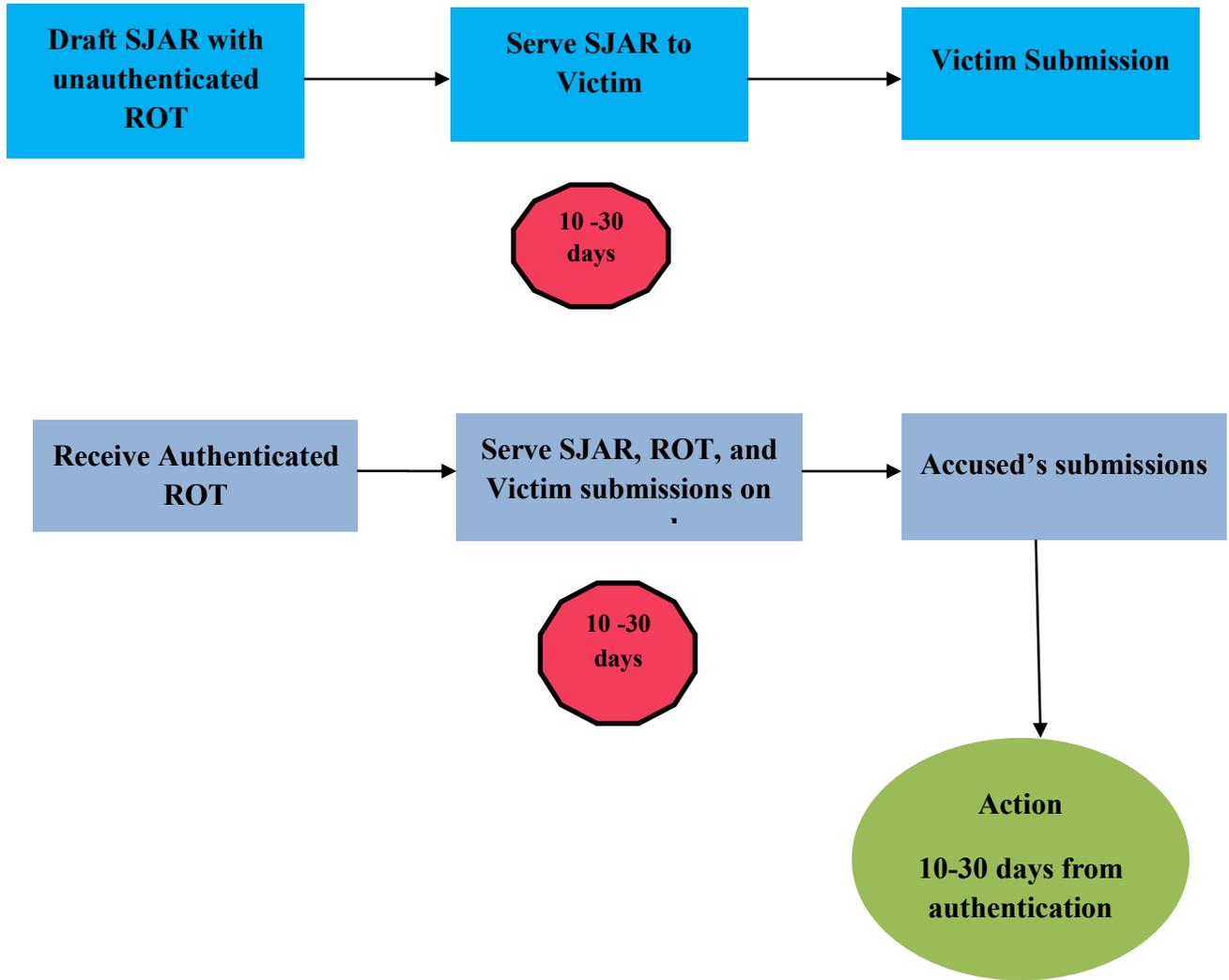
_____ I understand that it is my responsibility to inform the Office of the Staff Judge Advocate and/or my Special Victim Counsel of any changes to the contact information I have listed above.

I do not wish to submit matters. I understand that my waiver of the right to submit matters to the convening authority cannot be revoked.

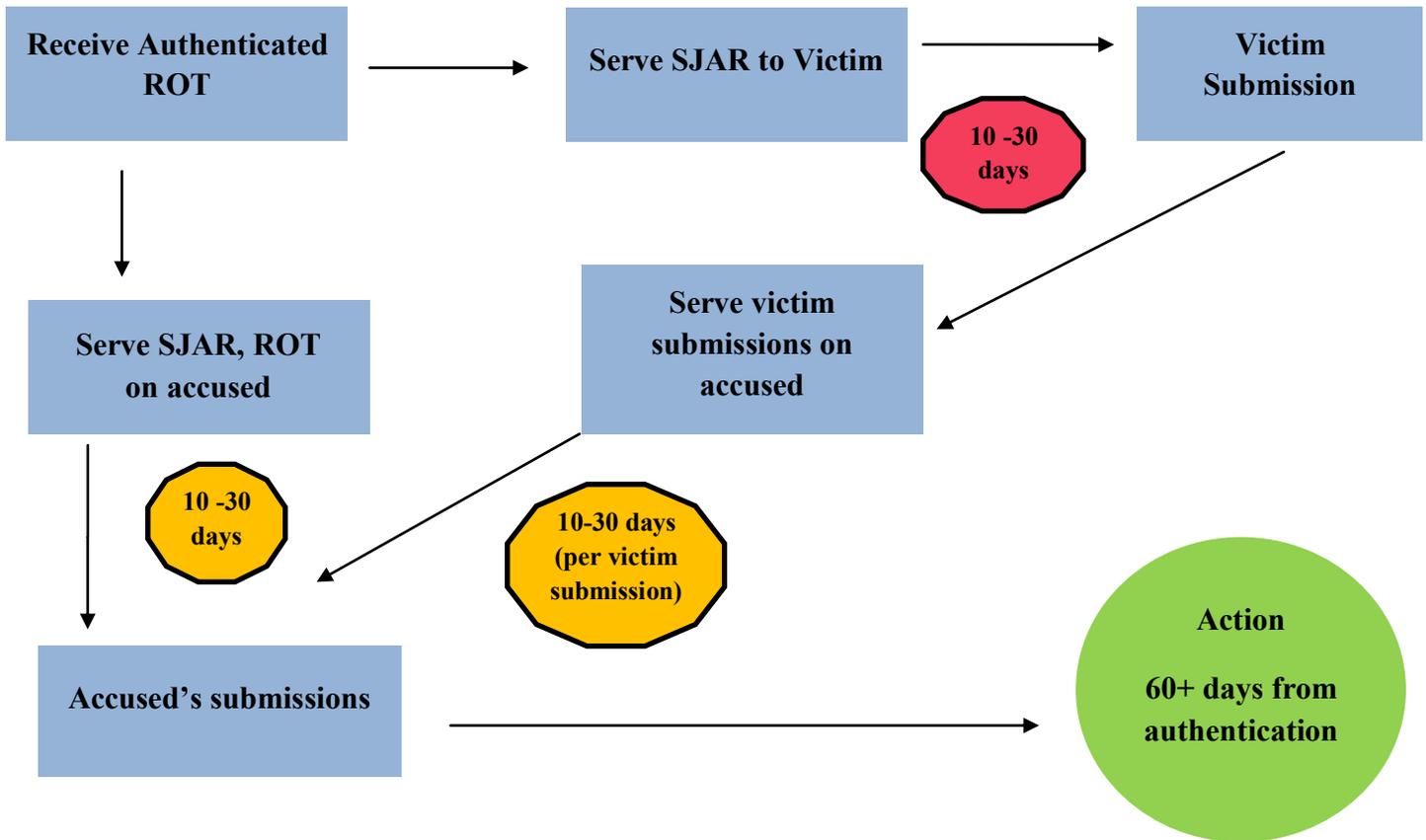
Date Signature

** Sign/date and return to the Office of the Staff Judge Advocate, Post-Trial Section **
Phone: (337)-531-7004, Fax: (337)-531-9420, Email: Victim.W.Liasion.civ@mail.mil

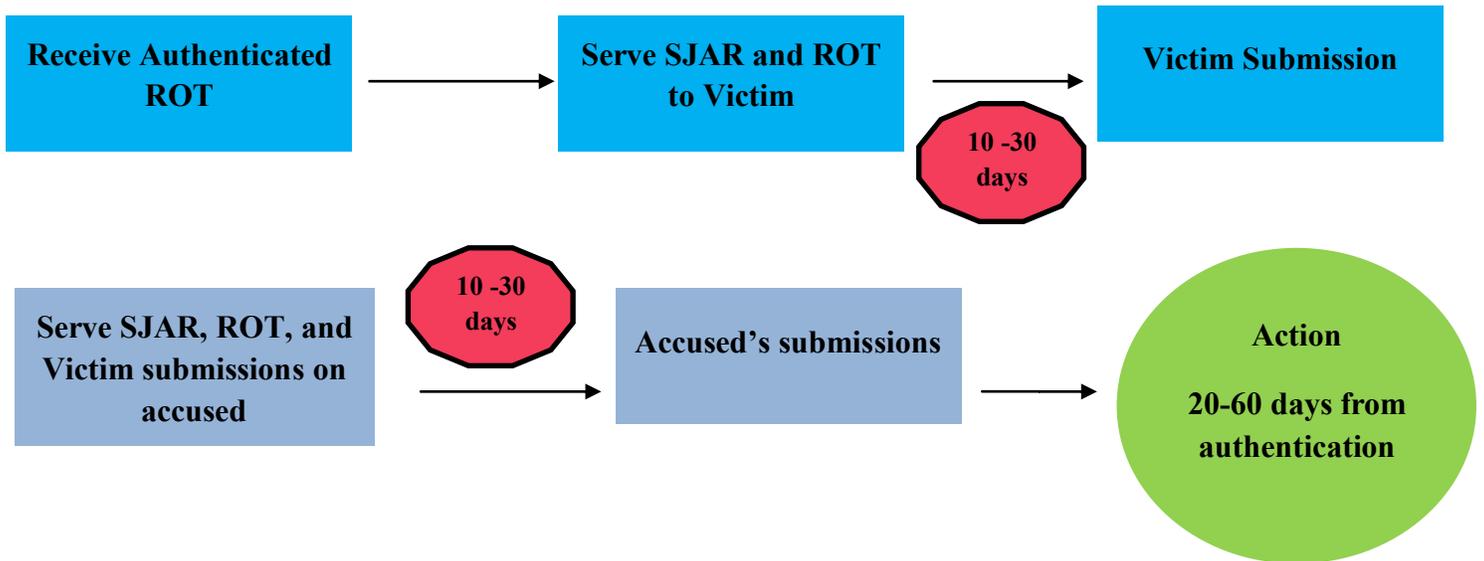
Victim Not Entitled To Authenticated Record of Trial



Victim Entitled to Free Copy of Authenticated Record of Trial IAW Article 54(e)



OR



Appendix D

Sample Standard Operating Procedure¹²¹

8. Pre-Trial Processing.

- a. Case Management.
- b. Pretrial Investigations.

When considering charges, trial counsel (TCs) will determine whether any “victim,” as defined by Rule for Court-Martial (RCM) 1105A, exists who will not be named in the specification. Trial Counsel will note any such victims to ensure that all entitled persons are provided the opportunity to provide input during post-trial processing.

- c. Pretrial Confinement (PTC).
- d. Preferral of Charges.
- e. Article 32 Investigations.
- f. Referral.
- g. Trial Preparation.

While the TC is preparing the case for prosecution, the Brigade Paralegal will consider each referred specification to identify all “victims,” as defined by Rule for Courts-Martial 1105A. The paralegal will then begin locating such “victims” so they may be notified of their potential right to submit matters pursuant to Rule for Courts-Martial 1105A. A sample notification letter is located at Appendix #.

- h. Trial Documents.
- i. Trial Procedures.
- j. Alternative Dispositions.
- k. After Trial.

i. At the end of trial, TCs will ensure that all necessary post-trial documents (Result of Trial, Victim-Witness Notification Form, Confinement Order) are properly prepared and signed, and that the signed Result of Trial is provided to the Staff Judge Advocate (SJA).

ii. No later than one week following the end of trial, the Post-Trial Paralegal will confirm the “victims,” as defined by RCM 1105A, for all specifications where a finding of guilty and sentence have been adjudged. The Post-Trial Paralegal will send notification letters to all identified “victims.” A sample post-trial notification letter is located at Appendix #.

9. Post-Trial Processing.

- a. All efforts will be made to ensure that court-martial post-trial matters are processed expeditiously.

b. Immediately following trial, the Chief of Justice will determine whether any findings or sentence was adjudged for an offense that involved a victim as defined in Rule for Courts-Martial 1105A. If such offense is involved, the Chief of Justice (CoJ) will ensure that the victim is identified and notified of his/her opportunity to submit matters for consideration by the convening authority before initial action. A sample notification letter is provided at Appendix #.

- c. Deferral Requests.

¹²¹ This sample Standard Operating Procedure (SOP) is an excerpt of relevant portions from the SOP the author used while assigned as Chief, Military Justice, 1st Cavalry Division, Fort Hood, Texas, from 2013 to 2014.

d. Errata.

e. Clemency.

i. Upon receipt of the authenticated Record of Trial (RoT), the post-trial paralegal will immediately draft the Staff Judge Advocate's Post Trial Recommendation (SJAR) using Military Justice Online (MJO). The post-trial paralegal will provide the drafted SJAR to the CoJ for review and forwarding to the SJA for signature. The CoJ will ensure that the SJA signs the SJAR within 48 hours of receipt of the authenticated RoT.

iii. Once the SJA signs the SJAR, the post-trial paralegal will ensure that the SJAR and authenticated RoT are sent to the Accused and Defense Counsel within 48 hours. If a victim has a right to submit matters, the post-trial paralegal will ensure that the SJAR and, if entitled, RoT (see Article 54(e), UCMJ) are served upon the victim. The post-trial paralegal will annotate in MJO the date on which each individual is served for the purpose of tracking the due date for submission of matters.

iv. Upon the expiration of the period for submissions, if matters have not been received, the post-trial paralegal will reach out to the Defense Counsel and Victim, if applicable, and request submission of matters pursuant to Rule for Court-Martial 1105 and 1105A or, if not yet requested, a request for additional time to provide matters.

v. If a request for additional time to file matters is received, the post-trial paralegal will properly annotate the date of request in MJO and will prepare a memorandum for the SJA's decision regarding the extension. The post-trial paralegal will annotate in MJO the new date matters will be due.

vi. When matters are received from a victim, those matters will be sent to the Accused and Defense Counsel within 48 hours of receipt so that the Accused and Defense Counsel may have the opportunity to respond to the victim's matters. The victim does not have the right to review and respond to the Accused's matters or response, if any, to the victim's matters.

vii. Upon receipt of matters from the Accused, Defense Counsel, and Victim, if applicable, the post-trial paralegal will annotate the date of receipt of matters in MJO and will prepare the Addendum to the SJAR and the Convening Authority's (CA) Action, also using MJO. The CoJ will review these documents prior to providing them to the SJA for signature and decision by the CA. The CoJ will ensure that the Addendum and Action are prepared for the first CG appointment following receipt of matters from relevant parties.

viii. Once the CA has taken Action in a court-martial case, the post-trial paralegal will immediately upload the signed Addendum and Action into MJO and will begin preparing the Promulgating Order. The post-trial paralegal will have the Promulgating order ready for the CoJ's signature within 48 hours of signed Action. Original Promulgating Orders are maintained, in reverse numerical order, in a green, two-sided folder, labeled by calendar year and type of Court-Martial. A list will be maintained on the left side of the folder.

ix. Once the Promulgating Order is signed, the post-trial paralegal will begin packaging the "Original" copy of the RoT for forwarding to the Army Court of Criminal Appeals (ACCA), if required. The post-trial paralegal will ensure that the record is properly assembled and forwarded, by Certified Mail, to ACCA and a copy of the Action and Promulgating Order is sent to the Accused and Defense Counsel within 48 hours of completion of the Promulgating Order.

x. All "SJA" copies of the RoT will be properly assembled and filed alphabetically in the Military Justice Section by year and type of Court-Martial.