

<p>VOLUME 16</p> <p><u>MILITARY JUSTICE</u></p> <p>SUMMARY OF VOLUME 16 CHANGES</p> <p>Hyperlinks are denoted by <i><u>bold, italic, blue and underlined font.</u></i></p> <p>The original publication date of this Marine Corps Order (right header) will not change unless/until a full revision of the MCO has been conducted.</p> <p>The date denoted by blue font (left header) will reflect the date this Volume was last updated.</p> <p>All Volume changes denoted in blue font will reset to black font upon a <u>full revision</u> of this Volume.</p>			
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VOLUME 16: MILITARY JUSTICE

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- (b) SECNAVINST 5430.27E
- (c) SECNAVINST 5430.25F
- (d) 10 U.S.C. §§ 806, 1044, 1044e, 1059, 1072, 1565b, 1588, and 8046
- (e) MCO 5430.2
- (f) JAGINST 5803.1E
- (g) Manual for Courts-Martial, (2019 ed.)
- (h) U.S. Navy Regulations, (1990)
- (i) MCO 5800.14
- (j) MCO 1001.62B
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- (o) MCO 1610.7A
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- (w) 38 U.S.C. §§ 4301-4334
- (x) DoDI 1205.12‘Members, Former Service Members and Applicants of the Uniformed Services, CH-1’
February
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- (aa) Executive Order 13269, (July 3, 2002)
- (ab) DoDD 2311.01E
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- (ag) DoDD 5240.01
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- (as) SECNAV M-5210.1 CH-1
- (at) MCO 5210.11F
- (au) The John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law No. 115-232)
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- (aw) 27 C.F.R. § 478.11
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PART A – GENERAL MILITARY JUSTICE MATTERS, ORGANIZATION, AND DETAILING

VOLUME 16: CHAPTER 1

GENERAL PROVISIONS

SUMMARY OF SUBSTANTIVE CHANGES

Hyperlinks are denoted by ***bold, italic, blue and underlined font.***

The original publication date of this Marine Corps Order (MCO) Volume (right header) will not change unless/until a full revision of the MCO has been conducted.

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CHAPTER VERSION	PAGE PARAGRAPH	SUMMARY OF SUBSTANTIVE CHANGES	DATE OF CHANGE

PART A – GENERAL MILITARY JUSTICE MATTERS, ORGANIZATION, AND DETAILING**CHAPTER 1****GENERAL PROVISIONS**

0101. PURPOSE

This Volume promulgates Service standards, policies, and procedures for the provision and functional supervision of military justice within the Marine Corps, as provided for in law, regulations, and rules of professional conduct.

0102. APPLICABILITY

This Volume applies to all judge advocates, legal administrative officers, litigation attorney advisors, legal services specialists, victim-witness assistance personnel, investigators, and administrative support personnel who provide military justice services within the Marine Corps, with the exception of personnel who serve in billets within the Defense Services Organization (DSO) and the Victims' Legal Counsel Organization (VLCO). Nothing in this Volume restricts the legal services provided by members of the DSO or the VLCO, whose missions, duties, and responsibilities are covered in detail in Volumes 3 and 4 of this Manual.

0103. GENERAL

010301. Purpose of Military Law

The purpose of military law, as stated in the Preamble to the Manual for Courts-Martial, "is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."

010302. Role of Military Justice Personnel

Military justice legal support within the Marine Corps consists of the provision of command legal advice and legal services. Command legal advice is provided primarily by the cognizant Staff Judge Advocate (SJA), while legal services are provided primarily by the Officer-in-Charge (OIC) of the cognizant Legal Services Support Section (LSSS). Legal services include trial services offices, which fulfill the prosecution function in the Marine Corps and consist of trial counsel who represent the United States in the prosecution of special and general courts-martial. All practitioners are responsible for professionally and diligently processing military justice matters in accordance with the purposes of military law and with respect for the dignity and rights of all participants.

010303. Role of the Staff Judge Advocate to the Commandant of the Marine Corps

The Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) exercises overall functional supervision of legal services and professional responsibility oversight within the Marine Corps, as described in Article 6, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 8046, SECNAVINST 5430.27E, and JAGINST 5803.1E.

A. Functional Supervision

Functional supervision includes the authority to formulate, promulgate, inspect, and enforce uniform standards and procedures for the performance of military justice tasks, but does not include direction and control of individual personnel.

B. Rules Counsel

The SJA to CMC serves as Rules Counsel for matters of professional responsibility within the Marine Corps. As Rules Counsel, the SJA to CMC has the responsibility to exercise professional responsibility oversight over all Marine Corps judge advocates who are not assigned as a trial or appellate judge.

010304. Role of Deputy Director, Judge Advocate Division (JAD), Military Justice and Community Development

The Deputy Director, JAD, Military Justice and Community Development (DepDir, MJCD) is responsible to the SJA to CMC for military justice matters and for legal community planning and development to ensure the Marine Corps provides high-quality legal support across the entire spectrum to commanders, Marines, Sailors, and their families. DepDir, MJCD oversees the standardization of military justice forms and letters. Approved standardized forms and letters may be available through the “FORMS” tab on the JAD public website at <https://www.hqmc.marines.mil/sja/JAD-Forms/> or at <https://forms.documentservices.dla.mil/order/>. Where forms are not available through the JAD website, personnel should consult the MCM and its appendices, the JAGMAN, this volume, and the Trial Counsel Assistance Program (TCAP).

010305. Role of Branch Head, Military Justice Branch (JMJ)

The Branch Head, JMJ, is responsible for supporting the SJA to CMC by providing military justice advice and other military justice-related support, to include meeting reporting and information requirements, reviewing and drafting legislation and policy, and providing guidance and training to practitioners and command officials, in order to promote justice and good order and discipline in the Marine Corps. The Branch Head, JMJ, oversees implementation of military justice-related legislation, regulations, and policy, and leads the Marine Corps TCAP in providing litigation training, advice, and resources to Marine Corps trial counsel worldwide, in order to standardize trial counsel practice and manage the Marine Corps Victim-Witness Assistance Program in accordance with MCO 5800.14. The Branch Head, JMJ, also oversees implementation of post-trial processing policies and regulations.

010306. Role of Marine Corps Post-Trial Chief

The Marine Corps Post-Trial Chief is the subject matter expert responsible for determining training standards as a part of the Training and Readiness Manual update team, liaising with Naval Justice School staff regarding court reporter student candidate selection and curriculum changes, drafting and implementing approved policy and legislation, and advising JAD staff and the SJA to CMC on matters relating to post-trial and court reporting.

010307. Role of Navy and Marine Corps Appellate Review Activity (NAMARA) Administrative Support Officer, OJAG

The Administrative Support Officer, OJAG, is designated as the Director, Administrative Support Division (Code 40), and is responsible for overseeing all Department of the Navy (DON) military justice records received at NAMARA, managing process flow of records through the appellate court process, and final archiving. Additionally, the Administrative Support Officer is designated as the Senior Post-Trial Administrative Officer (PTAO) for the Marine Corps providing oversight and mentorship to PTAOs in the field. The NAMARA PTAO provides guidance and advice on questions of policy, advises on recommendations for policy changes related to the administrative processing of court-martial records, develops training and educational products, and facilitates knowledge management. The NAMARA PTAO provides advocacy on issues raised by Regional PTAOs at the OJAG level.

0104. EXECUTION OF MILITARY JUSTICE SERVICE FUNCTION

010401. Judge Advocate Division

The Military Justice Branch (JMJ) within JAD, Headquarters, Marine Corps (HQMC), assists the SJA to CMC in providing military justice legal support to the CMC. The DepDir, MJCD; the Chief Defense Counsel of the Marine Corps; and the Officer-in-Charge, Victims' Legal Counsel Organization assist the SJA to CMC in performing the functional supervision of military justice services in each of their respective practice areas.

010402. Staff Judge Advocates

SJAs provide command legal advice on military justice matters directly to their supported commands. The ability of SJAs to provide accurate legal advice on military justice matters is a vital part of promoting justice and preventing unlawful command influence. Under 10 U.S.C. § 8046(d)(2), no officer or employee of DoD may interfere with the ability of an SJA to give independent legal advice to commanders.

010403. Legal Services Support Sections (LSSS)

The LSSSs and their subordinate Legal Services Support Teams (LSSTs) provide services, including military justice services, to supported commands within their Legal Services Support Area (LSSA). The LSSS OIC is ultimately responsible to the regional installation commander for the provision of trial services within the LSSA. Subordinate LSSTs provide direct legal services support to designated commands. The LSST OIC is directly responsible to the LSSS OIC for the provision of trial services to units and activities supported by the LSST.

010404. Supported-Supporting Relationships

Each LSSS and its subordinate LSSTs will provide military justice support to all supporting establishment and operating force commands within their respective LSSA in accordance with paragraph 0204 of Volume 1, Chapter 2 of this Manual. Transfer of a case to another region's LSSS must be approved by the gaining LSSS OIC.

0105. COMMUNICATION AND CASE MANAGEMENT

010501. Need for Effective Communication

The SJA to CMC's ability to effectively exercise functional supervision authority depends on effective communication. To that end, the requirements to maintain accurate entries in the Marine Corps' designated military justice electronic case management system are particularly important, as the information in those entries is used to identify military justice requirements, inform policy decision-making within the military justice system, and enhance the quality of reviews of the military justice system by the Military Justice Review Panel, as required by Article 146, UCMJ.

010502. Immediate Communication Required

Military justice related issues and events can potentially have a strategic impact on the legal community and the Marine Corps. LSSS OICs and SJAs shall immediately report, via phone or e-mail, all military justice issues that are likely to garner significant interest from the CMC, senior DoD officials, elected leaders, or members of the media; and military justice issues that could have a strategic impact on the legal community or the Marine Corps. Report such issues to the Deputy SJA to CMC, DepDir, MJCD, and the Branch Head, JMJ. When in doubt about whether to report an item, err on the side of reporting. This reporting requirement is exempt from reports control according to reference (as), Part IV, paragraph 7.g. Nothing in this order shall be construed to impair the authority of any SJA to communicate with their respective convening authority, the SJA to CMC, or with the Judge Advocate General of the Navy.

010503. Case Management and Data Collection

Article 140a, UCMJ, requires the Secretary of Defense to prescribe uniform standards and criteria for the collection and analysis of data concerning military justice matters, as well as military justice case processing and management. Procedures implementing those requirements are described in detail in Chapter 13 of this Volume. To facilitate uniform case management and to avoid imposing excessive administrative burdens on LSSSs and LSSTs, military justice practitioners are encouraged to collect military justice case data only from standardized source documents (legal and investigative documents) that are produced in the normal course of the military justice process. Practitioners should communicate with JAD (JMJ) regarding any proposed changes to electronic case management systems.

VOLUME 16: CHAPTER 2

MILITARY JUSTICE ORGANIZATION, PERSONNEL, AND QUALIFICATIONS

SUMMARY OF SUBSTANTIVE CHANGES

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CHAPTER 2

MILITARY JUSTICE ORGANIZATION, PERSONNEL, AND QUALIFICATIONS

0201. PURPOSE

This chapter provides guidance for the provision of trial services within the Marine Corps and describes the organization, roles, and responsibilities of the Regional Trial Counsel (RTC) Offices, Trial Service Offices (TSOs), and the counsel and personnel assigned to those offices, as well as specific qualifications required in the prosecution of certain cases.

0202. GENERAL ORGANIZATION

020201. Role of the LSSS in Military Justice

The LSSS provides legal services, including trial services, to supported commands within its Legal Service Support Area (LSSA). Trial services include conducting courts-martial on behalf of the government; providing prosecution advice to convening authorities and cognizant SJAs; assisting in the training of command legal personnel; providing victim and witness support throughout the court-martial process; conducting post-trial processing; coordinating with law enforcement in the investigation of offenses and the collection, maintenance, and custody of evidence; and prosecuting federal court cases under the Special Assistant United States Attorney (SAUSA) program.

020202. Performance of Trial Services

Marine Corps trial services are performed by commissioned officers who are licensed attorneys, certified as Trial Counsel (TC) under Article 27(b), UCMJ, sworn under Article 42(a), UCMJ, and assigned to TC billets at LSSSs and subordinate LSSTs (and detachments) within Marine Corps Installations Command (MCICOM), or assigned/attached to units deployed in support of an exercise, contingency, or operation.

020203. Providing Trial Services

Trial services are provided within the LSSA by the RTC Office and by the LSST TSOs. Legal Service Support Team TSOs are the primary provider of trial services. When a court-martial exceeds the capability and expertise of a LSST TSO, the RTC Office will provide assistance to the TSO or assume responsibility for prosecuting the court-martial.

020204. Other Duties

Consistent with this Order, LSSS and LSST OICs may assign TCs and TSO support personnel to perform non-trial duties.

020205. Professional Conduct of Trial Services Personnel

Professional conduct of Marine Corps trial counsel is governed by JAGINST 5803.1 series. Trial counsel should be familiar with the entire document and refer to Rule 3.8 in particular regarding the special responsibilities of a TC.

020206. Tour Lengths

A judge advocate assigned as a TC will normally serve in that billet for at least eighteen months. A judge advocate assigned as a supervisory trial counsel will normally serve in that billet for at least two years. To the extent possible, new trial counsel should be assigned in a way to allow for an on-ramp process instead of assuming lead counsel responsibilities on multiple, later phase cases.

020207. Reassignment of trial counsel (TC)

The reassignment of TC requires careful planning and coordination between the responsible LSSS OIC, LSST OIC, RTC, and Senior Trial Counsel (STC). The professional administration of military justice requires the United States be represented by qualified and well-prepared TCs. Once a TC is slated for reassignment, the RTC and STC must ensure the TC generates thorough turnover materials, and that a replacement TC is identified and integrated into all cases anticipated to extend beyond the target reassignment date.

020208. Prohibitions

An RTC, STC, or TC may not serve concurrently as a victim witness liaison officer, victim witness assistance coordinator, or military judge. An RTC, STC, or TC normally should not concurrently serve as an SJA, or in the DSO, or VLCO. A transition into or out of another billet while prosecuting cases requires analysis of conflict procedures outlined in paragraph 0601.

020209. Reserve Trial Services Branch (JRT)

The RTC or LSST OIC may request reserve support through the branch head of the Reserve Trial Services Branch (JRT) or the Reserve Legal Support (RLS). Normally, these judge advocates serve as instructors at TC training, assist active duty judge advocates with particular cases, and may be detailed as the TC at courts-martial.

0203. REGIONAL TRIAL COUNSEL OFFICE

020301. General Description

The RTC Office provides trial services, as required, across the LSSA; supervision, mentorship, training, and litigation support to TSOs and individual TC within subordinate LSSTs; and Complex Trial Counsel (CTC) to assist in prosecuting high-profile, complex, special victim cases, and other significant cases.

020302. Structure

The RTC Office is structured with the following personnel: an RTC; CTC; a Litigation attorney advisor (LAA); a Trial Service Administrative Officer (TAO); an RTC office paralegal; two RTC Office Investigators (RTIs) with Military Occupational Specialty of 5821 (Criminal Investigator, Criminal Investigation Division Agent); a SAUSA, where applicable; and appropriate enlisted support staff.

020303. Enlisted Support Staff

Each RTC Office will be staffed with enlisted support staff to assist in the execution of assigned tasks within the RTC Office. The RTC, in consultation with the Legal Services Chief, shall determine the reporting senior and reviewing officer of any assigned enlisted support staff.

0204. REGIONAL TRIAL COUNSEL

020401. General Description

The RTC is directly responsible to the LSSS OIC for the functional supervision of all trial services within the Legal Services Support Area (LSSA). The RTC directly supervises all cases personally detailed by the RTC. The reporting senior for the RTC is the LSSS OIC. The reviewing officer is normally the Marine Corps Installation Commander for that region.

020402. Eligibility

The RTC is a Marine judge advocate serving in or selected to the grade O-5/Lieutenant Colonel possessing considerable expertise in military justice matters and normally has the additional MOS of 4409 (masters of criminal

law). The billet of RTC requires a Top Secret clearance. The OIC, LSSS may waive any of the above prerequisites to serve as an RTC if, in the OIC's determination, the judge advocate possesses the necessary training and experience to fulfill the duties of the billet. If such a waiver is granted, the OIC shall document the rationale for issuing such waiver in a memorandum retained in LSSS files.

020403. Specific Duties

Specific RTC duties include, but are not limited to:

- A. Train, mentor, and supervise subordinate TC;
- B. Conduct quarterly training for all CTC, STC, and TC within the LSSS;
- C. Ensure all CTC, STC, and TC attend the appropriate training courses recommended by TCAP, which will include Trial Counsel Assistance Program (TCAP) developed training, TECOM funded training at military training locations, and other specialized training courses to properly develop individual TC's within their career progression;
- D. Serve as the detailing authority for all CTC, STC, and TC assigned to the LSSS;
- E. Task-organize complex trial teams and detail counsel to the team;
- F. Manage and supervise the RTC office and its members;
- G. When detailed, serve as a TC. The RTC's case load should not interfere with the duties to train, mentor, and supervise subordinate TC within the LSSA;
- H. Maintain a cooperative and close working relationship with the LSST OICs and SJAs to ensure the effective and efficient provision of trial services in the LSSA;
- I. Supervise the maintenance/updating of case entries in any electronic case management system;
- J. Oversee the SAUSA program for the LSSS, and coordinate with the cognizant LSST OICs and U.S. Attorney's Office to support the SAUSA program;
- K. Liaise with the Regional Defense Counsel as required;
- L. When applicable, coordinate with regional military confinement facilities that may provide confinement services to supported commands. Any coordination with federal, state, or local confinement facilities requires CMC, PSL (Corrections) notification.
- M. As appropriate for special victim cases, provide case analysis memos to SJAs in order to assist convening authorities with disposition decisions under R.C.M. 306;
- N. Ensure all Special Victim Investigation and Prosecution (SVIP) requirements are met within the LSSA;
- O. Employ the Complex Trial Team to deliver SVIP capabilities through a task organized combination of prosecutors, Litigation attorney advisors (LAAs), victim witness assistance personnel, investigators, administrative support, and paralegal support from across the region. Leveraging the regional trial assets to deliver a SVIP TC;

P. Ensure SVIP qualified TCs are detailed to a case and meet or consult with the Naval Criminal Investigative Service (NCIS) SVIP members within 48 hours after notification of a special victim investigation;

Q. Ensure TCs are meeting or consulting with NCIS at least monthly to assess the progress of investigations and prosecutions; and

R. Coordinate with TCAP to ensure lessons learned, motions, and best practices are shared across the TC community.

0205. COMPLEX TRIAL COUNSEL (CTC)

020501. General Description

The CTC is directly responsible to the RTC for representing the United States in complex, high visibility, and other cases when detailed as the TC or Assistant Trial Counsel (ATC).

020502. Eligibility

The CTC is a Marine judge advocate in the grade of O-3/Captain or O-4/Major who possesses considerable expertise in military justice matters and has the additional MOS of 4409. The LSSS OIC may waive the requirement to have the MOS of 4409 in a memorandum retained in LSSS files. The CTC billet for the National Capital Region requires a Top Secret clearance. See paragraph 0610 (NCR normally supports national security cases). The CTC's RS is the RTC and their RO is the LSSS OIC.

020503. Specific Duties

The CTC's primary duty is to prosecute cases on behalf of the United States. The CTC should also assist the STC and RTC in facilitating GCM and SVIP qualifications for TCs and in providing mentorship to TCs and ATCs co-detailed to a case.

0206. LITIGATION ATTORNEY ADVISOR (LAA)

020601. General Description

The LAA is an experienced civilian attorney. The LAA is directly responsible to the RTC for providing advice, training, and insight to TC and their support personnel on complex cases throughout the LSSA. The RTC is responsible for providing initial training to newly hired LAAs on the unique aspects of the military justice system and the Marine Corps in general. The LAA's higher level rater is the RTC and their senior rating official is the LSSS OIC.

020602. Specific Duties

Specific LAA duties include, but are not limited to:

A. Provide training, mentoring, and case-specific expertise to TC detailed to complex or special victim cases throughout the region in order to enhance the government's ability to strategically evaluate case specific issues, and fairly and effectively present admissible evidence;

B. Physically visit every LSST at least once annually;

C. Consult and advise on the prosecution of complex and special victim cases, and assist trial counsel, to include detailed preparation of individual cases in anticipation of trial;

D. Develop and implement training and standard operating procedures for the investigation and prosecution of complex and special victim cases;

E. Review Case Analysis Memos and provide input to TCs as required; and

F. Maintain a close, cooperative relationship with all other LAAs to discuss trends, developing cases, and coordinate responses to emerging issues.

0207. TRIAL SERVICE ADMINISTRATION OFFICER (TAO)

020701. General Description

The TAO is directly responsible to the RTC for the efficient operation and overall management of the RTC Office and administration of trial services throughout the LSSA. The TAO is Legal Administration Officer (LAO), normally in the grade of Chief Warrant Officer 2 (CWO2), with military justice experience. The TAO's reporting senior is the RTC. The reviewing officer is the LSSS OIC.

020702. Specific Duties

Specific TAO duties include, but are not limited to:

A. Manage all legal administrative functions, tasks, and correspondence associated with provision of trial services by the RTC or CTC;

B. Manage and provide direct supervision of investigators assigned to the RTC Office;

C. When required and as directed by the RTC, assist TC within the LSSA with discovery obligations, VWAP notifications, witness requests and travel authorizations, and all other administrative tasks associated with a court-martial that do not require Article 27(b) certification;

D. When required, assist the LSST TSOs with their legal administrative functions;

E. Ensure that all RTIs maintain access to the Consolidated Law Enforcement Operations Center (CLEOC), the National Crime Information Center (NCIC), and any future programs.

F. Assist the RTC with VWAP and DTS coordination, tracking, and oversight.

0208. REGIONAL TRIAL COUNSEL OFFICE PARALEGAL (RTC PARALEGAL)

020801. General Description

The RTC paralegal is directly responsible to the RTC for litigation support to the RTC Office and, when assigned, to subordinate LSST TSOs. The RTC paralegal is a staff noncommissioned officer (SNCO), normally between the grades of E-6/Staff Sergeant and E-8/Master Sergeant, who has preferably completed an undergraduate program and obtained a degree in Paralegal Studies from an American Bar Association (ABA) accredited program. The RTC Paralegal's RS is the RTC and their RO is the LSSS OIC.

020802. Specific Duties

Specific RTC Paralegal duties include, but are not limited to:

A. Conduct legal research and draft documents;

B. Create and organize case files;

- C. Track pre-RLS cases and brig confinement reports to alert and assist the RTC in detailing counsel to investigations;
- D. Interview witnesses;
- E. Supervise and mentor enlisted support staff in the RTC Office; and
- F. Coordinate with and assist the LSST Trial Services Chiefs for the provision of trial services.

0209. REGIONAL TRIAL INVESTIGATOR (RTI)

020901. General Description

The RTI is directly responsible to the RTC for trial production support as detailed throughout the LSSA. The RTI is an accredited agent of the U.S. Marine Corps Criminal Investigation Division (USMC CID), PMOS 5821, normally in the grade of E-6/Staff Sergeant or E-7/Gunnery Sergeant. The RTI's reporting senior is the CTC or STC, as designated by the RTC. The reviewing officer is the RTC.

020902. Requirements

The RTI fills a billet that is coded as "Armed" and requires a Top Secret clearance. Regional Trial Investigators shall complete the TC orientation course and attend a TCAP-approved special victim training course. The RTC may waive any of these requirements after consultation with the LSSS OIC.

020903. Specific Duties

Specific RTI duties include, but are not limited to:

- A. Provide trial production support, as approved by the RTC, to all TC within the LSSA. Trial production support refers to all investigative support directly relating to the preparation of the government's case for trial and sentencing by court-martial. Trial production support includes, but is not limited to: liaison with criminal investigative and law enforcement agencies (federal, state, local, and local national); liaison with evidence processing laboratories (e.g., United States Army Criminal Investigation Laboratory [USACIL], Defense Forensics Science Center [DFSC], Defense Cyber Crime Center's Cyber Forensics Laboratory [CFL], Navy Drug Screening Laboratory [NDSL]); witness interviews; preservation, custody, and control of evidence; background investigations of victims and witnesses; Military Rules of Evidence (MRE) 413/414 evidence collection; and other trial investigative duties, as required. Trial production support does not include the initiation of new investigations; however, information regarding previously uninvestigated misconduct should be brought to the attention of the RTC. In every instance possible, trial production support shall be conducted in cooperation with the primary investigative agency; however, if the primary investigative agency is unable to complete RTC directed investigative endeavors in a timely manner as it relates to the impending trial date, RTIs may conduct these endeavors independently while informing and coordinating with the primary investigative agency;
- B. Maintain qualifications to access CLEOC, NCIC, and future law enforcement programs and databases; and
- C. Maintain the proper qualifications to possess individual firearms. Individual RTIs shall obtain their weapon from the local Provost Marshal's office and follow all applicable orders, regulations, and local procedures associated with the possession of firearms by law enforcement personnel, in accordance with DoDD 5210.56, SECNAVINST 5500.29_ series, MCO 5500.6_series, and local USMC CID policy letters.
- D. Assist the RTC and STC with criminal justice information reporting requirements, including the training of counsel and tracking of any reporting requirements. Serve as a liaison between law enforcement agencies and the LSSS to facilitate proper reporting of criminal justice information.

E. Assist with courtroom security requirements and threat assessments for pending courts-martial as directed by the RTC, in support of the requirements listed in Chapter 15 of this Volume.

F. Serve as the evidence custodian for LSSS or LSST evidence locker used to temporarily store any evidence used for trial.

0210. COMPLEX TRIAL TEAM (CTT)

021001. General Description

The CTT will try all cases defined under paragraph 050101 that are detailed by the RTC, or any other case designated as a complex case by the RTC. The CTT will be task-organized to meet the needs of any detailed case. Once assembled, the CTT is responsible to the RTC for representing the United States in that particular case. The CTT will work in conjunction with law enforcement to deliver a comprehensive investigation and, when appropriate, prosecution.

021002. Personnel

The RTC may utilize any combination of personnel from the RTC Office or a LSST TSO to form the CTT. To be detailed as the lead TC of a CTT, the judge advocate must be qualified as an SVIP TC as defined in paragraph 022002.

021003. Special Victim Investigation and Prosecution (SVIP) capability

The RTC will employ the CTT to deliver an SVIP capability through a task organized combination of prosecutors, victim witness assistance personnel, investigators, administrative support, and paralegal support from across the region. The CTT will work in conjunction with the victim, victim support providers, the command, and NCIS to deliver a comprehensive investigation and, when appropriate prosecution.

0211. LSST TRIAL SERVICE OFFICE

Each LSST contains a TSO. The LSST TSO is responsible to the LSST OIC and the RTC for the provision of trial services within the LSSA. The LSST TSO is typically comprised of a STC, TC, a Trial Services Chief, a Trial Services NCO, Legal Service Specialists, and an Administrative Specialist.

0212. LSST OIC

021201. General Description

The LSST OIC is directly responsible to the LSSS OIC for the provision of all legal services, including trial services, to commands supported by the LSST. The LSST OIC is responsible for the direct supervision, legal training, and mentoring of all personnel who provide litigation services on behalf of the government. The LSST OIC also maintains administrative control of those personnel assigned to their respective LSSTs, including but not limited to: medical/dental readiness; routine duty assignments; required annual training; and command events such as unit physical fitness events and safety stand downs. The LSST OIC's RS is the LSSS OIC and their RO is the regional MCI Commander.

021202. Eligibility

The LSST OIC is a Marine judge advocate normally serving in or selected to the grade of O-5/Lieutenant Colonel that possesses a broad range of experience in all areas of military legal services.

021203. Specific Duties

Specific LSST OIC duties include, but are not limited to:

- A. Assign judge advocates within the LSST to TC billets;
- B. Train, mentor, and supervise all TC assigned to the LSST. The LSST OIC shall ensure TC receive at least one monthly training from the Senior Trial Counsel (STC);
- C. Maintain a cooperative and close working relationship with the RTC and the supported SJAs to ensure effective and efficient provision of trial services in the LSST;
- D. Supervise the maintenance/updating of case entries in the applicable electronic case management system for all cases in the LSST.
- E. Manage the SAUSA program within the LSST and coordinate with the RTC and U. S. Attorney's Office to support the SAUSA program.
- F. Liaise with the Regional Defense Counsel as required.
- G. When applicable, coordinate with regional military confinement facilities that may provide confinement services to supported commands. Any coordination with federal, state, or local confinement facilities requires CMC, PSL (Corrections) notification.

0213. SENIOR TRIAL COUNSEL (STC)

021301. General Description

The STC leads the LSST TSO and is directly responsible to the LSST OIC and the RTC for the delivery of trial services to the commands supported by the LSST. The STC's reporting senior is the RTC and the reviewing officer is the LSSS OIC. When the STC and RTC are geographically separated and are not able to have routine personal interaction, the STC's reporting senior is the LSST OIC and the reviewing officer is the RTC or LSSS OIC.

021302. Eligibility

The STC is a judge advocate serving in, or selected to, the grade of O-4/Major, who normally has at least two years of experience as a TC, possesses the additional MOS of 4409 (masters of criminal law), and is qualified to prosecute General Courts-Martial in accordance with paragraph 022001. The STC billet requires a Top Secret clearance to enable litigation of cases with classified material, even if the case is not designated a national security case. The assignment as STC should be based on the leadership and expertise of the judge advocate, not solely on seniority. The OIC, LSSS may waive any of the above prerequisites to serve as an STC if in the OIC's determination, the judge advocate possesses the necessary training and experience to fulfill the duties of the billet. In considering a waiver, the OIC should also consider that the STC must be selected to or in the grade of O-4 to be delegated detailing authority from the RTC. If such a waiver is granted, the OIC shall document the rationale for issuing such waiver in a memorandum to be retained in LSSS files.

021303. Specific Duties

Specific STC duties include, but are not limited to:

- A. Lead, train, mentor, and supervise subordinate TC, the Trial Services Chief, trial services NCO, trial services clerks, and any other personnel assigned to the TSO.
- B. Serve as the RS for TCs and trial services Marines;
- C. Conduct at least one training session for TSO personnel each month;

- D. When delegated detailing authority, ensure the proper TC, with adequate support, is detailed to each individual court-martial. When warranted, request the detailing of trial support assets from the RTC;
- E. Serve as a TC, as required, and maintain a caseload, as appropriate given the STC's supervisory responsibilities;
- F. Supervise the maintenance/updating of CMS for all cases supported by the STC's LSST, and the proper maintenance and disposal of case files in accordance with the references;
- G. Request supported commands to notify the TSO when a Service member is placed in pretrial restraint under R.C.M. 304(a)(2)-(4);
- H. Coordinate with military confinement facilities that provide pretrial confinement services to Marine Corps units and activities located within the LSSA;
- I. Coordinate with military law enforcement agencies for the provision of appropriate legal support by the TSO to investigations and for additional investigative support for cases;
- J. Ensure the proper implementation of the Victim-Witness Assistance Program by the trial counsel in accordance with Article 6b, UCMJ, and MCO 5800.14_ series;
- K. Ensure the proper collection, maintenance, handling, disposal, and appropriate redaction of personally identifiable information in accordance with 5 U.S.C. 552 and 552a, and SECNAVINSTs 5720.42G and 5211.5F, and this instruction by all TC and trial service Marines;
- L. Maintain access passwords for all contraband child pornography exhibits in accordance with JAGMAN section 0155;
- M. Manage overall TSO policy and compliance with CJIR requirements; and
- N. Ensure TCs are including trial services NCOs and trial services clerks in case analysis, witness interviews, and other tasks in a manner that allows the enlisted personnel to gain experience and be assigned tasks of increasing legal complexity.

0214. TRIAL COUNSEL (TC)

021401. Role of TC

As provided by Congress in Article 27, UCMJ, and implemented by the President in R.C.M. 502 and 503, Manual for Courts-Martial, TCs and assistant trial counsel (ATC) prosecute cases on behalf of the United States, cause records of trial to be prepared, and perform other logistical requirements associated with courts-martial. Accordingly, TCs are responsible for representing the United States in administering justice and are not simply advocates for a command or convening authority.

021402. General Description

The TC is directly responsible to the STC for the preparation and conduct of those courts-martial to which the TC is detailed. The TC's reporting senior is the STC and the reviewing officer is normally the RTC. When the STC is geographically separated from the RTC, the TC's reviewing officer is the LSST OIC.

021402. Eligibility

For the purposes of this Chapter, a TC is a judge advocate, generally between the rank of First Lieutenant and Major, who is certified as a TC under Article 27(b), UCMJ, and sworn under Article 42(a), UCMJ.

021403. Specific Duties

Specific TC duties include, but are not limited to:

- A. Prosecute cases on behalf of the United States, in coordination with the cognizant convening authority and SJA;
- B. Ensure prosecutions comply with constitutional, legal, and ethical standards applicable to prosecutors, and any resulting convictions are legally sustainable;
- C. Ensure any electronic case management system is continually updated, current, and accurate for those cases to which the TC is detailed;
- D. Consult with the STC, LAA, and RTC on any complex litigation matters;
- E. Ensure all victims and witnesses are provided timely and appropriate information, notifications, and consultations in accordance with Article 6b, UCMJ, and the Victim-Witness Assistance Program, MCO 5800.14 series;;
- F. Ensure all victims of sexual assault or related offenses are informed of the availability of assistance by a Victims' Legal Counsel (VLC) (see Chapter 6 of this Volume);
- G. Ensure a statement of trial results, including any corrections, is prepared and uploaded to any electronic case management system within 24 hours of the findings or correction;
- H. Ensure completion of the post-trial processing requirements by working with supported commands. This may entail the completion of the following tasks: Confinement Order, DD Form 2704; DD Form 2791; statement of trial results; review and certification of accuracy of the ROT; Sexual Assault Disposition Report; coordinating with the regional review section to provide applicable victims a copy of the authenticated ROT pursuant to Article 54(e), UCMJ; notifying the victim of the right to submit matters for consideration in clemency; informing the victim of any clemency granted by the convening authority; and any other matter prescribed by law, regulation, or policy;
- I. Serve as recorder at administrative separation boards or boards of inquiry when detailed or assigned by the LSST OIC, RTC, or STC;
- J. For cases involving accused service members that are foreign nationals, coordinate with the appropriate SJA to ensure appropriate notification of the consulate and that notification is placed in the record of trial in accordance with SECNAVINST 5820.6 series; and
- K. Provide leadership and mentorship to junior TCs, trial services NCOs, and trial services clerks. Ensure trial services clerks are included in case preparation and analysis in a manner that allows them to be assigned tasks of increasing legal difficulty, depending on the clerk's experience.

0215. TRIAL SERVICES CHIEF

021501. General Description

The Trial Services Chief is directly responsible to the Senior Trial Counsel (STC) for the enlisted support to the Trial Services Offices. The Trial Services Chief's reporting senior is the STC and the reviewing officer is the RTC.

021502. Eligibility

The Trial Services Chief is an enlisted Marine, generally between the rank of E-6/Staff Sergeant and E-

8/Master Sergeant, who assists the STC in the execution of assigned tasks and manages and mentors the enlisted Marines assigned to the LSST TSO.

021503. Specific Duties

Specific Trial Services Chief duties include, but are not limited to:

- A. Lead and supervise TSO NCOs, administrative specialists, and TSO clerks;
- B. Inspect all court-martial documents for completeness, accuracy, and sufficiency;
- C. Manage office correspondence and filing;
- D. Maintain all original standing convening orders;
- E. Maintain a secured evidence locker with controlled access for temporary storage of evidence used at court-martial;
- F. Coordinate court-martial related administrative requirements;
- G. Assist the Trial Counsel (TC) with post-trial processing as required;
- H. Coordinate with the regional TAO;
- I. Provide CJIR information from the TSO to commands and law enforcement agencies to assist them in complying with CJIR requirements;
- J. Serve as manager for the electronic version of a case management system; and
- K. Supervise the retention and destruction of adjudicated or disposed of cases

0216. TRIAL SERVICES NCO

The Trial Services NCO is an enlisted Marine, with the rank of E-4/Corporal or E-5/Sergeant, who assists in the execution of assigned tasks and the management of enlisted Marines assigned to the LSST TSO. The Trial Services NCO's reporting senior is the STC and the reviewing officer is the RTC.

0217. ADMINISTRATIVE SPECIALIST

The Administrative Specialist (MOS 0111) is an enlisted Marine, with the rank of E-4/Corporal, who assists with all administrative aspect of courts-martial.

0218. TRIAL SERVICES CLERK

The Trial Services clerk is an enlisted Marine, between the rank of E-1/Private and E-3/Lance Corporal, who assists in the execution of assigned tasks at the TSO.

0219. TRIAL COUNSEL ASSISTANCE PROGRAM (TCAP)

021901. General Duties

The Director of the TCAP is a judge advocate in the grade of O-4/Major, who has extensive trial experience (former STC/SDC), has formerly been qualified as an SVIP TC under paragraph 022102, and normally possesses the additional MOS of 4409 (masters of criminal law). TCAP reports directly to the Branch Head, JMJ.

TCAP is responsible for developing, publishing, and organizing annual training as required by statutes, instructions, and orders, for TCs throughout the Marine Corps as well as fostering a community of practice among Marine Corps prosecutors and providing litigation advice.

021902. Specific Duties

Specific Director of TCAP duties include, but are not limited to:

- A. Develop standardized procedures for the provision of trial services throughout the Marine Corps;
- B. Maintain a website for trial counsel to share lessons learned, legal research, motions, case disposition reports, and a forum for questions;
- C. Provide litigation advice for individual trial counsel on specific issues on a real-time basis including LAA assistance and case strategy when the regional LAA is unavailable;
- D. Coordinate with other service TCAPs to ensure best practices are shared throughout the services;
- E. Coordinate with DoD providers of forensic testing and expert assistance to ensure trial support and training for TC throughout the Marine Corps;
- F. Provide assessments of the impact proposed legislation, orders, directives, and instructions will have on TCs;
- G. Maintain a close, cooperative relationship with the RTCs and LAAs/GS-15 advisors throughout the LSSSs;
- H. Serve as the Marine Corps representative to the Department of the Navy's Litigation Training Coordination Council; and
- I. Develop and publish an organized annual training plan no later than 1 October of each fiscal year.

0220. GENERAL AND SPECIAL COURT-MARTIAL QUALIFICATIONS FOR TRIAL COUNSEL

022001. General Court-Martial Qualified Trial Counsel (GCM TC)

Qualification as a GCM TC shall be documented in writing by the RTC or LSSS OIC and is non-delegable. Qualification is based on the following requirements:

- A. Be certified as a TC under Article 27(b), UCMJ, and sworn under Article 42(a), UCMJ;
- B. Served as a TC for six months or have a combined eighteen months experience as a trial and/or defense counsel or military judge;
- C. Prosecuted a contested special court-martial as the lead trial counsel or a contested general court-martial as an assistant trial counsel or lead defense counsel;
- D. Received recommendations, in writing, from their STC and, when applicable, their LSST OIC.

In extraordinary situations, as determined by the LSSS OIC, the LSSS OIC may waive the requirements in subparagraphs B and C above. The written qualification letter shall note the extraordinary situations justifying the waiver.

022002. Special Court-Martial Qualified Counsel

Any commissioned officer qualified under Article 27(b), UCMJ and sworn in accordance with Article 42(a), UCMJ, may be detailed as a TC in a special courts-martial, except for special victim cases as defined in paragraph 050101. All TCs must complete a TC orientation course before being detailed to special courts-martial, absent extraordinary situations as determined by the LSSS OIC.

0221. SVIP QUALIFICATIONS AND PERSONNEL

The LSSS OIC shall designate, and maintain a list of, all SVIP personnel. The list shall contain the name, date of SVIP designation, and the location of the individual. Designation of such SVIP personnel shall be at the discretion of the LSSS OIC and may not be delegated. An individual with a conviction for, a substantiated incident of, or who is currently facing an open investigation into any of the following offenses is expressly prohibited from serving as SVIP personnel: any sex-related offense, domestic violence, sexual harassment, child abuse, aggravated assault, or retaliation.

022101. Special Victim Investigative and Prosecution Administrative Personnel

Qualification as SVIP administrative support personnel requires completion of the TC Orientation Course and attendance at a Trial Counsel Assistance Program (TCAP) approved special victim training course. The LSSS OIC may waive these requirements. The written qualification letter shall note the situation justifying the waiver.

022102. Special Victim Qualified Trial Counsel (SVIP TC)

Qualification as a SVIP TC shall be documented in writing by the LSSS OIC, and is non-delegable. Qualifications to become a SVIP TC are based on the following requirements:

- A. Be a GCMTC (qualification as a GCMTC and SVIP TC may occur simultaneously when a TC is detailed as an ATC in a contested general court-martial special victim case);
- B. Demonstrated to the LSSS OIC's satisfaction that the TC possesses the requisite expertise, experience, education, and disposition to competently prosecute special victim cases;
- C. Prosecuted a contested special or general court-martial in a special victim case as an ATC;
- D. Attended an intermediate level trial advocacy training course for the prosecution of special victims (e.g., TJAGLCS Intermediate Trial Advocacy, NJS Prosecuting Special Victims' Cases Course, or TCAP SVIP Training); and
- E. Received recommendations, in writing, from their STC, RTC, and, when applicable, LSST OIC.

The LSSS OIC may waive the requirements in subparagraph C provided the counsel has equivalent experience, such as civilian, defense, VLC, appellate, or other litigation experience in SVIP cases. The LSSS OIC may waive the requirements in subparagraph D provided the counsel has equivalent training, such as attending the defending sexual assaults course, National Criminal Defense College, or similar trial advocacy training. The written qualification letter shall note the situation justifying the waiver as well as the counsel's equivalent experience and training. The LSSS OIC will forward a copy to JAD (JMJ) if any qualifications were waived. If the LSSS OIC waives intermediate level trial advocacy training due to equivalent training, the LSSS OIC shall attempt to send the counsel to a course satisfying paragraph D at the earliest opportunity.

0222 POST-TRIAL ROLES AND RESPONSIBILITIES

022201. Post-Trial Administrative Officers

The Post-Trial Administrative Officer (PTAO) (formerly called review officer) may be a chief warrant officer holding the MOS of 4430 or a judge advocate, at the discretion of the LSSS OIC. The PTAO is responsible to the LSSS OIC for the overall supervision and management of the Regional Post-Trial Office. The PTAO's RS is the LSSS OIC and the RO is normally the Marine Corps Installation Commander for that region, but the LSSS OIC may direct another reporting chain as appropriate, based on the rank of the individual assigned. Specific PTAO duties include, but are not limited to:

- A. Supervise, train, and detail the Marines and civilians of the Court Reporter and Post-Trial Review Sections in support of Special and General Courts-Martial and other military justice proceedings;
- B. Ensure timely and accurate review of Summary, Special, and General Courts-Martial and preparation of Staff Judge Advocate's Review and Convening Authority's Action;
- C. Supervise proper certification and service of records of trial and other appropriate post-trial documents on the accused, defense counsel, and victims of crime;
- D. Report, track, promulgate, and store records and actions for all court-martial proceedings within the region, ensuring proper transfer of records for appellate review or archiving;
- E. Procure, upgrade, and inventory all required hardware, software, and peripheral items relating to court reporter tasks;
- F. Make recommendations to the LSSS OIC regarding personnel assignment/school seat allocations for court reporters and evaluate personnel for the court reporter billet;
- G. Conduct court reporter training at least quarterly; and
- H. If the PTAO is a judge advocate, conduct legal sufficiency reviews of qualifying courts-martial under the MCM. For LSSSs without a judge advocate PTAO, the SJA or DSJA may conduct the legal sufficiency review, or may request the LSSS OIC to cause another neutral judge advocate to conduct the review pursuant to JAGMAN section 0158.

022202. Regional Post-Trial Chiefs

Marines assigned to the billet of Regional Post-Trial Chief are responsible to the PTAO and LSSS OIC for supervising and managing post-trial case tracking, reporting case delay, training and assisting subordinate post-trial personnel, and ensuring the implementation of policy in their area of operation. They are also responsible for assisting the Post-Trial Chief of the Marine Corps with post-trial requests for information and reporting requirements, implementation of new policy and procedures, and providing advice to the SJA to CMC. The Regional Post-Trial Chief normally holds the MOS of 4422.

022203. Post-Trial Chief

Marines assigned to the billet of Post-Trial Chief are responsible for the day-to-day supervision of subordinate court reporters and post-trial clerks, personnel assignment recommendations, and case management and tracking entry, supervision, and validation. The Post-Trial Chief normally holds the 4422 MOS. The Post-Trial Chief coordinates with the LSSS OIC, LAO, Legal Services Chief, and PTAO to recommend eligible 4421s as qualified candidates for court reporter training.

022204. Court Reporters

Marines holding the Military Occupational Specialty (MOS) 4422, and in a court reporting billet, are responsible for the accurate and timely capture, transcription, editing, proofreading, redaction, assembly, and distribution of official records of trial and approved miscellaneous transcription requests. Upon graduation, 4422s are sworn to serve as an officer of the court under R.C.M. 807(b)(2)(D). The goal when filling a 4422 billet is to produce verbatim transcripts on demand. This means recording accurate notes, audio, exhibits, and taking down the correct spelling of parties to the court. Court reporters are in direct support of the military judge when detailed to a general or special court-martial to ensure accurate records of trial that are the result of general and special courts-martial. Court reporters mark and maintain control of exhibits, and maintain a list of witnesses, exhibits, court times, and milestones.

022205. Post-Trial Clerks

Marines assigned as post-trial clerks perform administrative tasks as assigned by the Post-Trial Chief and PTAO, except for those that must be performed by a court reporter sworn under R.C.M. 807(b)(2)(D).

VOLUME 16: CHAPTER 3

DETAILING

SUMMARY OF SUBSTANTIVE CHANGES

Hyperlinks are denoted by *[bold, italic, blue and underlined font.](#)*

The original publication date of this Marine Corps Order (MCO) Volume (right header) will not change unless/until a full revision of the MCO has been conducted.

All Volume changes denoted in *blue font* will reset to black font upon a full revision of this Volume.

CHAPTER VERSION	PAGE PARAGRAPH	SUMMARY OF SUBSTANTIVE CHANGES	DATE OF CHANGE

CHAPTER 3**DETAILING**

0301. PURPOSE

This chapter provides guidance for the detailing of Trial Counsel, and the counsel and personnel assigned to trial services offices, as provided by relevant law, regulations, and rules for professional conduct.

0302. DETAILING CONSIDERATIONS IN ALL CASES

Detailing policies ensure counsel detailed to represent the United States are well qualified to fulfill their duties as trial counsel. The detailing authority will consider the following factors before detailing a trial counsel to a particular case: any potential conflicts of interest in detailing; the trial counsel's caseload, experience, temperament, and qualifications; the case complexity; geographic location of the trial counsel and the expected location of the court-martial; and, the expected rotation date of the counsel. Detailing authority also includes the authority to remove a trial counsel from a case. Detailing authority may be rescinded or withheld at any time. In addition to the limitations of this chapter, the LSSS OIC, or RTC may further limit the detailing authority of any counsel under their supervision.

0303. DETAILING LETTER

Detailing of trial counsel to a court-martial must be in writing and shall specify the supervisory counsel the trial counsel may seek assistance from. The detailing letter will be maintained in the casefile and by the detailing authority. If immediate detailing is necessary, the detailing authority may orally detail a counsel to a case, provided the detailing letter is later signed indicating the date the counsel was detailed.

0304. TIMELINE

An SVIP qualified trial counsel shall be detailed in writing as soon as practicable upon notification by NCIS or another Military Criminal Investigative Organization (MCIO) of an SVIP investigation. The detailing shall not be delayed until the receipt of an RLS. In non-SVIP cases, a trial counsel shall be detailed in writing to a case as soon as practicable, but not later than any one of the following:

- (1) Ten calendar days after an accused has been placed in pretrial confinement;
- (2) Ten calendar days after receipt of a Request for Legal Services (RLS);
- (3) As otherwise required by law or regulation.

0305. DETAILING AUTHORITY OF THE LSSS OIC

The LSSS OIC is the detailing authority for all TCs assigned, or made available, to the LSSS. The LSSS OIC normally delegates this detailing authority to the RTC. The authority to detail the RTC to an individual case may not be delegated.

0306. DETAILING AUTHORITY OF THE REGIONAL TRIAL COUNSEL (RTC)

The RTC is the detailing authority of all trial counsel within the RTC's region, as delegated by the LSSS OIC. The RTC normally delegates detailing authority to the STC for TCs under the STC's supervision. Detailing authority may only be delegated to an officer in the grade or selected to the grade of O-4 or higher. The RTC may not delegate the authority to detail in the following cases: (1) any capital case; (2) national security cases, or cases involving the use of classified information; (3) special victim cases as defined in chapter 4 of this Volume; (4) cases where the accused is an E-8, E-9, CWO3, CWO4, CWO5, or O-3 and above; and (5) detailing of the complex trial counsel.

0307. DETAILING AUTHORITY OF THE STC

The STC may detail counsel under the STC's supervision as delegated by the RTC. The STC may not further delegate detailing authority to any other trial counsel, but the LSSS OIC, RTC, or LSST OIC may appoint a trial counsel as the acting STC during periods when the STC is absent.

0308. SPECIAL DETAILING CONSIDERATIONS FOR *DUBAY* HEARINGS AND REMANDS

The detailing authority must consult with the Appellate Government Division (Code 46) before detailing a TC to a case that has been remanded by an appellate court for retrial, sentencing, or for a fact-finding hearing under *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1967). Because the limited purpose of a *DuBay* hearing is to obtain further evidence on a matter under consideration by the court, these hearings often require specialized knowledge of the unique appellate posture of the case. The detailing authority should consider the benefit of having two counsel represent the government for the hearing – a local trial counsel and a counsel assigned to the Appellate Government Division. The cognizant SJA should promptly inform the LSSS so the detailing authority may start coordination between the LSSS and Code 46, thereby protecting an accused's right to speedy post-trial review and meeting the appellate court's timelines.

0309. DETAILING MILITARY JUSTICE SUPPORT PERSONNEL

There is no requirement to detail military justice clerks and other personnel to courts-martial under R.C.M. 503 in the same way that counsel are detailed. However, to ensure military justice clerks gain a breadth of experience and familiarity with the facts of a case, RTCs and STCs should consider developing policies that allow military justice clerks and other support personnel to be assigned to cases for the life of the case, to the greatest extent possible.

PART B: SPECIAL CONSIDERATIONS IN VICTIM CASES

VOLUME 16: CHAPTER 4

VICTIM RIGHTS

SUMMARY OF SUBSTANTIVE CHANGES

Hyperlinks are denoted by ***bold, italic, blue and underlined font***.

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PART B – SPECIAL CONSIDERATIONS INVOLVING VICTIMS**CHAPTER 4****VICTIM RIGHTS**

0401. PURPOSE

This Chapter outlines specific duties of trial counsel and other personnel in military justice sections in cases involving victims. Nothing in this Chapter restricts the legal services provided by members of the VLCO, whose missions, duties, and responsibilities are covered in detail in Volume 4 of this manual.

0402. TYPES OF VICTIMS

Various provisions in the UCMJ, Rules for Courts-Martial, Military Rules of Evidence, and service regulations guarantee victims certain rights throughout the military justice process. Practitioners must ensure they are using the correct definition of victim in all circumstances. For example, certain rights attach once a victim has suffered a direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ, while other rights require the victim to be named in a specification, to have testified at trial, or to have suffered harm as a result of an offense the accused was convicted of. Please refer directly to the text of the statute or rule to determine if an individual meets the definition of a victim based on the right at issue.

0403. AVAILABILITY OF VICTIMS' LEGAL COUNSEL (VLC)

040301. Requirement to Notify Certain Victims of VLC

Every victim, as defined in Article 6(b), UCMJ, shall be notified of the availability of VLC and offered the option of receiving assistance from a VLC. Pursuant to 10 U.S.C. § 1044e and 10 U.S.C. § 1565b, when a trial counsel or representative of a trial counsel meets with a victim who is not already represented by a VLC, the trial counsel shall ensure that the victim has been notified of the availability of VLC and offered the option of receiving assistance from a VLC.

040302. Timing of Notification

Notification of the victim must occur before a trial counsel or representative of the trial counsel interviews or requests a statement from the victim, unless exigent circumstances require the interview to proceed immediately. Exigent circumstances include situations such as the need to collect evidence that is subject to degradation (e.g., sexual assault forensic exams and deoxyribonucleic acid (DNA) collection); or prevent or mitigate a serious and imminent threat to the health or safety of the victim or another person). The trial counsel must document the notification to the victim in the case file, or the exigent circumstances that required the immediate interview of the victim.

040303. Notifying Other Victims of the Availability of VLC

Although 10 U.S.C. § 1044e only requires the notification of the availability of VLC to eligible victims (as defined in § 1044e(a)(2)) of sex-related offenses, Marine Corps policy (*See* Volume 4 of this manual) permits the OIC, VLCO to represent victims of domestic violence and to grant exceptions to policy to represent victims of other crimes, as well as victims who are not eligible for services under 10 U.S.C. § 1044e. Since the OIC, VLCO may exercise discretion in representation, TCs shall notify every Article 6(b) victim of the availability of VLC.

0404. DISCLOSURES TO VICTIMS

The counsel for the government is responsible for the disclosures and notifications listed in this paragraph. If the victim is represented by counsel, the information will be provided to the VLC or civilian counsel. Nothing in this section is intended to prevent the counsel for the government from withholding listed information when necessary

based on the facts of the case, or disclosing additional documents not listed, if doing so is authorized under 5 U.S.C. § 552a and SECNAVINST 5211.5F. Counsel withholding any required information must consult supervisory counsel and should only do so when exceptional circumstances show that disclosing the information to the victim would lead to the destruction of evidence, would compromise the investigation, or would otherwise be inconsistent with the pursuit of justice. Further, nothing in this section is intended to prevent the victim or the victim's counsel, if applicable, from requesting disclosure of additional documents as necessary to safeguard victims' rights. However, as described in chapter 11, providing additional documents or information to a victim may lead to questions about whether their testimony was influenced by knowledge of these additional facts. The disclosure requirements listed in this Chapter do not eliminate any specific requirements to provide information and materials to victims under the UCMJ, the Rules for Courts-Martial, Military Rules of Evidence, Victim Witness Assistance Program, and other sources of applicable law and policy. For purposes of this paragraph, a victim is defined under Article 6b, UCMJ, unless the specific provision states otherwise. Upon request by the victim or the victim's counsel, the counsel for the government, normally the TC, shall provide the following to the victim or victim's counsel unless otherwise directed by supervising attorney or military judge:

040401. Before Preferral

A. A copy of the victim's statements, including video statements, and documentary evidence derived directly from and pertaining directly to the victim that are in the possession of the counsel for the government or the SJA. Obligation to disclose continues throughout the court-martial proceeding.

B. The date, time, and location of any pretrial confinement review pursuant to R.C.M. 305 and any change in confinement status of the accused.

040402. After Preferral

A. Copy of the charge sheet, redacted for personally identifiable information (PII), setting forth the preferred specifications pertaining to the victim making the request.

B. DD Form 2702 (Court-Martial Information for Victims and Witnesses of Crime). See MCO 5800.14 (Victim-Witness Assistance Program) for additional guidance.

C. Subpoenas for personal or private information regarding a victim named in a specification. See paragraph 090206 of Chapter 9 and R.C.M. 703(g)(3)(C)(ii).

D. A copy of any appointing order directing a preliminary hearing under Article 32, UCMJ; the date, time, and location of any preliminary hearing pursuant to R.C.M. 405; and any requests for continuances of the hearing. After the hearing, victims named in a specification will be provided a copy of the recording of the hearing, upon request.

040403. After Referral

A. A copy of the referred charge sheet, redacted for PII, setting forth the referred specifications pertaining to the victim making the request.

B. Any docket requests, as well as docketing or scheduling orders, including deadlines for filing motions and the date, time, and location for any session of trial.

040404. Upon Receipt by the Government

A. A copy of any filing, including attachments, that may limit a victim's ability to participate in the court-martial, affect the victim's possessory rights in any property, concern the victim's privileged communications or private medical information, or any filing where a victim has a right to be heard regarding the filing, such as a motion filed under M.R.E. 412.

B. A copy of any proposed agreement and the final signed agreement, including the signed stipulation of fact, if any, related to the offenses involving that victim.

040405. Post-Trial

A. A copy of the statement of trial results, regardless of whether the accused was found guilty of any offenses related to the victim.

B. A Certified Record of Trial pursuant to R.C.M. 1112(e)(1)(C), if the victim was named in a specification, regardless of whether the accused was found guilty of any offenses related to the victim.

0405. ADDITIONAL NOTIFICATIONS TO VICTIMS

040501. VWAP Notifications

The Victim Witness Liaison Officer (VWLO) will ensure that the victim receives all required notifications and case updates, as required by MCO 5800.14 (Victim-Witness Assistance Program). The trial counsel will coordinate with the VWLO to provide updates, and ensure that required updates are documented in the case file and electronic case management system. The TAO shall assist the trial counsel as directed by the RTC.

040502. Change in Confinement Status

The trial counsel will notify the victim or VLC anytime there is a change in the confinement status of the accused.

040503. Other Regular Updates

The trial counsel shall make other regular updates to the VLC or victim on any significant events impacting the litigation of the case.

0406. NOTIFICATION TO VICTIMS IN CHILD PORNOGRAPHY CASES

040601. Article 6b Applies in Child Pornography Cases

Children depicted in images of child pornography have all the rights guaranteed in Article 6b, UCMJ, including the rights to reasonable, accurate, and timely notice of proceedings, to confer with counsel for the government, and if the accused is convicted, to be reasonably heard during sentencing. *United States v. Barker*, 77 M.J. 377 (C.A.A.F. 2018).

040602. Applicability

When the identity of the child depicted in the images is known to the trial counsel, for example, in cases alleging the production of child pornography, the trial counsel must provide all information required under paragraphs 0403-0405 of this chapter to the victim, or victim's designee. The following paragraphs apply to situations where an image appears to depict an actual victim, but the identity of the victim is unknown to NCIS or the trial counsel.

040603. VWAP Procedures for Child Pornography Cases

A. Case Identified

When a potential child pornography case is identified, NCIS submits gathered images to the National Center for Missing and Exploited Children (NCMEC) for analysis.

B. NCMEC Report

NCMEC will provide a Child Identity Report (CIR) to the NCIS case agent. The CIR will indicate whether a known victim is reflected in the images.

C. Federal Bureau of Investigation (FBI) Report

When a CIR reflects a known victim, the NCIS case agent will forward the CIR to the FBI's Child Pornography Victim Assistance (CPVA) program, which in turn provides a Victim Information Report (VIR) containing the victim's notification preference and indicating whether victim impact statements are available (DOJ maintained). The information contained in the VIR remains valid for only 45 days. The trial counsel may request an updated VIR by sending an electronic copy of the CIR to CPVA@ic.fbi.gov. If an electronic copy is not available, a copy of the CIR can be faxed to 202-324-1311, attention CPVA. Please indicate trial counsel contact information and official work email in the fax cover letter.

D. Known Victim Requesting Not to Receive Notifications

Should a victim elect not to be notified, the VIR will contain no contact information. Trial Counsel and representatives for the government will comply with the victim's preference and will not attempt to make contact. In the event a victim has elected not to be notified or to participate in a hearing, statements by the victim are not admissible during sentencing under R.C.M. 1001A. *See Barker, 77 M.J. at 382-84.* In these cases, trial counsel may only seek to introduce the victim's statement as negotiated through a pretrial agreement or plea agreement, or if the statement is otherwise admissible under the rules of evidence.

E. Known Victim Requesting Notifications

Should a victim request notifications, the VIR will contain contact information including the victim's representative and mailing or email address. The trial counsel will be responsible for providing the DD2702, DD2703, and a copy of the DD2704 with a cover letter explaining the victim's rights and providing contact information for the trial counsel. If a DD2701 has not been provided by law enforcement, the trial counsel should also provide the victim with the form.

F. Completing a DD2704 in a Child Pornography Case

The DD2704 Section 2 will never be applicable since there are always victims in child pornography cases involving actual children. Section 3 of the DD2704 should be signed, as there are eligible victims. Within Section 4, for known victims who elected notification, add their contact information (as reflected on a VIR issued within the past 45 days). When a known victim declines notification or when all victims in a case are either unidentified or are unknown, Section 4 will contain a short statement as to why contact information is unavailable.

0407. INDIVIDUAL TO ASSUME RIGHTS OF CERTAIN VICTIMS

040701. When Appointment May be Warranted

Under R.C.M. 801(a)(6), at the military judge's discretion, the military judge may appoint a person to assume the victim's rights under the UCMJ if the victim is under 18 years of age and not a member of the armed forces, or is incompetent, incapacitated, or deceased. The military judge is not required to hold a hearing before making such a designation. But if the military judge orders a hearing, the trial counsel will ensure the victim is notified of the hearing and the right to be present at the hearing. The trial counsel must consult with the VLC, if applicable, regarding the selection of a designee. The designee may not be the accused. R.C.M. 801(a)(6)(C).

040702. Factors to Consider in Recommending Designee

This paragraph outlines factors and considerations for a trial counsel in recommending a designee for a military judge to appoint. Nothing in this paragraph is intended to restrict or limit a military judge's discretion

under R.C.M. 801(a)(6) to appoint, or not appoint, an appropriate designee. Factors to consider when recommending a person for the military judge to appoint include: the age and maturity, relationship to the victim, and physical proximity of any proposed designee; the costs incurred in effecting the appointment; the willingness of the proposed designee to serve in such a role; the previous appointment of a guardian by another court or competent jurisdiction; the preference of the victim; any potential delay that may be caused by a specific appointment; and any other relevant information that shows appointment of a particular designee is in the best interest of the victim.

040703. Compensation for Designee Paid by Convening Authority

In most cases, the designee will likely be a family member, parent, or legal guardian who does not require compensation for services. However, if the military judge appoints a designee that requires payment for services (such as a civilian guardian *ad litem* or counselor), the trial counsel will seek an order from the military judge fixing the rate and maximum amount of compensation. Costs associated with a designee will be paid by the convening authority. The RTC may direct the TAO to provide administrative assistance to the TC and convening authority to ensure proper funding.

VOLUME 16: CHAPTER 5

SPECIAL VICTIM CASES AND PROCESSING OF SEX-RELATED OFFENSES

SUMMARY OF SUBSTANTIVE CHANGES

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CHAPTER 5

SPECIAL VICTIM CASES AND PROCESSING OF SEX-RELATED OFFENSES

0501. DEFINITIONS

050101. Special Victim Cases

Special victim cases are those cases involving alleged violations of Articles 117a, 118, 119, 119a, 120, 120a (for stalking offenses committed prior to 1 January 2019), 120b, 125 (with a child or forcible), 128 or 128b (domestic violence involving aggravated assault or child abuse), 132 (when the retaliation was for reporting a sex-related offense), 134 (child pornography or assault with intent to commit the previously listed articles), or 80 (attempts to commit the previously listed articles) of the UCMJ. All special victim cases will have an SVIP TC detailed as lead counsel.

050102. Sex-Related Offenses

“Sex-related offenses” are defined differently depending on the specific provision at issue. *Compare* R.C.M. 307(e) and JAGMAN section 0128(a)(1)(a) with JAGMAN Section 0128(e)(2).

050103. Collateral Misconduct Associated with Sex-Related Offenses and Data Collection Requirements

Collateral misconduct means alleged victim misconduct that might be in time, place, or circumstance associated with the victim’s sexual assault incident. *See* DoDI 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures, Glossary. In accordance with MCO 1752.5C, disposition authorities authorized to take action on collateral misconduct of an alleged victim should ordinarily defer taking action until after the underlying sex-related offense is resolved. Every allegation of collateral misconduct must be resolved in a fair and just manner based on the unique facts of the case and in accordance with laws governing the disposition of collateral misconduct. Section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law No. 115-232) directs the Secretary of Defense to submit a biennial report to the congressional defense committees on the number of instances of collateral misconduct committed by alleged sexual assault victims. Practitioners must ensure collateral misconduct is properly annotated in any electronic case management system.

0502. PROCESSING AND ELEVATED REVIEW OF SEX-RELATED OFFENSES

050201. Sexual Assault Initial Disposition Authority

The authority to make the initial disposition of sex-related offenses is withheld to an officer in the grade of O-6 or above with special courts-martial convening authority. This official is designated as the Sexual Assault Initial Disposition Authority (SA-IDA). *See* JAGMAN section 0128. Note that although JAGMAN section 0128(g) contains a definition of sex-related offenses, it refers to this Volume for Marine Corps cases. The Commandant of the Marine Corps expanded the offenses withheld to the SA-IDA to include aggravated sexual contact and abusive sexual contact in violation of Article 120(c) and 120(d). *See* MARADMIN 372-12. Therefore, the requirements of JAGMAN sections 0128 paragraphs (e) through (j) apply to aggravated sexual contact and abusive sexual contact offenses in Marine Corps cases.

050202. Withholding of Disposition Authority Applies to Collateral Misconduct

The withholding of disposition authority for sex-related offenses applies not only to the sex-related offense, but to all other alleged offenses arising from or relating to the same incident, whether committed by the alleged offender or the alleged victim. The victim’s collateral misconduct will be referred to the first SA-IDA in the victim’s chain of command.

050203. Forwarding to Subordinate Commander Prohibited

The SA-IDA may not forward any offense relating to the initial incident to a subordinate commander. Unless forwarded to a superior commander for disposition, the SA-IDA maintains disposition authority over the case until final adjudication of all offenses arising from the incident, even if the SA-IDA decides to go forward on charges not listed in this paragraph or disposes of the case at a lower forum such as nonjudicial punishment (NJP) or administrative separation. For example, if the SA-IDA finds insufficient evidence for a sex-related offense, but finds sufficient evidence of another offense, such as underage drinking, the SA-IDA will adjudicate that offense and may not send it to a subordinate commander for adjudication.

050204. Sexual Assault Initial Disposition Authority (SA-IDA) Disposition Considerations

Before a SA-IDA makes an initial disposition decision under R.C.M. 306, the SA-IDA must consider the victim's preference, including the victim's views regarding disposition and the victim input on the nature of the offense, as well as the victim's preference in prosecution jurisdiction as described in paragraph 050205, consult with the cognizant SJA, and review any other evidence necessary to make an informed disposition decision. If the SA-IDA directs a preliminary hearing, all documents that were provided to the SA-IDA must be provided to the defense within five days of the SA-IDA ordering a preliminary hearing. See R.C.M. 404A and Chapter 11 of this Volume.

050205. Consultation Regarding Victim's Preference in Prosecution JurisdictionA. Commander's Responsibility to Consider Victim's Preference

Per R.C.M. 306, and JAGMAN section 0128, for allegations of sex-related offenses that occur within the United States, the victim must be provided an opportunity to express views as to whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense. The SA-IDA will ensure the victim is provided an opportunity to express such views and must consider the victim's preference for jurisdiction, if available, prior to making the initial disposition decision.

B. Victim's Preference is Non-Binding

The commander must consider the victim's preference. However, the victim's preference is not binding. In appropriate cases, the commander may take initial disposition actions inconsistent with the victim's preference.

C. Procedure for Capturing Victim's Preference

The procedures for capturing victim's preferences are listed in JAGMAN section 0128. The detailed SVIP TC will attempt to interview the alleged victim before preferring charges or completing a Case Analysis Memorandum (CAM) as described in paragraph 0503. If the alleged victim is represented by VLC, the SVIP TC will coordinate the interview request through the VLC. During or after the interview, the SVIP TC should normally have the victim sign a standard Victim's Preference Letter, which is contained in Appendix A-1-q of the JAGMAN. Practitioners may use a form that contains additional information, so long as it includes all required information in the JAGMAN form. If the alleged victim declines to be interviewed or declines to provide victim preferences after reasonable attempts to contact the victim, the SVIP TC shall follow the procedure outlined in JAGMAN section 0128 to document the steps taken to ascertain the victim's preference. TC requests for victim input will also be documented in the case file and electronic case management system.

D. Forwarding the Victim's Preference

The TC shall ensure the written victim's preference statement is forwarded to the SJA along with the CAM. The written victim's preference statement and CAM will also be included in the case file and uploaded to the electronic case management system. While the CAM is normally attorney work-product, the victim's preference statement is subject to normal discovery rules and is usually provided to the defense, if applicable, at the appropriate time.

E. Notification to Civilian Authorities

If the victim preference is for prosecution in a civilian court with jurisdiction over the offense, the TC will ensure the appropriate civilian authority is notified. Following notification to the appropriate civilian authority, the cognizant commander is responsible for notifying the victim of any decision by the civilian authority to prosecute or not prosecute the offense in a civilian court. The TC will assist the cognizant commander by notifying the VLC or the victim or victim witness liaison officer, if the victim does not have a VLC. The date the victim was notified of the decision by civilian authorities must be documented on the victim preference letter referenced in subparagraph C above.

050206. Requirement to Submit Sexual Assault Disposition Report (SADR)

The cognizant SA-IDA will complete a SADR no later than fifteen business days after final disposition of a sex-related offense. The SADR will use the NAVMC 1752 SADR form or a DoD-directed form, if one is implemented. The default SA-IDA is the O-6 SPCMCA in the chain of command of the alleged offender. If the alleged offender is not assigned to a Marine Corps command, the SA-IDA in the chain of command of the alleged victim will be responsible for completing and submitting the SADR form if the alleged victim is assigned to a Marine Corps command. The General Court Martial Convening Authority (GCMCA) SJA shall maintain a copy of the SADR in local files, upload it into any electronic case management system (if applicable), and ensure submission to Judge Advocate Division (JAD) by emailing the form to JAD_SADR@usmc.mil, copying the pertinent TC/STC on the submission to JAD. Because the SADR Form contains PII, the email must be sent encrypted. Follow the instructions on the SADR form to submit the form to JAD and NCIS after the last disposition is complete.

050207. Elevated Review of Disposition DecisionsA. SJA recommends referral

In any case in which an SJA, pursuant to Article 34, recommends any specification(s) of sex-related offenses be referred for trial by court-martial and the convening authority does not refer to court-martial all of those specification(s) recommended by the SJA, the convening authority will forward those specifications not referred along with a copy of the case file, containing all items required by JAGMAN section 0128(h)(4), to the Secretary of the Navy for review. A specification recommended for referral by an SJA, but not referred by the convening authority, need not be forwarded if the specification was charged only as an alternative theory of proof to a specification that was referred to court-martial. See JAGMAN section 0128(h)(1).

B. SJA Does Not Recommend Referral

In any case in which an SJA, pursuant to Article 34, UCMJ, recommends that any specification(s) of sex-related offenses not be referred for trial by court-martial and the convening authority does not refer to court-martial those specification(s), the convening authority will forward those specifications not referred along with a copy of the case file, containing all items required by JAGMAN section 0128(h)(4), to the next higher GCMCA for review. A specification not referred by the convening authority need not be forwarded if the specification was charged only as an alternative theory of proof to a specification referred to court-martial. If a single case contains specifications that must be reviewed by the next higher GCMCA under this paragraph, and specifications that must be reviewed by the Secretary of the Navy under paragraph A, the review by the next higher GCMCA will be omitted and the entire case file and all specifications will be forwarded to the Secretary of the Navy for review. See JAGMAN section 0128(h)(2).

C. Detailed Trial Counsel Requests Elevated Review

JAGMAN section 0128(h)(3) allows a detailed trial counsel to request the Chief Prosecutor, as defined in service regulations, to seek Secretary of the Navy review of the case file if the convening authority and next higher GCMCA have both decided not to refer a sex-related offense to court-martial. In the Marine Corps, the DepDir, MJCD, JAD fulfills the role of Chief Prosecutor of the Marine Corps, until such a time as a separate billet

may be created for this role. The DepDir, MJCD may seek Secretary of the Navy review after reviewing the case file and determining the case has prosecutorial merit. All requests from the detailed trial counsel must contain the information listed in JAGMAN section 0128(e)(4), as well as an endorsement of the request signed by the RTC, with input from the LAA.

D. Forwarding the Case File for Elevated Review

Once a SA-IDA decides not to adjudicate charges at court-martial, the charges should normally be dismissed without prejudice, unless there is a substantial likelihood that the statute of limitations for those specification(s) will run before the higher authority has an opportunity for review. When forwarding a case for review to the next higher GCMCA, the charge sheet and case file, including all items listed in JAGMAN section 0128(h)(4), shall be forwarded via secure electronic means, such as a secure electronic file transfer system, or electronic case management system, if possible. The next superior GCMCA is determined by standard command relationships established in the U.S. Navy Regulations and Marine Corps Manual. When forwarding a case for review by the Secretary of the Navy, the case file shall be routed through the Judge Advocate General (Code 20).

E. Notification to Victim Upon Completion of Elevated Review

Upon completion of any review by higher authority under this provision, the SJA will ensure that the victim of the alleged sex-related offense is notified of the results of the elevated review.

050208. Unlawful Influence of Disposition Decision is Prohibited

No person may attempt to coerce or, by unauthorized means, influence the action of a convening authority with respect to any judicial acts, including referring or not referring a charge to a court-martial. If a higher authority conducts an elevated review of a disposition decision and decides referral of specifications is warranted, the higher authority should normally become the convening authority.

0503. CASE ANALYSIS MEMORANDUM (CAM)

050301. Purpose

Fulfillment of the purpose of military law described in paragraph 010301 of Chapter 1 turns on diligence in the investigation, development, analysis, and preparation of cases. The Case Analysis Memorandum (CAM) serves these objectives through three principal means: (1) ensuring competent preparation of a case in order to inform the advice of an SJA and thereby assist a commander in applying and considering the non-binding disposition guidance contained in Appendix 2.1 of the Manual for Courts-Martial and making an initial disposition decision under Rule for Courts-Martial 306; (2) assisting convening authorities in making other disposition decisions, such as accepting a plea agreement, referring charges, or dismissing charges; and (3) enabling supervision of counsel. The CAM also provides a historical record of case analysis for use by the SJA to CMC in supervising the provision of legal services and command legal advice.

050302. Applicability

This section on CAMs applies to government counsel (trial counsel and SJAs) and VLCs, and is issued pursuant to the authority of the SJA to CMC as described in Volume 2 and in Chapter 1 of this Volume.

050303. When Required

The servicing LSSS shall prepare a CAM in all cases involving the actual infliction of grievous bodily harm, or actual, attempted, or solicited offenses involving: death; sex-related offenses; (except for 120a and 120c); and, retaliation under Article 132, when the retaliation was related to a sex-related offense. However, a CAM is not required if the accused is not subject to military jurisdiction, or if the SJA and RTC agree that charges should be preferred and there is no dispute as to which charges and charging theory will be alleged. Additionally, for allegations of abusive sexual contact, the SJA may waive the requirement that a CAM be completed when the

interests of justice support speedy resolution of the case without a CAM, and when the victim's preferences with respect to disposition and the SJA's waiver of the CAM requirement are memorialized. Only one CAM is required in each case, unless by exception when an SJA specifically requests a supplemental CAM.

050304. Detail, Content, and Form

There are two types of CAMs, abbreviated and comprehensive. The contents of each type of CAM are different. The RTC, or designee, will determine whether to issue an abbreviated or comprehensive CAM. If an abbreviated CAM was prepared, the SJA may request the RTC to direct a comprehensive CAM be prepared. The CAM shall be marked, "FOUO – ATTORNEY WORK PRODUCT." The CAM template may be found on the "JAD Forms" tab on the SJA to CMC public website and shall not be modified. While good judgment and careful analysis of the unique facts and circumstances of each individual case will guide preparation of a CAM, the primary focus for trial counsel are factors regarding the availability of victims and witnesses, victim preferences regarding disposition, the admissibility of evidence and likelihood of obtaining a sustainable conviction, and the criminal history of the accused – particularly in those cases where the government has reason to believe prior misconduct is relevant and admissible in the present case. The level of detail in a CAM will necessarily vary with case complexity, availability of witnesses, depth and strength of the evidence, and other legal issues. The determination of how much detail is appropriate is necessarily based on the specialized knowledge, training, and experience of the SVIP TC and RTC supervising the preparation of the CAM. The content of a CAM also varies with case complexity and type. Regardless of the type of CAM or level of detail it contains, all CAMs will be completed and submitted on the form provided by JAD. Completion of the fields in block 1 is mandatory, as is the entry of block 1 data in the electronic case management system.

A. Abbreviated CAM

An abbreviated CAM is appropriate where, following preliminary review, the SVIP TC and RTC determine any of the following:

(1) There is no probable cause to believe the accused committed an offense;

(2) Although probable cause exists, an obvious and fatal flaw in the strength, availability, or admissibility of evidence or a critical witness renders the likelihood of obtaining a sustainable conviction at trial so remote that prosecution is inadvisable based on one or more of the non-binding disposition guidance factors listed in Appendix 2.1 of the MCM;

- *Example:* Where an essential witness is unavailable, and there is no other means by which the government can prove its case, an abbreviated CAM analyzing the availability of the key witness would be proper.
- *Example:* Where the evidence shows probable cause to believe that the accused committed the offense, but the only available evidence was obtained unlawfully and in a manner that will clearly result in its suppression, an abbreviated CAM analyzing only the admissibility issue would be proper.

(3) A victim who, having had the benefit of counsel (or who has affirmatively declined representation), clearly states an informed preference that the government not proceed with the case, and the interests of justice are served by advising the convening authority to dispose of the case without prosecution;

- *Example:* Where a victim submits a signed victim's preference statement through a VLC indicating a desire that proceedings not move forward, an abbreviated CAM that omits the analysis of the strength of the evidence, but memorializes the victim's preference would be proper. The CAM in this situation would note the victim's preference in block 1, and counsel must make appropriate entries in CMS to record that preference.

(4) There is probable cause to believe the accused committed an offense, the strength of the evidence supports trial by court-martial, but there is some dispute as to charging theory;

Example: Where an accused has confessed, the other available evidence is strong and corroborates the confession, and the victim desires prosecution and is willing to participate in the case, an abbreviated CAM that omits detailed analysis of the evidence, but analyzes the different possible charges would be proper.

Note that in this situation, pursuant to paragraph 050303 if both the RTC and the SJA concur that charges should be preferred and there is no dispute as to which charges and charging theory will be alleged, no CAM is required.

B. Comprehensive CAM

More complex cases require more comprehensive analysis. In general, counsel may generate a more comprehensive CAM in any case where, in the judgment of detailed counsel or the RTC, additional analysis is helpful or necessary. However, because the exercise of prosecutorial discretion is a matter within the purview of the convening authority, and because the decision not to proceed to preferral or referral in a case supported by probable cause and admissible evidence should be informed by thorough analysis and careful consideration, a comprehensive CAM will be prepared when, in the judgment of the RTC, there is probable cause to believe the accused committed an offense, there is no obviously fatal flaw in the available evidence or proof, but the preferral of charges is inadvisable based on one or more of the non-binding disposition guidance factors listed in Appendix 2.1 of the Marine Corps Manual (MCM).

- *Example:* Where a victim in a sexual assault case is available for trial and willing to proceed, but there are serious concerns with the credibility of a critical witness, or the ability to obtain a sustainable conviction at trial, the CAM must carefully analyze available evidence for strength and admissibility and carefully document that analysis. In these situations, a comprehensive CAM that includes a full evidentiary analysis would be proper.

050305. Procedure

On receipt of an RLS or notification by NCIS or an MCIO of an SVIP case, the SVIP TC and the RTC will assign the case for preliminary review. Junior counsel not yet certified as an SVIP TC may participate in the preliminary review and preparation of a CAM under the supervision of an SVIP TC. In addition, the input of a prosecution Litigation Attorney Advisor (LAA) may add value in many cases, particularly in complex litigation. VLCs also play a critical role by effectively communicating the inputs of their clients in order to enable the disposition determination of a CA. Accordingly, VLC will provide those inputs in writing, including the victim's preference for military or civilian prosecution, if applicable. If a victim is not represented by a VLC, the SVIP TC should interview the victim and obtain the victim's preference in writing.

050306. Who Can Sign

Both an SVIP TC and the RTC must sign all CAMs. For abbreviated CAMs only, the RTC may delegate authority to review and sign the CAM to the STC. Any employment of this delegation must be noted in the supervisory attorney comments section of the CAM. Any judge advocate may sign a CAM in a case where no CAM is required, but in the judgement of the RTC, a memo will contribute materially to the proper disposition of that case. Use of the CAM to resolve issues in cases where a CAM is not formally required is encouraged. The prosecution LAA may, but is not required to sign any CAM. The LAA must be consulted and provide input on comprehensive CAMs or when otherwise requested by the RTC.

050307. Timelines

A. An abbreviated CAM shall be completed within 30 days of receipt of an RLS accompanied by a substantially complete investigation, except that completion may be delayed to allow a victim a reasonable opportunity to provide a victim's preference. An investigation is "substantially complete" when the STC decides no additional investigative steps are necessary to make a disposition recommendation.

B. A comprehensive CAM shall be completed within 45 days of receipt of an RLS accompanied by a substantially complete investigation, except that completion may be delayed to allow a victim a reasonable opportunity to provide a victim's preference.

C. Where a victim under Article 6b, UCMJ, desires to submit views as to disposition, those views shall normally be submitted in writing within ten (10) days of a request by Counsel for the Government. If a VLC is detailed, Counsel for the Government shall make requests for matters via the VLC. If a victim has not submitted matters within the established timeline, or has not responded after reasonable attempts to contact the victim, the right to submit matters will be deemed to have been waived 30 days after the request. The SVIP TC shall follow the procedure outlined in JAGMAN section 0128 to document the steps taken to ascertain the victim's preference. TC requests for victim input will also be documented in the case file and electronic case management system.

D. Counsel signing a CAM shall upload the CAM, or cause it to be uploaded, to the case management system within five working days of completion.

050308. Confidentiality

By its nature and purpose, a CAM will nearly always contain significant judgments about the proper means of prosecuting a case, and the assessment of government attorneys regarding the best means of doing so. While underlying matters referenced in the CAM, such as victim statements or matters affecting the credibility of a witness, are almost always discoverable, the discussion of those matters and predictions of how the evidence would be used at trial, constitute attorney work product. Because the work product doctrine is well established in military and civilian law, counsel will diligently safeguard the CAM from disclosure. Counsel should not place any matters in the CAM that would make the document discoverable or provide the CAM to a victim, VLC, or other person not included within the trial counsel's work product privilege. An SJA should not include a CAM in the matters forwarded to the convening authority.

PART C: COURTS-MARTIAL

SUBPART C1: PRETRIAL MATTERS

VOLUME 16: CHAPTER 6

MISCELLANEOUS PRETRIAL MATTERS

SUMMARY OF SUBSTANTIVE CHANGES

Hyperlinks are denoted by *[bold, italic, blue and underlined font.](#)*

The original publication date of this Marine Corps Order (MCO) Volume (right header) will not change unless/until a full revision of the MCO has been conducted.

All Volume changes denoted in *blue font* will reset to black font upon a full revision of this Volume.

CHAPTER VERSION	PAGE PARAGRAPH	SUMMARY OF SUBSTANTIVE CHANGES	DATE OF CHANGE

PART C – COURTS-MARTIAL**SUBPART C1 – PRETRIAL MATTERS****CHAPTER 6****MISCELLANEOUS PRETRIAL MATTERS**

0601. CONFLICTS OF INTEREST

060101. Obligation to Avoid the Appearance of Conflicts

The SJA to CMC supervises and regulates the practice of law within the Marine Corps. All military justice practitioners have an obligation to adhere to the rules of professional responsibility prohibiting conflicts of interest, such as JAGINST 5803.1E and individual state bar rules. Additionally, practitioners should strive to the greatest extent possible to avoid the appearance of conflicts. Even if no actual conflict exists, counsel should avoid situations where their loyalties might be questioned, or situations that might cause members of the public to question the fairness of the proceedings.

060102. Conflicts by Defense Counsel and VLC

Because the resolution of conflicts within the DSO and VLCO often involves confidential information and relevant facts not known by the government, military justice practitioners aware of possible conflicts of interest with a defense counsel or VLC shall bring those facts to the attention of supervisory counsel within those respective organizations (SDC, RDC, RVLC, or other supervisory personnel). This allows the Chief Defense Counsel (CDC) or the VLCO OIC to resolve potential conflicts. However, if after such notification it appears a potential conflict exists, counsel for the government should timely inform the military judge of the facts creating the potential conflict. See *United States v. Lee*, 70 M.J. 535, 542 (N-M. Ct. Crim. App. 2011). This allows the military judge to take appropriate steps such as determining no conflict exists, an accused has been informed of and waived any potential conflict, finding a conflict exists and there is good cause to excuse the counsel, or taking other appropriate action as determined by the military judge.

060103. Conflicts by Trial Counsel

Trial counsel may not prosecute cases if they are the defense counsel or VLC's immediate supervisor or participate in the evaluation of the defense counsel or VLC, unless the defense counsel or VLC's client has been informed of the conflict, waives the conflict, and the waiver is reflected in the record. Trial counsel may also not prosecute cases when they owe duties to former clients under the rules of professional responsibility, such as having previously served as a defense counsel for the accused, a VLC for the victim, received confidential communications related to a case, or otherwise participated in the case in a way that would create an appearance that the trial counsel's current prosecution of the case creates a conflict. Trial counsel, legal services specialists, or investigators prohibited from being detailed to a case because of previous involvement or other conflicts, must also not provide any assistance to other TSO personnel on the case or reveal information or strategies obtained through their prior involvement in the case, or from their knowledge of the accused or victim. If a conflict prevents a member of the TSO from being detailed to a case, the supervisor of the person not detailed must order the person, in writing, not to participate in the case or provide assistance to those who do. A copy of the order shall be provided to the trial counsel detailed to the case. If the conflicted person serves in a supervisory role, the written order shall also include an alternate supervisor who should be consulted for that case.

0602. FUNDING FOR CASE-RELATED EXPENSES

060201. Convening Authority Responsibility

All case-related expenses shall be paid by the convening authority, as required by JAGMAN section 0145. That section includes detailed guidance for payment of case-related expenses, such as witness travel and expert witness fees. The following paragraphs provide additional definitions and guidance to supplement the JAGMAN.

060202. Definition of Case-Related Expense

Generally, case-related expenses are those expenses that are unique to a particular case, or arise under contracts entered into in support of a particular case. They do not include routine training for counsel, maintenance of facilities or offices, or the purchase of equipment or supplies routinely used by an LSSS. Case-related expenses include the purchase of specialized equipment or supplies required for a particular case, travel expenses for any counsel detailed to a case or a VLC, such as travel to an IRO hearing, a preliminary hearing under Article 32, or any session of court, and necessary investigative or pre-trial expenses such as travel for counsel to interview witnesses, conduct crime scene or site investigations, meet with their clients, review evidence, or conduct other necessary investigation. Case-related expenses also include expenses under DoDI 1030.2 (victim and witness procedures) that allow a victim or witness to participate in court proceedings, such as funding for transportation, parking, child care, lodging, translators, interpreters, as well as funding of travel for a support person, counselor, guardian, or other personnel who enables a victim or witness to participate in a proceeding.

060203. Hardware and Software Contracts

Hardware, software, or other official applications used by military justice offices are funded by each LSSS. Coordination with Policy and Innovation Branch (JPI), JAD is required before entering into contracts or purchasing specialized equipment. This ensures consistency across regions and sometimes allows the government to negotiate for contracts at a more favorable rate, such as for electronic research services (Westlaw or LEXIS), which are usually contracted for the entire Marine Corps or DoD.

060204. Equality in Funding Necessary Case-Related Expenses

Funding for all case-related expenses should be provided equitably, based on need. Recognizing the unique role different counsel play at various stages in the process, this does not mean funding for travel or other case-related expenses for one party necessarily mandates similar expenditures for any opposing parties. However, unequitable funding of necessary case-related expenses in order to provide an advantage to the opposing side is prohibited.

0603. PROTECTION OF PERSONALLY IDENTIFIABLE INFORMATION (PII)

060301. Requirement to Protect PII

Each LSSS and SJA Office, the DSO, and the VLCO must have adequate policies in place to ensure PII is properly handled, redacted, and disposed of in accordance with JAGMAN section 0141a, SECNAVINST 5211.5 (series) and the Privacy Act, 5 U.S.C. § 552a. Social security numbers, or any shortened form of the social security number, will not be used on any military justice forms, documents, or correspondence, including the charge sheet and in any electronic case management system, unless specifically required by authorized policy, such as when reporting criminal justice information to the FBI. When documents, forms, correspondence, or CMS require a unique identifier for an individual, the DoD ID Number will be substituted for the social security number. Chapter 5 provides additional guidance to trial counsel regarding protection of PII during the discovery process.

060302. Redacting Dockets, Filings, and Court Records

Unless otherwise required by law, the Rules for Courts-Martial, or the Military Rules of Evidence, Section 0141a of the JAGMAN requires all counsel to omit PII from all dockets, filings, pleadings, court records, and

exhibits that counsel intend to use at any court proceeding including the Article 32, UCMJ preliminary hearing, or that may otherwise be included in the record of trial. Victims shall be referenced by initials only in any docket, filing, or court record made publicly available by 10 U.S.C. § 140a.

A. Definitions

“Docket” includes information concerning each case docketed with the trial or appellate courts of each military department. The trial court docket includes the name of the case, the location of the hearing, the type of hearing, the military judge presiding over the hearing, and the counsel assigned to the case. The “docket” does not include any hearings before a case has been referred to a court-martial or Article 32 preliminary hearings.

“Filings” consist exclusively of all motions, notices, petitions, and requests submitted to a trial court or Court of Criminal Appeals.

“Court records” consist exclusively of the charge sheet, convening order(s), court rulings, statement of trial results, convening authority’s action, entry of judgment, and appellate court orders and opinions. “Court records” do not include the Article 32 report, a recording of any court session, or a transcript of the proceedings.

B. Redactions Required

Dockets, filings, and court records will be redacted to remove the following information from the documents: (1) all social security numbers; (2) all taxpayer identification numbers; (3) birthdates; (4) names of minors; (5) names of victims; (6) all financial account numbers; (7) any other sensitive information as determined by the Secretary of the Navy. Any counsel responsible for creating a filing or court record is responsible for redacting such information from the document before filing it. If a counsel believes including such information in any filing or court record is necessary, counsel shall first request permission from the military judge to file the document unredacted, in accordance with rules established by the trial judiciary. Counsel for the government should request any filed document containing unredacted information be sealed.

0604. SIGNING DOCUMENTS RELATED TO MILITARY JUSTICE

Only the officer then in command, as defined in the U.S. Navy Regulations 1990, and the Marine Corps Manual, shall sign Article 32 detailing orders, court-martial convening orders, the referral block on charge sheets, plea agreements, and convening authority actions. Such documents shall not be signed by an individual exercising “by direction” authority. While acting commanders who have properly succeeded to command may sign such documents, they shall not use the word “acting” with their signature. Under R.C.M. 1112, a court reporter or military judge may certify a record of trial. As used in R.C.M. 1112(c), “court reporter” means an individual sworn under R.C.M. 807. Signatures on any documents may be handwritten or electronic. Unless specifically stated elsewhere, the preference is for documents to be signed with digital signatures that can be included in the record of trial as originals. Because documents related to military justice are often routed electronically and signed at different times, documents that contain scanned copies of some signatures are acceptable pursuant to the principles contained in M.R.E. 1003, unless a genuine question is raised about the signature’s authenticity.

0605. REQUESTING LEGAL SERVICES

All convening authorities will use approved forms to request legal services from the four regional legal services support sections or subordinate legal services support teams for assistance with courts-martial, case analysis memos, administrative separation boards, or boards of inquiry. Forms are available on the naval forms online website at: <https://forms.documentservices.dla.mil/order/result.cfm> and linked through the SJA to CMC website at <http://www.hqmc.marines.mil/sja/jadforms/militaryjustice.aspx>.

0606. EXERCISE OF COURT-MARTIAL JURISDICTION OVER RETIRED, RESERVE, FLEET RESERVE, FLEET MARINE CORPS RESERVE, AND DISCHARGED PERSONNEL

060601. Purpose

Commanders occasionally determine the needs of good order and discipline or of pursuing justice require the recall of a reservist to active duty or bringing a retiree to face a court-martial. This paragraph supplements section 0123 of the JAGMAN and provides guidance in those situations. The paragraph assumes that there is both subject matter and personal jurisdiction over the alleged crime and individual service member. *See* Articles 2 and 3, UCMJ; JAGMAN sections 0123 and 0145.

060602. Routing of Cases Requiring Prior Secretary of the Navy (SECNAV) Authorization

The authority to refer charges or impose confinement in certain situations is withheld, without the prior authorization of the Secretary of the Navy. Section 0123 of the JAGMAN contains detailed instructions for cases when the exercise of courts-martial jurisdiction requires prior authorization from the Secretary of the Navy. Subparagraph (b) of that provision requires all requests to be addressed to the Secretary of the Navy, via OJAG (Code 20) or HQMC (JA), as appropriate. For Marine cases, forward all requests to the Military Justice Branch Head, Judge Advocate Division, via the TCAP.

060603. Contents of Request

The JAGMAN lists six pieces of information that must be included in the request:

- (1) Draft charge(s) and specification(s) (do not prefer charges until authorization has been received from the Secretary of the Navy; care should be exercised to avoid triggering the speedy trial provisions of R.C.M. 707);
- (2) A summary of the evidence in the case;
- (3) The facts showing amenability of the accused or suspected person to trial by court-martial;
- (4) Whether civilian jurisdiction exists, and if so, whether the civilian jurisdiction has declined to prosecute the case at the time of the request; and in applicable cases, the victim's preference as to jurisdiction (see subsection 0128(a));
- (5) The military status of the accused or suspected person at present and at the time of the alleged offense; and
- (6) The reasons that make trial by court-martial advisable.

In addition to these minimum requirements, requests should strive to provide all relevant information to streamline the process and answer the inevitable questions that arise. For example, instead of a mere summary of the evidence, it is often beneficial to provide a full copy of all the evidence, including the most recent portions of the investigation. The request should contain documented communication from the civilian agency declining jurisdiction, if applicable. At a minimum, an email from a representative of any such agency is desirable. Victim preferences or considerations that make trial by court-martial advisable should also be included in the request.

060604. Disciplinary Disposition Authorities for Reservists and Retirees

Because reservists and retirees are distinct in so many relevant aspects (e.g., jurisdiction, recall requirements, and unit association), this chapter discusses each category separately. Service members who have transferred to the Fleet Marine Corps Reserve after 20 years of service are considered, for purposes of this chapter, with retirees. The disciplinary disposition authority (DDA) is the entity initially authorized to recall a reservist, to

bring a retiree back on active duty, or to otherwise adjudicate reports of misconduct levied against reservists or retirees.

060605. Reservists

A. General Guidance on Reservists

Reservists are “recalled” to active duty when jurisdiction is sought under Articles 2(a)(3), 2(d), and 3(d), UCMJ. Reservists may be recalled to active duty by a General Court-Martial Convening Authority (GCMCA) or by SECNAV. If the recall authority is the GCMCA, then charges against the reservist may be investigated at an Article 32 or sent to court-martial, or disposed of through NJP. However, the reservist may not be sentenced to confinement or be required to serve a punishment of any restraint on liberty during a period other than a period of inactive duty training or active duty unless prior approval from SECNAV was obtained. Furthermore, Section 0123e(3)(a) of the JAGMAN states charges should not be preferred before SECNAV authorization for recall is obtained to avoid prematurely triggering the speedy trial clock.

B. Enlisted Reservists

The DDA is the commanding general of 4th Marine Division, 4th Marine Aircraft Wing, 4th Marine Logistics Group, Force Headquarters Group, or Marine Forces Reserve as appropriate. Any of these commanders may authorize GCMCA recalls of enlisted reservists.

C. Officer Reservists

The disposition authority for officer cases is the Commander, Marine Forces Reserve. Therefore, only Commander, Marine Forces Reserve may authorize GCMCA recalls of officer reservists.

D. Mobilized Reservists and Individual Mobilization Augmentees

Individual Mobilization Augmentees (IMAs) and Reservists mobilized and joined to units not otherwise within the MFR structure are attached to the units they are supporting. Commanders of these units exercise operational control (OPCON) or administrative control (ADCON), as delegated, over assigned or attached forces. In such cases, the DDA is the relevant commander in the chain of command. If the DDA is not a GCMCA, then the GCMCA over the DDA can authorize a recall for such individuals.

060606. Retirees and Members of the Fleet Marine Corps Reserve (FMCR)

Retirees are not “recalled,” although this terminology is often used to connote the action of bringing a retiree to face court-martial. A retiree may be brought to face a court-martial at any time pursuant to Article 2(a)(4), UCMJ. A member of the FMCR (i.e., an enlisted member who retired between years 20 and 30), is subject to recall under Article 2(a)(6) until the individual reaches 30 years and transfers to the Active Duty Retired List (ADRL). While it is possible to prefer charges against a retiree without SECNAV authorization, prior authorization must be sought from SECNAV if referral of charges is desired. In addition to the authorization required to refer charges, separate and specific authorization is required to arrest, apprehend, or confine a retiree. If an investigation implicates a retiree or member of the FMCR with no logical connection to any DDA, the investigation shall be forwarded to Commanding General (CG), Marine Corps Training and Education Command. SECNAV authorization to refer charges, or to arrest, apprehend, or confine a retiree contains authorization to serve as the DDA for that case, unless SECNAV designates another DDA in the authorization.

060607. Requests for Legal Services for the Recall and Prosecution of Reservists and Retirees

Since the LSSS National-Capital Region provides legal support services to the U.S. Marine Corps Forces Reserve (MARFORRES), Headquarters U.S. Marine Corps Manpower and Reserve Affairs (M&RA), and Marine Corps Training and Education Command (TECOM), it will, by default, receive all initial requests for legal services (RLS) for the recall to active duty and prosecution of reservists, members of the FMCR, and retirees. The SJA and

LSSS-NCR may facilitate transfer of an RLS to another LSSS on a case-by-case basis, provided the transfer is approved by the gaining LSSS OIC. The most appropriate venue for a case may depend on a number of factors and could be the last command of a now retired suspect, a command near a retired member's home of record, or a command near where the alleged misconduct took place. SJAs should coordinate with all relevant entities to identify the most logical convening authority and situs for the court-martial.

060608. Templates and Forms

Templates and forms used in requesting a recall are available by contacting TCAP.

0607. JURISDICTION OVER CASES TRIED IN CIVILIAN COURTS

060701. State or Foreign Courts

Section 0124 of the JAGMAN establishes a policy that when a Marine has been tried in a state or foreign court, military charges will not be referred to a court-martial or be the subject of NJP proceedings for the same act or acts, except in those unusual cases where trial by court-martial or the imposition of NJP is considered essential in the interests of justice, discipline, and proper administration within the Naval Service. In those cases, no case will be referred for trial by court-martial or be the subject of NJP proceedings without the prior permission of the first GCMCA over the Marine.

060702. Criteria

JAGMAN subsection 0124(b) lists three criteria where a GCMCA may authorize court-martial or NJP for the same act or act tried in civilian or foreign courts. A GCMCA may not grant authorization unless one of the three criteria apply.

060703. Federal Courts

Marines who have been tried by courts that derive their authority from the United States Government, such as U.S. District Courts, will not be tried by court-martial or be subjected to nonjudicial punishment for the same act or acts.

060704. Required Report to HQMC (JA)

The GCMCA must report a grant of permission to HQMC (JA) for Marine Cases. A template to report a grant of permission under this paragraph is available through the "FORMS" tab on the Judge Advocate Division (JAD) public website at <https://www.hqmc.marines.mil/sja/JAD-Forms/>. This reporting requirement is exempt from reports control according to reference (as), Part IV, paragraph 7.g.

0608. GENERAL CONSIDERATIONS WHEN CONCURRENT JURISDICTION EXISTS

060801. General Policy

When concurrent military/civilian jurisdiction exists for a felony-level criminal offense committed by a Marine, it is essential that SJAs proactively engage with the civilian prosecutors representing that jurisdiction. In every such case, the SJA's engagement should demonstrate to civilian prosecutors that military authorities are ready, willing, and able to prosecute. SJAs should also ascertain what the civilian jurisdiction's inclination and capability is with respect to prosecution. Engagement should occur as early as possible. In foreign countries, concurrent jurisdiction is often addressed in status of forces agreements. When negotiations result in civilian prosecutors taking a case for prosecution, SJAs should maintain an open, supportive relationship with the civilian prosecutors until the case is resolved. If at any time throughout the process civilians reconsider their decision to investigate or prosecute, they should know that military authorities retain an interest in the case and should have the SJA's contact information.

060802. Engagement by SJA with Civilian Authority

Engagement does not mean the Marine Corps is trying to prosecute every case in which concurrent military/civilian jurisdiction exists. In certain cases, a state may have a more compelling interest than the Marine Corps in prosecuting or greater experience and capability to prosecute, as might be true in a capital case. In other cases, however, particularly cases that concern Marine-on-Marine offenses, the Marine Corps will generally have a greater interest in acquiring jurisdiction over the case in order to ensure appropriate accountability for the subject/accused, proper support for the victim, and good order and discipline within the command. That said, even in cases where civilian authorities have a strong interest in prosecuting the case and are well equipped to do so, SJAs should engage early and remain involved until completion of the prosecution. Where memoranda of understanding (MOU) exist between commands and local prosecutor's offices, they should be consistent with these principles. Proactive engagement by SJAs is the standard for all concurrent jurisdiction negotiations.

060803. Compliance with JAGMAN Subsection 0124(b)

Judge advocates advising convening authorities shall memorialize jurisdictional analysis along with other relevant factors under Section 3 of Appendix 2.1 to the MCM. When case analysis memos are required, the discussion of concurrent jurisdiction will be included in the SVIP TC's analysis.

060804. Consideration of Victim's Preference Regarding Jurisdiction

Considerations when concurrent military/civilian jurisdiction exists must take into account a victim's preference for jurisdiction, if applicable. See R.C.M. 306, JAGMAN section 0128, and paragraph 0502 of this volume for additional details.

0609. COURT-MARTIAL JURISDICTION OVER MAJOR FEDERAL OFFENSES

060901. Coordination with Civilian Authorities Required

The Attorney General and the Secretary of Defense have signed a Memorandum of Understanding on guidelines for determining which authorities will have jurisdiction to investigate and prosecute major crimes in cases where there is concurrent jurisdiction. See Appendix 3, MCM; DoDI 5525.07; JAGMAN section 0125. NCIS administers this program on behalf of the Naval Service. See SECNAVINST 5430.107 (series). This close coordination and possible limitation on courts-martial jurisdiction ensures that actions under the UCMJ do not preclude appropriate action by civilian federal authorities in cases likely to be prosecuted in U.S. District Courts. Under the Memorandum of Understanding, convening authorities must coordinate with the DOJ in major federal offenses before issuing a grant of immunity, approving a plea agreement, or trial by court-martial.

060902. Procedure

Commanding officers receiving information a service member committed a major federal offense as defined in SECNAVINST 5430.107 (series), including major federal offenses committed on a military installation, will refrain from taking action with a view towards court-martial, but will refer the matter to the senior resident agent of the cognizant NCIS office for a determination in accordance with the SECNAVINST. See JAGMAN section 0125 for further details on appropriate procedures.

060903. Immediate Military Prosecution Required

When federal civilian law enforcement agencies are investigating a case, but existing conditions require immediate military prosecution, the GCMCA (SJA) must contact the cognizant U.S. Attorney to coordinate immediate trial by court-martial. If the GCMCA and cognizant U.S. Attorney cannot reach an agreement on whether immediate military prosecution is advisable, JAGMAN 0125(c)(3) mandates that the matter be referred to Judge Advocate Division "for disposition." As used in that paragraph, "disposition" means only that the SJA for the GCMCA must notify Judge Advocate Division via the Branch Head, Military Justice Branch of the fact the

GCMCA is moving forward with immediate military prosecution without the concurrence of the cognizant U.S. Attorney. Commanding officers may take any lawful action with respect to disposing of charges, unless that authority has been withheld. Commanding officers should consider all relevant non-binding disposition guidance referenced in Appendix 2.1 of the MCM. Commanders should consider whether the military or civilian law enforcement agents and prosecutors have a closer relationship with any potential victim, and the victim's preference regarding prosecution jurisdiction, if applicable, along with any other relevant factors in determining whether immediate military prosecution is necessary.

0610. NATIONAL SECURITY CASES

061001. Definition and Procedure

Paragraph 0126 of the JAGMAN defines a national security case and contains detailed procedures for the processing of these cases.

061002. Required Notifications

NCIS is responsible for investigating actual, suspected, or alleged national security incidents. Commanders must immediately refer any such incidents to NCIS. SECNAVINST 5430.107 (series) and SECNAVINST 5510.36 (series) also pertain. If any NCIS investigation or preliminary inquiry referenced in JAGMAN section 0126(d) indicates a case may meet the criteria of a national security case, the commanding officer must notify the first applicable National Security Case Disposition Authority listed in JAGMAN 0126(f), CG, Marine Corps Training and Education Command, and HQMC, Judge Advocate Division, within 72 hours. Anyone making notifications under this paragraph must consult with applicable classification officials and NCIS before making these notifications to determine whether notification via unclassified means is permitted, keeping in mind that separate pieces of unclassified information may become classified when combined in a single message.

061003. Default Venue for National Security Cases is National Capital Region

The JAGMAN lists convening authorities that are national security case disposition authorities. Regardless of which authority convenes the case, experience from litigating national security cases has shown that the most appropriate venue is often the national capital region (NCR). National security cases often require extensive in-person coordination between TC and the original classification authority, NCIS National Security Law Unit, Code 30, MCIA, and DOJ Main Justice. Additionally, special courtrooms might be necessary to present classified material, such as the courtroom at the Washington Navy Yard. Therefore, the NCR LSSS is the designated responsible LSSS to receive an RLS for a national security case. A national security case disposition authority may determine another venue is better for a particular case, but the cognizant SJA should consult with the NCR LSSS OIC, the cognizant LSSS OIC, and JMJ before advising a disposition authority to litigate a national security case in another venue.

0611. AUTHORITY TO GRANT IMMUNITY FROM PROSECUTION

061101. Types of Immunity

Two types of immunity may be granted under R.C.M. 704. *Transactional immunity*: A person may be granted transactional immunity from trial by court-martial for one or more offenses under the UCMJ. *Testimonial immunity*: A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial. See the discussion to the R.C.M. for further details.

061102. Witnesses Subject to the Uniform Code of Military Justice (UCMJ)

A GCMCA, or designee, may grant immunity to a person subject to the UCMJ from prosecution under the UCMJ. However, as specified in R.C.M. 704(c)(1) approval from the Attorney General or designee is required before granting a person immunity from federal civilian prosecution. Use the procedures in the following paragraph

to request immunity from federal civilian prosecution. GCMCAs may delegate in writing the authority to grant immunity to a subordinate SPCMCA, unless limited by superior authority.

061103. Civilian Witnesses

See JAGMAN section 0138(c) for procedures to request immunity for civilian witnesses from the Department of Justice. When the JAGMAN requires such requests to be routed through HQMC (JA), contact JCA (administrative law) for further details. Sample documents related to immunity requests and approvals are available through the “FORMS” tab on the Judge Advocate Division (JAD) public website at <https://www.hqmc.marines.mil/sja/JAD-Forms/>.

061104. National Security Cases

All requests for immunity in national security cases must be routed through OJAG (code 30) for the purpose of consultation with the Department of Justice. See JAGMAN section 0138(d) for further details.

0612. REFERRING CHARGES TO NON-BCD JUDGE ALONE SPECIAL COURTS-MARTIAL

A convening authority may refer certain charges to a special court-martial consisting of a military judge alone, without authority to adjudge a bad conduct discharge. *See* Article 16(c)(2)(A), UCMJ. A convening authority may convene such special court-martial with a separate convening order. Alternatively, a convening authority may also use the referral block, Section V, of the Charge Sheet, to document both the referral and convening of a judge alone SPCM under Article 16(c)(2)(A). In that case, the referral block should read as follows: “Referred for trial to the *Special* court-martial convened by *this document on [Date]*, which convenes a *Special Court-Martial to be tried by judge alone pursuant to Article 16(c)(2)(A), UCMJ*, Dated [*same date as referral*], subject to the following instructions: *The court may not adjudge punishment in excess of the limitations specified in Article 19(b), UCMJ.*”

VOLUME 16: CHAPTER 7

INITIAL REVIEW OF PRETRIAL CONFINEMENT

SUMMARY OF SUBSTANTIVE CHANGES

Hyperlinks are denoted by *[bold, italic, blue and underlined font.](#)*

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CHAPTER 7

INITIAL REVIEW OF PRETRIAL CONFINEMENT

0701. DETAILING INITIAL REVIEW OFFICER

All General Court-Martial Convening Authorities (GCMCAs) have authority to designate one or more officers of the grade of O-4 or higher to act as the initial review officer (IRO) for purposes of R.C.M. 305(i)(2). The GCMCA exercising jurisdiction over the confinement facility shall coordinate the assignment of initial review officers to specific cases.

0702. LOCATION

Initial reviews shall normally be conducted at the confinement facility. Every effort shall be made to provide an atmosphere appropriate for a review. *See* SECNAVINST 1640.9D

0703. RESPONSIBILITIES OF INITIAL REVIEW OFFICER

The IRO is empowered to order the release from pretrial confinement of anyone ordered into pretrial confinement pursuant to RCM 305 when continued pretrial confinement does not satisfy legal requirements. Although the pretrial confinement review is not an adversarial proceeding, the IRO may exercise discretion by allowing the pretrial confinee, defense counsel or government representative to present evidence and cross-examine witnesses. Upon completion of review, the reviewing officer shall approve continued pretrial confinement or order immediate release.

0704. CONTENT OF IRO'S MEMORANDUM

The IRO decision to continue pretrial confinement or order immediate release must be set forth in a written memorandum. This memorandum will include the factual findings on which their decision is based, whether the victim was notified of the review, whether the victim was given the opportunity to confer with the representative of the command or counsel for the government, and whether the victim was given a reasonable opportunity to be heard. A copy of the memorandum and all documents considered by the IRO shall be provided to the accused or the Government on request.

0705. NOTICE TO VICTIM(S)

The Command shall provide the alleged victim or victim's counsel with the date, time, and location of any pretrial confinement review and notice of the right to be heard during the review. *See* R.C.M. 305(i)(2)(A)(iv). However, the hearing may not be unduly delayed for this purpose. If the reviewing officer orders immediate release of confinement, a victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the release, unless such notice may endanger the safety of any person.

0706. RECONSIDERATION OF APPROVAL OF CONTINUED CONFINEMENT

The IRO shall upon request, and after notice to the parties, reconsider the decision that confinement was warranted based upon any significant information not previously considered.

VOLUME 16: CHAPTER 8

MILITARY MAGISTRATES

SUMMARY OF SUBSTANTIVE CHANGES

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CHAPTER 8

MILITARY MAGISTRATES

0801. NOT AUTHORIZED

The Secretary of the Navy has not authorized the utilization of military magistrates as defined in Article 26a, UCMJ. This Chapter is reserved for future use, if applicable.

VOLUME 16: CHAPTER 9

INVESTIGATIVE SUBPOENAS, WARRANTS, ORDERS, AND ARTICLE 30(a) PROCEEDINGS

SUMMARY OF SUBSTANTIVE CHANGES

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CHAPTER 9

INVESTIGATIVE SUBPOENAS, WARRANTS, ORDERS, AND ARTICLE 30(a) PROCEEDINGS

0901. COORDINATION BETWEEN TRIAL SERVICES OFFICES AND LAW ENFORCEMENT

090101. Trial Services Office (TSO)

A. The Trial Services Office (TSO) confers regularly with the local CID and NCIS offices to discuss all developing cases. At a minimum, each TSO should consult with any military law enforcement agency at the initiation of, and critical stages in, the investigation of any serious offense. The RTC shall ensure SVIP TCs meet or consult with NCIS SVIP members within 48 hours after notification of a special victim investigation.

B. Once notified of any pending special victim investigation or the investigation of any other serious offense, the designated trial counsel will work closely with and provide legal advice to investigative entities throughout the investigative process. Trial counsel will assist law enforcement in obtaining search and seizure authorizations, subpoenas, orders, and warrants pursuant to the UCMJ.

090102. Law Enforcement

Military law enforcement agencies will work closely with the TSO and designated trial counsel in investigating a case. Requests for investigative subpoenas pursuant to RCM 703(g)(3)(C) and warrants pursuant to RCM 703A will be submitted through the trial counsel. Although RCM 703A allows a law enforcement officer to submit a written application for a warrant to a military judge, section 0132a of the JAGMAN specifies that “only a trial counsel” may submit such application. While the trial counsel submits the application to the judge, the trial counsel does not serve as the affiant for the application. In a case investigated by CID or NCIS which is referred to trial, law enforcement personnel will continue to assist investigating the case consistent with their regulations.

0902. INVESTIGATIVE SUBPOENAS

090201. Applicability

This chapter deals only with investigative subpoenas issued before charges are referred to courts-martial. It does not address subpoenas issued after referral of charges or subpoenas issued by the president of a board of inquiry. Subpoenas issued after referral of charges will comply with R.C.M. 703.

090202. When permitted

A. A pre-referral investigative subpoena issued under RCM 703 may only be used to obtain evidence for use in an investigation of an offense under the UCMJ. An “investigation of an offense under the UCMJ” is a military criminal investigation conducted by investigators or agents from CID, NCIS, Department of Defense police, military police, or any counterpart from the investigative agencies of another military service, or a command investigator appointed to investigate suspected criminal activity likely to result in trial by courts-martial. The issuance of subpoenas for non-criminal administrative investigations is not permitted by 10 U.S.C. §846 or this Chapter, but may be authorized by other authorities.

B. Charges do not need to be preferred nor must a particular suspect be identified before a subpoena may be issued. However, because Article 30(a) and R.C.M. 703-703A are only tools to obtain evidence of crimes under the UCMJ for potential use at a later court-martial, there must be probable cause to believe the suspect would likely be subject to the UCMJ to use these authorities. Law enforcement should closely consult with the SJA and civilian authorities in obtaining subpoenas or warrants when it appears the suspect may not be subject to the UCMJ. This helps avoid violating *Posse Comitatus*-like restrictions under 10 U.S.C. § 275 and DoDI 3025.21, and ensures any compulsory process is issued by a person with authority to do so.

C. A pre-referral investigative subpoena may also be issued in accordance with R.C.M. 309 or 703(g)(3)(D)(v) for the production of evidence not under the control of the government for use at an Article 32 preliminary hearing.

090203. Who May Issue

A. A military judge may issue the subpoena. Trial counsel should ordinarily seek a military judge's issuance of a subpoena whenever possible. Doing so enables the development of uniform standards and procedures, resulting in greater predictability for law enforcement and more uniform protection of service members' rights. It also avoids unnecessarily entangling the GCMCA in investigations under the cognizance of subordinate commanders.

B. Detailed trial counsel or counsel for the government may issue the subpoena when authorized by the GCMCA. The authorization from the GCMCA may not be delegated and must be for the particular subpoena issued. GCMCAs may not give blanket authorization for a trial counsel to issue subpoenas in a case or class of cases. Authorization from the GCMCA may be provided orally, electronically, or in writing. If authorization is given orally, the GCMCA should later provide the trial counsel with written documentation of the authorization. The SJA may sign such written documentation memorializing the GCMCA had authorized the subpoena, but the authorization itself may not be delegated.

C. A GCMCA may not authorize the trial counsel to issue a subpoena if the request for a subpoena has already been denied by a military judge, absent exigent circumstances. A trial counsel requesting authorization from a GCMCA to issue a subpoena under these circumstances must inform the GCMCA a military judge has previously denied the request and must also inform the GCMCA why exigent circumstances require immediate issuance of the subpoena rather than seeking reconsideration from the military judge.

090204. Procedure for Issuing a Subpoena

A. Required Coordination

The assigned trial counsel will coordinate with the supporting law enforcement agency to complete the subpoena request, supporting affidavit if any, and all other matters supporting the request. The request may be submitted to the military judge personally or electronically, at the military judge's discretion or in accordance with the court's rules. Requests to a GCMCA for authorization to issue a subpoena should be routed through the SJA for the GCMCA, and may be submitted to the GCMCA personally or electronically, at the GCMCA's discretion.

B. Contents of request

When seeking a subpoena from a military judge, the request shall include a completed subpoena (DD Form 453) ready for signature by the military judge as the issuing authority. The request shall also include any matters sufficient to show the material sought is relevant to the investigation, and the request is lawful and is not unreasonable or oppressive. A request to a GCMCA for authorization to issue a subpoena should include the same information, except that the DD Form 453 should list the trial counsel or counsel for the government as the issuing authority, and indicate authorization from the GCMCA. For example, the title of the issuing authority would be "Trial Counsel – Authorized by [title of GCMCA]." The form should not be signed by the trial counsel until the GCMCA has authorized its issuance.

090205. Defense Requests for Investigative Subpoenas

A. Applicability

Defense requests for a subpoena in relation to a preliminary hearing pursuant to Article 32, UCMJ, will be processed in accordance with R.C.M. 405(h). This paragraph deals with all other defense requests for pre-referral investigative subpoenas.

B. Contents of Request and Procedure

Defense counsel may request the government counsel make an application for a pre-referral investigative subpoena. All such defense requests will be submitted to the trial counsel. The request must include a completed subpoena (DD Form 453) ready for signature by the issuing authority and sufficient information to show issuance of the subpoena is lawful and not unreasonable or oppressive. The trial counsel may present the defense request to the military judge, request authorization from the GCMCA to issue the subpoena, or may defer considering the request until after a referral decision has been made. Reasons to defer considering the request include the likelihood the referral decision will make the defense request moot or unnecessary. If the request is for perishable matter that may be lost or destroyed in the event of delay, the request shall clearly state so, including the basis for such a belief.

090206. Investigative Subpoenas for Personal or Confidential Information About a Victim

A. Written notice required

The trial counsel will provide a victim named in a specification notice of a request for a subpoena for personal or confidential information about that victim. *See* R.C.M. 703(g)(3)(C)(ii). The trial counsel will maintain a record of such written notice to the victim in the case file.

B. Personal or Confidential Information

Personal or confidential information is information that relates to or comes from a victim, and is generally regarded as private. It includes, but is not limited to, the following types of information: any information which the victim could assert a claim of privilege over; any information for which the victim has a reasonable expectation of privacy; any information where unauthorized release is restricted by law, such as records protected by the Privacy Act, medical records covered by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or student education records covered by the Family Educational Rights and Privacy Act (FERPA); any information specific to a victim that is not normally released by the holder of the information to members of the public, such as employee records, insurance records; and, any financial records of the victim. Subpoenas for financial records might be subject to additional statutory requirements, *e.g.*, the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422, which applies to financial records. Note that classifying information as personal or confidential does not mean the information will not ultimately be subject to subpoena under applicable rules and constitutional provisions. It simply means the victim must be provided notice of the request for the subpoena. Therefore, if in doubt about whether information pertaining to a victim is “personal or confidential,” err on the side of providing notice to the victim, unless there are exceptional circumstances not to.

C. Exceptional Circumstances Not Requiring Notification

Exceptional circumstances may justify withholding the required notice to a victim. The discussion to R.C.M. 703(g)(3)(C)(ii) cites to Fed. R. Crim. P. 17 (Advisory Committee Notes, 2008 Amendments) for the following discussion of exceptional circumstances: “Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided *ex parte* and authorize service of the third-party subpoena without notice to anyone.” A party believing exceptional circumstances justify withholding notification to a victim must clearly state the exceptional circumstances in the request, including the basis for the belief.

0903. WARRANTS

090301. Authorization

Pursuant to R.C.M. 703A(b) and 18 U.S.C. § 2703, a military judge may issue a warrant authorizing the search for and seizure of information specified in R.C.M. 703A(a) (1), (2), (3), or (4).

090302. When Permitted

A. Although the R.C.M. allows a trial counsel *or* federal law enforcement officer to apply for a warrant, the JAGMAN has restricted that ability to only a trial counsel in the applicable circuit where the warrant will be sought. See JAGMAN section 0132a. The application must contain an affidavit or sworn testimony establishing probable cause to believe that the information contains evidence of a crime. While the trial counsel submits the application on behalf of law enforcement, the trial counsel does not serve as the affiant. “Crime” means an offense under the UCMJ. When applying for a warrant, identification of a particular suspect may not be possible. However, there must be enough information provided in the application to show the crime is an offense under the UCMJ, meaning the suspect is likely subject to the UCMJ. Otherwise, the person applying for the warrant risks violating *Posse Comitatus*-like restrictions under 10 U.S.C. § 275 proscribing direct assistance to civilian law enforcement.

B. A warrant, not a court order, must be used under 18 U.S.C. § 2703 and R.C.M. 703A when the information sought is covered in R.C.M. 703A(a)(1) (disclosure by a provider of electronic communication service of the contents of any wire or electronic communication in electronic storage for 180 days or less). However, paragraph 090402 further restricts the use of court orders when the customer or subscriber has a reasonable expectation of privacy in the information sought. In those cases, a warrant, not a court order, must be sought.

090303. Contents of Warrant Application

The application for a warrant must be completed on DD form 3057, and must contain an affidavit or sworn testimony subject to examination by a military judge. Specific minimum requirements are listed in the JAGMAN, section 0132a.(a). The application must include a completed warrant (DD form 3056), ready for signature by the military judge. The trial counsel may submit the application for a warrant electronically or in person, in accordance with rules established by the trial judiciary and applicable circuit.

090304. Preservation Letters

Pursuant to 18 U.S.C. § 2703(f) and R.C.M. 703A(f), trial counsel or a federal law enforcement officer may request a provider of wire or electronic communication services or a remote computing service take all necessary steps to preserve records and other evidence in its possession pending the issuance of a warrant. Whether preservation has been sought and the expiration date of any preservation period must be included in the application to the military judge.

090305. Defense Requests for Warrants

The defense may request the trial counsel or other counsel for the government to make an application for a warrant. Defense requests shall include all information described in paragraph 090303 above (completed DD forms 3056 and 3057), and a written application ready for signature by the trial counsel. If the request is for perishable matter that may be lost or destroyed in the event of delay, the request shall clearly state so, including the basis for such a belief. If the defense requests issuance of a preservation letter, the defense request must also include a preservation letter ready for signature by the trial counsel or a federal law enforcement officer. If the trial counsel determines the defense request shows probable cause the information sought would contain evidence of a crime, the trial counsel shall inform law enforcement as soon as possible. Unlike subpoenas or court orders, the trial counsel may not delay considering the request until after a referral decision is made.

0904. ORDERS FOR WIRE OR ELECTRONIC COMMUNICATIONS

090401. Authorization

Pursuant to R.C.M. 703A(c) and 18 U.S.C. § 2703(d), a military judge may issue an order authorizing the disclosure of information specified in R.C.M. 703A(a) (2), (3), or (4).

090402. When Permitted

A. Similar to warrants, the JAGMAN restricts the ability to apply for orders to a trial counsel in the applicable circuit where the warrant will be sought. *See* JAGMAN section 0132a. The application must contain specific and articulable facts that establish reasonable grounds to believe that the information sought is relevant and material to an ongoing criminal investigation. The phrase “ongoing criminal investigation” under R.C.M. 703A(c) means the same thing as “investigation of an offense under the UCMJ” as defined in paragraph 090202.A of this chapter. Generally, an ongoing investigation is “criminal” if it is of an offense under the UCMJ and is conducted by law enforcement agencies. The fact that a commander may later dispose of a criminal offense through administrative means does not change the nature of a criminal investigation, or invalidate any evidence obtained through court order during the investigation. But court orders may not be used to obtain evidence for non-criminal administrative investigations.

B. Although 18 U.S.C. § 2703(d) and R.C.M. 703A allow use of a court order to obtain content data that has been in storage for over 180 days, many courts require a warrant. *See e.g., United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010). Warrants are required when a suspect in an investigation has a reasonable expectation of privacy in the information being sought from a third party. For example, historical cell-site location information must be obtained through a warrant, because a suspect maintains a legitimate expectation of privacy in the historical record of their physical movements as captured through cell-site location information. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Trial counsel should always consult with supervisory counsel and read current case law to determine whether an order is sufficient to obtain the data sought. Unless applicable case law clearly supports getting the information via a court order, the safer course is to seek a warrant.

090403. Contents of Order Request

The order request must contain specific and articulable facts that establish reasonable grounds to believe the information sought is relevant and material to an ongoing criminal investigation. Specific minimum requirements are listed in the JAGMAN, section 0132a.(a). The request must include a completed court order, ready for signature by the military judge. The order must not be unreasonable, oppressive, or prohibited by law. Court orders may be unreasonable or oppressive if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on a provider. Pursuant to R.C.M. 703A(c)(1)(B), the trial counsel seeking the order must also include in the application whether prior notice has been provided to the subscriber or customer of the application for the order, unless delayed notice of an order is requested as outlined below.

090404. Delayed Notice of Order

A trial counsel may include in the application a request for an order delaying the notification to the subscriber or customer required by R.C.M. 703A(c)(1)(B). The request for delayed notice must be included in the application, and must comply with R.C.M. 703A(d). Upon expiration of the applicable period of delay of notification, the federal law enforcement officer, trial counsel, or other authorized counsel for the government may request an additional period of delay, or otherwise shall serve upon, or deliver by registered first-class mail to, the customer or subscriber a copy of the process or request together with the required notices in R.C.M. 703A(d)(3).

090405. Preservation Letters

Pursuant to 18 U.S.C. § 2703(f) and R.C.M. 703A(f), trial counsel or a federal law enforcement officer may request a provider of wire or electronic communication services or a remote computing service take all necessary steps to preserve records and other evidence in its possession pending the issuance of an order. Whether preservation has been sought and the expiration date of any preservation period must be included in the application to the military judge.

090406. Defense requests for orders

The defense may request the trial counsel or other counsel for the government make application for an order for wire or electronic communications. Defense requests shall include all information described in paragraph 090403, and a written application ready for signature by the trial counsel. If the request is for perishable matter that may be lost or destroyed in the event of delay, the request shall clearly state so, including the basis for such a belief. If the defense requests issuance of a preservation letter, the defense request must also include a preservation letter ready for signature by the trial counsel or a federal law enforcement officer. The trial counsel may present the application for an order to a military judge, or may defer considering the request until after a referral decision has been made if it is likely the referral decision will make the defense request moot or unnecessary. If the trial counsel presents the application to the military judge, the trial counsel is responsible for providing the required notice to the subscriber or customer listed in R.C.M. 703A(c)(1)(B), or requesting delayed notice as described in paragraph 090404 above. The military judge may grant or deny the application for an order, or may, as a matter of discretion, afford the defense an opportunity to be heard.

0905. PROCEEDURES FOR ARTICLE 30a HEARINGS

090501. General Guidance

See R.C.M. 309 and JAGMAN, section 0132a for specific guidance on the conduct of pre-referral judicial proceedings. Any request for an *ex parte*, *in camera*, or closed hearing must be made in writing. Military justice practitioners must also ensure they are following procedures for the conduct of pre-referral proceedings established by the trial judiciary.

090502. Preparing, Maintaining, and Distributing Copies of the Proceedings

If hearings are held as part of the proceeding, only witnesses whose testimony is relevant to establishing probable cause for the warrant may be called. A victim, as defined in Article 6b, UCMJ, may not be compelled to testify at the proceeding. The military judge may examine any witnesses called. The hearing will be recorded and the court reporter will maintain a copy of the recording for the later of two years from the date of the proceeding or until final disposition of the charges related to the proceedings. Records are not required to be transcribed before referral. After referral of charges, such record will be transcribed to the same extent as required for post-referral proceedings. The court reporter will provide the record of the proceeding to the trial counsel, who will forward it to the convening authority or officer with authority to dispose of the charges or offenses in the case. If charges are referred, the court reporter will ensure the record is provided to the military judge detailed to the court-martial and the detailed defense counsel and made a part of the official record of trial. If the record of any pre-referral proceeding or part of any such proceeding is ordered sealed by the military judge, the court reporter is responsible for complying with the order pursuant to R.C.M. 1113.

0906 COST REIMBURSEMENT FOR A SUBPOENA, ORDER, OR WARRANT

In accordance with 18 U.S.C. § 2706, electronic communications and electronic service providers are entitled to reimbursement of costs reasonably necessary and directly incurred in searching for, assembling, reproducing, or otherwise providing the information sought. Such reimbursable costs might include any costs due to necessary disruption of normal operations of any electronic communication service or remote computing service in which such information may be stored. Before seeking compulsory process which could obligate the government to pay costs associated with compliance, the trial counsel or law enforcement agent seeking the compulsory process shall inform the relevant convening authority, via the staff judge advocate, of the financial obligation that may be incurred and obtain authorization from the convening authority to obligate the government for any costs associated with the subpoena, order, or warrant. The authorization may be provided orally or in writing.

0907. REQUESTS FOR RELIEF FROM COMPULSORY PROCESS

090701. General Guidance

Under Article 46(e), UCMJ, a military judge shall review requests for relief from a subpoena or other compulsory process such as a warrant or order on grounds compliance is unreasonable or oppressive, or prohibited by law. A military judge detailed in accordance with Article 26 or 30a, UCMJ, shall review the request and shall: (1) order the subpoena or other process be modified or withdrawn, as appropriate; or (2) order the person to comply with the subpoena or other process. Additionally, if the government and an entity providing information cannot mutually agree on the amount of compensation under 18 U.S.C. § 2706, the military judge in the location where a criminal prosecution relating to the information would be brought may determine the amount of the fee.

090702. Procedures for Requesting Relief

Any compulsory process described in this chapter (investigative subpoena, warrant, or court order) will contain contact information for questions and requests for relief. The contact information will include the name, phone number, and email address of the person who can answer questions on filing a request for relief, usually a clerk for a judge in the trial judiciary office in which any request for relief would be filed. The trial judiciary may establish rules for the filing and format of any requests for relief under this paragraph.

090703. Appeals

Appeal of an adverse ruling by a military judge on a request for relief from compulsory process may be sought by petitioning the Navy-Marine Corps Court of Criminal Appeals in accordance with the rules of that court, which are available at <http://www.jag.navy.mil/nmcca.htm>.

VOLUME 16: CHAPTER 10

ARTICLE 32 PRELIMINARY HEARINGS

SUMMARY OF SUBSTANTIVE CHANGES

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CHAPTER 10

ARTICLE 32 PRELIMINARY HEARINGS

1001. DETAILING OF PRELIMINARY HEARING OFFICERS (PHO)

Prior to detailing an Article 32, UCMJ, Preliminary Hearing Officer (PHO), the detailing authority will choose a capable and fully qualified officer who is reasonably available. Factors to consider in such a decision include, but are not limited to, the following: the education, training, and experience of the potential PHO; any applicable conflict-of-interest analysis; the case complexity; civilian or primary military duties of Reserve Component and Active Duty Component candidates who are available for detailing as PHOs; the geographic locations of the accused and counsel; the expected location of the hearing; media interest in the case; any implications for cases with classified evidence; and the expected duration of the hearing.

100101. Eligibility

The PHO shall be a judge advocate certified under Article 27(b), UCMJ; sworn under Article 42(a), UCMJ; if practicable, equal in grade to or senior in grade to both the trial and defense counsel; and in the grade of O-4/Major or higher, subject to the exceptions below. A judge advocate below the grade of O-4/Major may only be detailed as a PHO if they have at least six months of experience as a trial or defense counsel, subject to the limitations in this section. If the case involves a special victim, the PHO must be a judge advocate. In other exceptional cases not involving a special victim, the interests of justice may dictate detailing a PHO who is not a judge advocate.

100102. Education Requirements

Prior to conducting the hearing, the PHO must familiarize themselves with the “Article 32 Preliminary Hearing Officer’s Guide” which is published by Naval Justice School.

100103. Appointment Letter

The convening authority directs an Article 32 preliminary hearing by appointing the PHO in writing.

1002. SPECIAL VICTIM CASES

Special victim cases are defined in Chapter 5 of this volume. In those cases involving special victims, a judge advocate below the grade of O-4/Major may only be detailed as a PHO if they have previously been SVIP qualified pursuant to paragraph 022102 of this volume.

1003. ISSUING WARRANTS OR SUBPOENAS

See R.C.M. 405(h)(3) regarding production of evidence for a preliminary hearing. The PHO has no authority to issue a subpoena or warrant, but shall note in the report any evidence the PHO determined was relevant, not cumulative, and necessary to the determination of the issues at the preliminary hearing, along with the government’s refusal to obtain the evidence for the hearing.

1004. VICTIM RIGHT NOT TO TESTIFY

A victim named in a specification under consideration at the hearing shall not be required to testify. *See* R.C.M. 405(h)(2)(A)(iii).

1005. CLOSED SESSIONS

Preliminary hearings are public proceedings and should remain open to the public whenever possible. When an overriding interest outweighs the value of an open preliminary hearing, the convening authority or the preliminary

hearing officer may restrict or foreclose access by spectators to all or part of the proceedings. Convening authorities or preliminary hearing officers must conduct a case-by-case, witness-by-witness, and circumstance-by-circumstance analysis of whether restriction or closure is necessary. If the PHO or convening authority orders a closed session, precautions should be employed to ensure no unauthorized personnel enter or attend the closed session. Judge Advocates serving as supervising attorneys to counsel detailed to the closed session are authorized to attend any closed session.

100502. M.R.E. 412 Hearing

If the PHO conducts a hearing to determine the admissibility of the evidence, the hearing shall be closed. The victim shall be afforded a reasonable opportunity to attend and be heard, to include being heard through counsel.

100503. Procedures

The procedures for determining the admissibility and/or sealing of evidence in cases of an alleged sexual offense, as defined under M.R.E. 412(d) are found in R.C.M. 405(i)(2).

1006. PHO REPORT

The PHO shall assemble the preliminary hearing report in accordance with R.C.M. 405(l). In addition to those items listed in the rule, the preliminary hearing report will contain: DD Form 457, Preliminary Hearing Officer Report, and any attachments; DD Form 458, Charge Sheet, and any attachments; and the PHO appointment letter. The PHO must include a copy of the preliminary hearing recording.

1007. DISTRIBUTING THE PHO REPORT

The PHO shall deliver the PHO Report to the appropriate SJA within the time specified by the convening authority in the appointment letter. If no deadline is specified, the PHO shall deliver the PHO report within eight days after the closure of the preliminary hearing or timely receipt of supplementary information under R.C.M. 405(k), whichever is later. The SJA, in turn, delivers the report to the convening authority who directed the preliminary hearing. The convening authority must cause the PHO Report to be served on the accused. Government counsel must obtain a receipt from the accused upon service of the PHO Report.

1008. OBJECTING TO THE PHO REPORT

Any objections to the PHO Report must be submitted in accordance with R.C.M. 405(l)(2)(K)(5) within five days of receipt. The day the accused receives the report is not counted in calculating the five-day window in which the accused may raise objections. The five-day period does not prohibit a convening authority from referring any charge or taking any other action within the five-day period.

1009. FORWARDING THE PHO REPORT TO A SUPERIOR CONVENING AUTHORITY

If the convening authority who directed the preliminary hearing decides to forward the PHO report to a superior convening authority for disposition, the convening authority who directed the hearing must prepare a forwarding letter providing a recommendation for disposition of the charge(s). The forwarding letter will include the following attachments: the charge sheet, the commander's endorsement to the charge sheet, and the PHO Report, with the attachments appended to the report. This letter is forwarded to the superior convening authority through the superior convening authority's SJA.

100901. Uncharged Offenses

If an uncharged offense examined by the PHO in the preliminary hearing is later preferred, the GCMCA may refer the offense to court-martial without convening an additional preliminary hearing, provided the SJA's Article 34, UCMJ pretrial advice addresses the offense per R.C.M. 601(d)(2).

1010. SEALING DOCUMENTS

Refer to R.C.M. 1103A for authority, limitations, and procedures relevant to review of sealed materials in or attached to a PHO Report. Sealed materials will be kept separate. Sealed documents and or each recording/transcripts of the closed portion of the hearing will be placed in its own envelope or other suitable container. The envelope or container shall be marked CLOSED SESSION.

101001. Sensitive Information

If the PHO determines a record contains graphic materials or matters of a sensitive personal nature, the PHO, with the assistance of the trial counsel, shall ensure such materials are enclosed separately in an envelope, wrapping, or other suitable container to conceal and protect the materials from inadvertent exposure or tampering. Any graphic materials or matters of sensitive personal nature shall be properly labeled and separately enclosed prior to inclusion in the PHO's report. The envelope, wrapping, or container should be marked: "CAUTION, CONTAINS SENSITIVE INFORMATION." These sensitive materials are viewable only by authorized reviewing authorities and support personnel with an official need to view the materials. In the absence of such determination, should the cognizant SJA later determine the record includes such matters, the SJA shall ensure the matters are enclosed and marked in accordance with the requirements above.

1011. RECORDING THE PRELIMINARY HEARING

Government Counsel shall ensure the preliminary hearing is recorded by suitable government recording devices. Government counsel may use a secondary suitable recording device to create a back-up recording.

101101. Providing Preliminary Hearing Recording to the Accused

The Accused will receive a copy of the preliminary hearing report, which includes a copy of the recording or transcript. Do not provide any portions of the hearing ordered sealed by the PHO to the accused or counsel.

101102. Providing Preliminary Hearing Recording to the Victim(s)

Upon written request from a victim named in one of the specifications at the preliminary hearing (or victim's counsel), government counsel shall provide the victim with access to, or a copy of, the recording or transcript. Do not provide any portions of the hearing ordered sealed by the PHO to the victim or victim's counsel. Trial counsel is not normally required to redact the recording or transcript except as indicated below. However, to maintain compliance with the Privacy Act, the government should release the recording or transcript in the following manner:

A. If the victim is represented by a VLC, the unredacted recording or transcript should be provided to the victim's VLC as a "For Official Use Only" disclosure under the Privacy Act. The VLC must maintain the recording or transcript in accordance with the Privacy Act.

B. An unredacted recording or transcript may not be provided directly to the victim.

1012. HEARINGS VIA REMOTE MEANS

The preliminary hearing officer or appointing authority may order the use of audiovisual technology, such as video teleconferencing technology, or telephonic participation among the parties and the preliminary hearing officer for purposes of Article 32, UCMJ, proceedings, consistent with similar provisions guiding Article 39(a), UCMJ, sessions and consistent with R.C.M. 405, 804, and 805. Such technology may include two or more remote sites as long as all parties can hear each other. VTC or telephonic participation may also be utilized to facilitate the presence of victims or VLC exercising a victim's right to be present under R.C.M. 405(g). However, the possibility of VTC or telephonic participation does not create a right to use such means when doing so imposes too great of a burden on the government, causes undue delay, or prejudices the rights of the accused.

SUBPART C2: TRIAL MATTERS

VOLUME 16: CHAPTER 11

DISCOVERY

SUMMARY OF SUBSTANTIVE CHANGES

Hyperlinks are denoted by ***bold, italic, blue and underlined font.***

The original publication date of this Marine Corps Order (MCO) Volume (right header) will not change unless/until a full revision of the MCO has been conducted.

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CHAPTER VERSION	PAGE PARAGRAPH	SUMMARY OF SUBSTANTIVE CHANGES	DATE OF CHANGE

SUBPART C2 – TRIAL MATTERS**CHAPTER 11****DISCOVERY**

1101. PURPOSE

This section provides policy guidance to trial counsel on how to meet their discovery obligations as set forth in the Rules for Courts-Martial, the Military Rules of Evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), and the *Giglio v. United States*, 504 U.S. 150 (1972) line of cases. This policy guidance is not intended to confer any additional rights, privileges, or benefits on any party or third person.

1102. APPLICABILITY

This chapter applies to all trial counsel, legal administrative officers, litigation attorney advisors, legal services specialists, investigators, and administrative support personnel who provide military justice services within the Marine Corps, or who assist the trial services offices in fulfillment of the prosecution function. Discovery obligations of personnel who serve in billets within the Defense Services Organization (DSO) and the Victims' Legal Counsel Organization (VLCO) are covered by relevant constitutional provisions, statutes, rules, and other policies published by the leaders of those organizations.

1103. GENERAL

110301. Role of the Trial Counsel in Discovery

The trial counsel is the gatekeeper for discovery on behalf of the United States and must never abdicate this role. The guiding principle for the trial counsel in every court-martial is not to simply win a case, but that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88 (1935). Any intentional discovery violation is a serious matter and a violation of the rules of professional responsibility. Remaining willfully ignorant of evidence that reasonably tends to be exculpatory so as to avoid a discovery obligation is also a discovery violation inconsistent with the pursuit of justice. See *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015). But it does not matter if the failure to disclose discoverable information is in good faith or bad. *Giglio*, 405 U.S. at 153. Even unintentional isolated lapses can have a disproportionate effect on public and judicial confidence in trial counsel and the military justice system. Beyond the consequences in the individual case, which can include continuances, exclusion of evidence, or dismissal of charges, such a loss in confidence can have significant negative consequences on our effort to achieve justice in every case.

110302. Liberal Discovery in Courts-Martial

Consistent with the role to seek justice, broad and early disclosures often lead to speedy resolution of cases and preserve limited resources for other cases. The United States Attorney's Manual requires federal prosecutors to take a broad view of discovery and err on the side of disclosure of exculpatory and impeachment evidence beyond that which is constitutionally and legally required. USAM § 9-5.001. That is true to an even greater extent for trial counsel. "Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004). Trial counsel should always evaluate discovery and disclosure issues in light of the "liberal mandate" of discovery practice in courts-martial. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). But while broad discovery is desirable, disclosures beyond those required by relevant statutes, rules, and policies may risk harm to victims or witnesses, or have other ramifications contrary to the pursuit of justice. In recognition of these competing goals, the trial counsel must make discovery determinations on a case-by-case basis. The trial counsel should provide timely, open, and broad discovery, while still protecting victim and witness privacy interests as established under 10 U.S.C. § 806b, the Military Rules of Evidence, the Privacy Act, and relevant case law.

110303. Overview of Discovery Process

The discovery process is basically a three step process. Unless a privilege exists, the trial counsel must first actively seek out discoverable material in possession of the government. After obtaining the material, the trial counsel must determine whether or not it shall be disclosed to the defense on a case-by-case and document-by-document basis. Finally, the trial counsel must disclose such materials deemed discoverable expeditiously in accordance with the Rules for Courts-Martial, case law, and this chapter. The disclosure may include the opportunity to inspect the materials. If copies are provided to the defense or VLC, the materials must be properly redacted to remove PII or privileged material, or include a disclosure notice in accordance with paragraph 110704 of this chapter.

110304. Evidence Relevant to Defense Preparation

When making the discovery determination described above, the government must always turn over certain types of information. For example, any material which accompanied the charges when they were referred, the convening order and any modifications, and any sworn or signed statement relating to an offense charged must always be turned over pursuant to R.C.M. 701(a)(1). Other types of information in the possession of the government need only be discovered if they are “relevant to defense preparation.” See R.C.M. 701(a)(2). “Relevant to defense preparation” broadens the scope of discovery from the prior standard of “material” to defense preparation. See App. 15, MCM (2019 ed.). Information does not need to be admissible under the rules of evidence, or be directly related to the government’s case in chief to be relevant to defense preparation. The defense may possess confidential information or have a theory of the case the government is not aware of. Therefore, the trial counsel may not always understand how a piece of requested information is relevant. Trial counsel should normally assume information specifically requested by the defense is relevant to the preparation of a defense, although discovery might not be required for other reasons. However, if the requested information appears to be irrelevant, and unlikely to lead to any useful information, the trial counsel may deny the request or request additional information to demonstrate the relevancy of the requested items.

1104. SOURCES OF DISCOVERY

110401. Exculpatory Information Not in the Trial Counsel’s Files

It is the obligation of trial counsel, in preparing for trial, to seek out, obtain, and disclose to the defense all exculpatory and impeachment information held by government agencies participating in the investigation. The trial counsel must look beyond their own physical files for exculpatory evidence and has a duty to learn of any exculpatory evidence known to others acting on the government’s behalf in the case, including the police. *Kyles v. Whitley*, 514 U.S. 419 (1995). The scope of the trial counsel’s inquiry beyond the trial counsel’s own files depends upon the nature of the request and the trial counsel’s relationship to the holder of the information. *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). A trial counsel must always review law enforcement case files related to the case. Potential files that might also need to be reviewed include those of other federal, state, and local law enforcement agencies, forensic laboratories, child protective services, social services, command investigators, and other civilian or government officials participating in the investigation or testing of evidence in the case.

110402. Information Held by Non-Law Enforcement Government Agencies

A trial counsel is normally not required to review the records of agencies that are not closely aligned with the prosecution. When determining whether another federal, state, or local agency may be in possession of discoverable evidence, trial counsel should look to the following factors:

- A. Whether the agency’s primary purpose is to assist law enforcement or the prosecution, or the agency shared resources with law enforcement;
- B. Whether the agency played an active role in the investigation, including obtaining evidence, interviewing witnesses, or otherwise acting as part of the investigation team;

- C. Whether the trial counsel knows of and has access to discoverable information held by the agency;
- D. The degree to which the trial counsel or law enforcement have shared information with the agency;
- E. The degree to which the agency has provided input on decisions regarding civil, criminal, or administrative charges;
- F. The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party;
- G. Whether the agency routinely releases the information requested to representatives of the government;
- H. Whether any person could assert a privilege over any of the information requested;
- I. Whether the information requested is protected from release by other statutes or regulations, such as medical records, school records, counseling records, or mental health or substance-abuse treatment records.

1105. SPECIFIC EVIDENCE TO REVIEW FOR DISCOVERY

110501. Evidence Gathered During the Investigation

The trial counsel must review all evidence and information gathered during the investigation.

110502. The Military Law Enforcement File

The trial counsel shall review all documents within the case file of the investigating agent or the investigating officer upon receipt of the RLS. The trial counsel should not treat the case file as a single document for discovery purposes, but instead should consider the case file as a container for individual documents and media. These documents and media include all documents, reports, witness statements, video recordings, and confidential witness files within the case file as well as case agent notes, e-mails about the case, and any other correspondence regarding the case. Additionally, trial counsel shall inspect any evidence seized by investigative agencies connected to the case.

110503. Impeachment and Bias Information

A. Witness Background Checks

(1) Law Enforcement Witnesses. The trial counsel must make a reasonable inquiry regarding the existence of any material information affecting the agent's credibility or other information favorable to the defense in the personnel files of any law enforcement witness. A reasonable inquiry usually involves asking the law enforcement agent involved. Law enforcement personnel are obligated to notify the trial counsel of any adverse material in their personnel files affecting their credibility. If the trial counsel is aware of any adverse information, the existence of the adverse information shall be disclosed to the defense. If the trial counsel is not aware of any potentially adverse material, the trial counsel only has a duty to examine the personnel files of law enforcement witnesses if an accused requests their production. Balancing the defense's need for potential impeachment material against the privacy interests of the agents, the obligation is normally satisfied by obtaining a *Henthorn* letter or functional equivalent from the appropriate authority. A *Henthorn* letter is a letter signed by a supervisor or other authorized official for the law enforcement agency (NCIS general counsel office for example) certifying they have reviewed the contents of the law enforcement witness's personnel files, and there is no adverse material in the files relevant to the case, such as any information that would affect the witness's credibility, truthfulness, or show a particular bias.

(2) Other Witnesses. The trial counsel should ensure a National Crime Information Center (NCIC) background check is run on all witnesses anticipated to testify at trial. Additionally, all military witness personnel files should be reviewed for adverse materials. When the trial counsel discovers adverse materials, the trial counsel must make a necessity determination under R.C.M. 701 and M.R.E.s 608 and 609, and at a minimum, disclose to the defense the existence of adverse materials.

B. Other Impeachment and Bias Information

Additionally, the following information known by or in the possession of the government about witnesses must be gathered, reviewed, and disclosed to the defense.

- (1) Prior inconsistent statements.
- (2) Statements or reports reflecting witness statement variations.
- (3) Benefits provided to witnesses including:
 - (a) immunity.
 - (b) assistance in state or local criminal proceedings.
 - (c) non-prosecution agreements or reduced charges.
 - (d) letters to other officials setting forth the extent of a witness's assistance.
 - (e) relocation assistance or expedited transfer.
 - (f) benefits to third-parties who have a relationship with the witness.
 - (g) any other consideration or benefit provided that may reasonably affect credibility or bias.
- (4) Other conditions that could affect the witness's impartiality or other items that may arise such as:
 - (a) animosity toward a group of which the accused is a member.
 - (b) relationship with the victim.
 - (c) uncharged criminal conduct.
- (5) Specific instances of truthfulness or untruthfulness under M.R.E. 608.
- (6) Any issue that could affect the witness's ability to perceive or recall events.

110504. Information Obtained in Witness Interviews

A. The trial counsel should have a third person or "prover" present during all witness interviews and all trial preparation meetings conducted by the trial counsel. A best practice is to have the assigned case agent or RTI present during important witness interviews when practicable.

B. The trial counsel must disclose to the defense any signed or adopted statements made by a witness during a witness interview.

C. The prover must memorialize any inconsistent statements or variances within the witness's statement even if they occur within the same interview. Recognizing it is sometimes difficult to assess the materiality of evidence before trial, the trial counsel generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence, even when such evidence may not be admissible at trial. These inconsistent statements or material variances shall be disclosed to the defense.

D. The trial counsel or prover should also memorialize all relevant new information learned during the witness interview or trial preparation meeting. This new information, even if it is not exculpatory, should be disclosed to the defense.

110505. Mental Health Records

The trial counsel should not seek to obtain privileged mental health records without permission from the patient or an order from a court pursuant to M.R.E. 513. Upon a request for mental health records, the trial counsel may attempt to determine if mental health records exist and where they are located, and should normally ask potential witnesses if they have or had any medical or mental health issues that may have affected their ability to perceive or understand events, or recall past events. If the trial counsel becomes independently aware of a mental health disorder materially affecting a victim or witness, the existence of that condition must normally be disclosed to the defense. The trial counsel may seek permission from the patient to obtain such records or may otherwise attempt to obtain the records pursuant to M.R.E. 513. Since both sides have equal access to evidence, trial counsel must be aware that a trial counsel's review of mental health records generally waives any claim of privilege, and the defense normally may review all records reviewed by the trial counsel.

1106. PREPARING DISCOVERY

110601. Discovery Inventory Required

The trial counsel shall maintain a discovery inventory of the items reviewed, items disclosed, and the rationale for any items not disclosed. For material that is reviewed and disclosed to the defense, the electronic discovery file may serve as the discovery inventory. For items not disclosed, the trial counsel should provide notice of the existence of these items to the defense.

110602. Privileged Material Log

The trial counsel shall identify material that is protected or privileged under the 500 series of the Military Rules of Evidence. If the trial counsel becomes aware of privileged material that is relevant to defense preparation, the trial counsel must notify the defense of the existence of these documents, but shall not disclose this material until the proper administrative and judicial processes have been followed.

110603. Special Considerations Applicable to a Law Enforcement Case File

A. An investigator's file has law enforcement sensitive information and requires careful handling by the trial counsel and, when applicable, by the defense counsel. *See* SECNAVINST 5211.5E.

B. As described in paragraph 110502, the trial counsel must personally review law enforcement files, determine what information within the file must be disclosed, and determine the manner of disclosure. Investigators' notes should be reviewed for *Brady* material regardless of whether they testify.

C. The trial counsel must inform the case agent of all materials within the file the trial counsel intends to disclose, the timing of the disclosure, and the manner of disclosure to provide the investigation agency sufficient opportunity to assert any privileges over these materials.

D. The trial counsel shall disclose all documents within the file that are relevant to defense preparation and not subject to a claim of privilege.

(1) The trial counsel shall inform the defense of the existence of privileged material under M.R.E.s 505-507, but shall not disclose this material without authorization from the holder of the privilege.

(2) For confidential witness information, trial counsel may produce a summary letter to defense counsel disclosing all necessary and material information while still protecting the identity of the informant. Summary letters must be approved by the holder of the M.R.E. 507 privilege.

E. After the trial counsel has provided copies of or allowed the defense to inspect relevant portions of the case file, the defense might request to inspect the original and complete law enforcement case file. Trial counsel shall forward any request to review the original case file to the law enforcement agency involved. Every request must be evaluated on the unique facts of the case. Allowing the defense to inspect the original case file may help avoid unnecessary delays in the case and save judicial resources by avoiding unnecessary litigation. On the other hand, many courts have held that *Brady* and related cases impose an obligation on the government to disclose, but do not entitle the defense to personally inspect the government's files. "Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). Routinely granting requests to inspect the original case file can create an institutional culture implying such a right exists and ultimately harm the integrity of law enforcement investigations.

110604. Special Concerns Related to Safety Investigations

Safety investigations may contain privileged material protected from discovery by M.R.E. 506. The privilege for safety investigations is held by SECNAV. If SECNAV believes waiver of the privilege is warranted, SECNAV may authorize waiver for the limited use in the trial, subject to appropriate protective measures, and after first consulting with the DoD General Counsel and DUSD (I&E). Outside of authorizing release for *in camera* review, the SECNAV has never waived the safety privilege for a criminal prosecution.

110605. Classified Information

All classified information must be reviewed by the Original Classification Authority (OCA) to determine if the M.R.E. 505 privilege applies and will be invoked in the case, prior to disclosure to the defense. The trial counsel will coordinate with OJAG (Code 30) as soon as possible in all cases involving classified information.

110606. Attorney-Work Product

To the extent any attorney work product is included in material gathered for discovery, such as notes of witness interviews, the trial counsel may redact the material before disclosing to the defense. Redactions shall be clearly labeled indicating attorney work product has been removed. A trial counsel may also meet disclosure obligations by producing a summary document of all exculpatory and new information learned, without disclosing the original notes containing the attorney work product.

1107. CONDUCTING DISCOVERY

110701. Preference for Electronic Discovery

Even if discovery is required, a physical copy of every item subject to disclosure need not be made in every case. For cases involving large volumes of potentially discoverable information, to protect witness privacy, or for other similar rationale, trial counsel may discharge their disclosure obligations by choosing to make items subject to disclosure available to the defense for inspection rather than providing a copy. When trial counsel do provide copies of discovery, they are encouraged to make all efforts to provide electronic copies of discovery, in lieu of paper copies, when practicable.

110702. Timing

A. TCs are encouraged to disclose relevant, non-protected material as soon as it is received, personally reviewed by the trial counsel, and accounted for in the discovery index. Exculpatory material, regardless

of whether the information is memorialized, must be disclosed to the accused promptly after discovery even if court ordered deadlines have not arisen. Impeachment and bias information as described in paragraph 3303.4, shall be disclosed no later than determination that a witness will likely be called by the trial counsel at the court-martial in order to allow defense counsel to prepare for trial.

B. Discovery obligations are on-going and continue after trial. The TC must be alert to developments occurring throughout the preparation, during, and after a trial that may impact their discovery obligations and require disclosure of information not previously disclosed.

110703. Use of Bates Stamp and Electronic Discovery

To the maximum extent practicable, all documents disclosed to the defense shall be electronically served through a shared network drive or a secured internet site. All materials should be bates stamped. A bates stamp refers to numbering each document provided in discovery with a sequential number for that case. All electronic evidence should be available to the defense in a read only manner, and the date of discovery must be recorded electronically. All electronic files should be labeled by the Bates stamp numbers and the name of the case.

110704. Personally Identifiable Information (PII)

If PII is material to the preparation of the defense, it shall be disclosed under the applicable Routine Uses exception as published in the System of Records Notice. If a TC provides defense counsel with materials that include PII under the Routine Uses exception, the TC must use a Privacy Act disclosure cover sheet notifying the defense of their obligation to protect this material. TCs may provide the defense with a copy of discoverable materials with PII redacted, so long as the TC provides the defense access to inspect an unredacted version of all PII material to the preparation of the defense.

110705. Contraband Material

Trial Counsel shall not provide any person with any evidence or copies of evidence that is illegal for the person to possess. Examples include controlled substances, child pornography, and prohibited weapons. In appropriate circumstances, and in coordination with NCIS or the applicable law enforcement agency, contraband materials should be made available for inspection.

110706. Classified Information

Before disclosing the nature of any classified information, trial counsel must ensure an appropriate protective order is in place and the defense counsel has the appropriate security clearance. Contact OJAG (Code 30) early in any case involving classified information for further guidance and best practices.

110707. Other Sensitive Information

Trial Counsel may allow defense an opportunity to inspect other information relevant to the preparation of a defense, copies of which are sensitive and should be kept under close control. Examples of such information include photographs of a person's private area taken during a sexual assault medical forensic exam (SAMFE). Normally, the appropriate way to handle such photographs or other sensitive items is to allow the defense an opportunity to inspect such items if doing so is relevant to the preparation of a defense, while also seeking a court order to seal the items, preventing each side from making copies or showing the photographs to others, including the accused, without a court order.

1108. DISCLOSURES TO WITNESSES, VICTIMS, AND VICTIMS' LEGAL COUNSEL (VLC)

Trial Counsel's disclosures to a victim are covered in chapter 4 of this volume. To avoid tainting potential witness testimony, trial counsel should normally not disclose other investigative materials to a witness, beyond the witness's own statement or materials provided by the witness. In some cases, VLC may request additional documents. For example, if a motion filed under Mil. R. Evid. 412 relied exclusively on facts contained in another witness's

statement, the VLC might request a copy of that statement in order to adequately respond to the 412 motion, even though another witness's statement is not normally disclosed to the VLC. Trial counsel may disclose such a statement, so long as doing so would not violate the Privacy Act or the Rules for Professional Responsibility. If requested by the defense, the TC shall inform the defense what, if any, witness statements or materials were provided to the VLC or victim.

VOLUME 16: CHAPTER 12

MILITARY JUSTICE HEARING AND COURT REPORTING PROCEDURES

SUMMARY OF SUBSTANTIVE CHANGES

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CHAPTER 12

MILITARY JUSTICE HEARINGS AND COURT REPORTER PROCEDURES

1201. PURPOSE

This chapter sets forth the administrative responsibilities and procedural components to conducting military justice hearings. It does not alter or replace any requirements in the rules for court-martial, rules of evidence, or rules established by the trial judiciary.

1202. APPLICABILITY

This Chapter applies to all cases in which charges were referred to trial by court-martial on or after 1 January 2019 or administrative hearings convened on or after 1 January 2019. Except as otherwise provided in this Order, proceedings in any case not meeting these conditions shall be held in the same manner and with the same effect as if this Chapter had not been prescribed.

1203. GENERAL PROCEDURES APPLICABLE TO ALL HEARINGS

120301. Detailing and Role of Court Reporter

The PTAO shall detail a court reporter to every special and general court-martial. The PTAO may delegate this authority to a post-trial chief as necessary. The detailed court reporter is in direct support of the military judge for the case. The court reporter is responsible for ensuring accurate and complete capture of all proceedings to which they are assigned. In the event of equipment failure, the court reporter is responsible to inform the military judge immediately, interrupting proceedings as necessary.

120302. Control of Recording Devices

After a recording has been initiated, only the detailed court reporter or military judge may stop, pause, mute, disconnect, or in any way modify the recording equipment and/or the software settings.

120303. Inadvertent Recording of Conversations

Recording devices are sensitive and may inadvertently record conversations intended to be private and/or privileged.

120304. Maintaining Recordings

Official recordings will be managed and maintained under the direction and supervision of the PTAO. All records and recordings generated and maintained by a Post-Trial Office shall abide by applicable retention guidelines.

1204. TRANSCRIPTS FOR NON-JUDICIAL PUNISHMENT OF OFFICERS

A verbatim transcript shall be produced in all Officer Non-Judicial Punishment proceedings per LSAM, Volume 15. The detailed court reporter for the proceeding will cause a recording to be made of the proceeding to facilitate transcript production. Use of the hardware and software approved for courts-martial is encouraged. The format of any produced transcript is contained in Appendix I.

1205. RECORDING PRELIMINARY HEARINGS

R.C.M. 405(j)(5) requires preliminary hearings be recorded. Counsel for the government are responsible for ensuring a recording is created. If a court reporter is detailed, he or she will provide the Government with a

complete recording as soon as possible after conclusion of the hearing. Use of the hardware and software approved for courts-martial is encouraged. The format of a produced transcript is contained in Appendix I.

1206. ENLISTED ADMINISTRATIVE SEPARATIONS

Administrative Separation hearings shall be recorded by the Recorder or support personnel assigned this duty. Use of the hardware and software approved for courts-martial is encouraged. A verbatim transcript of a hearing may be requested and approved pursuant to paragraph 1210.

1207. BOARDS OF INQUIRY

Boards of Inquiry shall be recorded by the Government or support personnel assigned this duty. If a transcript is required, the Post-Trial Office shall attempt to create one within 30 days after the hearing concludes. Use of the hardware and software used for courts-martial is encouraged. The format of any produced transcript is contained in Appendix I.

1208. SUMMARY COURTS-MARTIAL

A recording or a transcript is not normally required for a summary court-martial. A court reporter will not normally be detailed to a summary courts-martial, unless the LSSS or LSST OIC authorizes detailing for a particular case.

1209. SPECIAL OR GENERAL COURTS-MARTIAL

All sessions of a special or general court-martial shall be recorded, except for sessions closed for deliberations. The format of any produced transcript is contained in Appendix I.

1210. OTHER HEARINGS OR RECORDINGS

A request for transcription for any other hearing (deposition, investigation, etc.) or of a recording (NCIS videotaped interview, etc.) may be submitted to the Post-Trial Office using standard procedures established by the LSSS OIC. A court reporter may be detailed to the hearing at the discretion of the Regional, Post-Trial Office or the PTAO. Use of the hardware and software approved for courts-martial is encouraged. The format of any produced transcript shall be substantially similar to those contained in Appendix I. Practitioners are encouraged to submit requests for transcription at least 30 days before the transcript is needed.

1211. EXHIBIT HANDLING

121101. Original Exhibits

All original exhibits anticipated for use in a court-martial will be given to the detailed court reporter prior to trial. The use of an automated marking system is permitted. The court reporter will determine the marking of original exhibits.

121102. Marking

Exhibits will be marked in the lower right-hand margin. If marking in this area obscures evidentiary matters, the marking may be moved. Depictions of physical evidence will be marked and inserted in ROTs with the permission of the military judge and in accordance with circuit rules.

121103. Redaction

Section 0141a of the JAGMAN requires all counsel to omit PII from all dockets, filings, pleadings, court records, and exhibits that counsel intend to use at any court proceeding. Exhibits shall use a victim's initials, not name. If an un-redacted exhibit is used at trial, the Regional Post-Trial Office has the responsibility to ensure a Privacy Act compliant version is created prior to distribution.

VOLUME 16: CHAPTER 13

MILITARY JUSTICE DATA COLLECTION

SUMMARY OF SUBSTANTIVE CHANGES

Hyperlinks are denoted by *bold, italic, blue and underlined font*.

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CHAPTER VERSION	PAGE PARAGRAPH	SUMMARY OF SUBSTANTIVE CHANGES	DATE OF CHANGE

CHAPTER 13

MILITARY JUSTICE DATA COLLECTION

1301. PURPOSE

Accurate data collection and management is essential to the effective and fair administration of military justice. Additionally, military justice is routinely an area of intense congressional and public interest. As public servants, we have an obligation to answer congressional inquiries for statistical data concerning military justice. Article 140a, UCMJ, requires the Secretary of Defense to prescribe uniform standards and criteria for the conduct of each of the following functions at all stages of the military justice system, including retrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of Federal and State courts:

(1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system, and enhances the quality of periodic reviews under section 946 of this title (article 146).

(2) Case processing and management.

(3) Timely, efficient, and accurate production and distribution of records of trial within the military justice system.

(4) Facilitation of access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.

1302. DATA POINTS MANDATED BY THE SECRETARY OF DEFENSE

Article 140a, UCMJ, requires the Secretary of Defense to prescribe standards for information that is required to be collected in every military justice case. Military Justice practitioners must routinely update CMS entries to ensure the required data points are included in the case entry.

1303. ELECTRONIC CASE MANAGEMENT SYSTEM (CMS) ENTRIES

CMS refers to the applicable electronic case tracking system that is used to track military justice cases that require services from the LSSS. All significant pending actions and case developments must be properly documented. Cases will be tracked through completion of the appellate review process and will be created in CMS—regardless of the anticipated disposition—at the earlier of:

(1) Notification to the LSSS by a Military Criminal Investigative Organization (MCIO) or other law enforcement agency of any Special Victim Case defined in paragraph 5;

(2) Receipt of the request for legal services (RLS), or;

(3) Within 10 calendar days after the imposition of pretrial confinement.

The following documents will be uploaded into CMS as applicable:

(1) Case Analysis Memorandum (CAM);

(2) Signed victim preference letter;

(3) Preferred and referred charge sheet;

(4) Withdrawal/withdrawal and dismissal letter;

- (5) Plea agreement;
- (6) Report of Result of Trial/Statement of Trial Results;
- (7) Entry of Judgment;
- (8) Any notification made pursuant to chapter 14 of this order (criminal justice reporting, sex offender notification, etc.); and
- (9) Sexual Assault Disposition Report (SADR).

1304. SUPERVISION

Leaders at all levels will enforce the use of case management systems and oversee the accuracy, quality, and completeness of the information contained in the system. Senior Trial Counsel should review CMS entries at least once a week to ensure trial counsel and military justice clerks are making appropriate entries in cases and keeping any electronic CMS up to date. The RTC shall periodically review CMS entries to ensure this supervision is taking place. Completion of CMS entries is subject to inspection pursuant to Article 6, UCMJ, and the inspection procedures outlined in Volumes 1-2 of this order.

1305. REPORTS

130501. Quarterly Criminal Activity, Disciplinary Infractions and Courts-Martial Report (QCAR)

JAGINST 5800.9D sets forth the policy to collect and maintain accurate and timely statistical information reflecting trends in criminal activity and military justice processes necessary for the measurement of the efficiency of personnel and the effectiveness of discipline-related initiatives by the Department of the Navy. Marine Corps general court-martial convening authorities shall submit their QCAR reports quarterly to JMJ. Format for submission of the QCAR and further information is contained in JAGINST 5800.9D.

130502. Publication of Court-Martial Results

The Marine Corps publishes all general and special courts-martial results on a monthly basis. In coordination with COMSTRAT, the SJA to CMC will ensure accurate and timely publication of the data. On a monthly basis, each LSSS will submit the compiled summarized results from the previous month to MCICOM. The compiled summarized results shall be submitted no later than the 10th day of the following month.

130503. Article 146a, Uniform Code of Military Justice (UCMJ) annual report

Article 146a, UCMJ, requires the SJA to CMC to submit an annual report to the Secretary of Defense, Secretary of the Navy, and the House and Senate Armed Services Committees. The report must contain, among other requirements, data on the number and status of pending cases. The SJA to CMC obtains the information for this report from the designated electronic case management system. Therefore, it is vital that practitioners maintain and update cases in accordance with this volume.

130504. Victim Collateral Misconduct Report

Section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law No. 115-232) directs the Secretary of Defense to submit a biennial report to the congressional defense committees on the number of instances of collateral misconduct committed by alleged sexual assault victims. The SJA to CMC obtains the information for this report from the designated electronic case management system and submitted SADR forms. Therefore, it is vital that practitioners maintain and update cases in accordance with this volume.

VOLUME 16: CHAPTER 14

**CRIMINAL JUSTICE INFORMATION REPORTING, SEX OFFENDER NOTIFICATION, AND
CRIMINAL INDEXING**

SUMMARY OF SUBSTANTIVE CHANGES

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CHAPTER 14

**CRIMINAL JUSTICE INFORMATION REPORTING, SEX OFFENDER NOTIFICATION, AND
CRIMINAL INDEXING**

1401. PURPOSE

The purposes of this chapter are to: (1) ensure judge advocates are familiar with criminal justice information (CJI) reporting requirements; (2) provide policy and guidance to ensure sex offenders are notified of their requirement to register with a sex offender registry and that appropriate authorities are notified of convictions requiring sex offender registration; and (3) ensure required fingerprint and deoxyribonucleic acid (DNA) samples are forwarded for criminal indexing and inclusion in the combined DNA index system (CODIS).

CRIMINAL JUSTICE INFORMATION REPORTING

1402. BACKGROUND

140201. Situation

In 2017, the DoD Inspector General (IG) reported the services were not meeting requirements for collecting and forwarding criminal justice information to systems used by the FBI to prevent unlawful firearms transfers. The accurate and timely reporting of CJI is essential to facilitate identification of persons prohibited by law from purchasing or possessing firearms or ammunition. A Marine Corps Order on CJI is currently pending publication (as of 2020). This order, when published, supersedes any contrary guidance in this Volume.

140202. Overview of Process

A coordinated effort between Commanding Officers, their SJAs, LSSSs, and Law Enforcement Agencies (LEAs) is utilized throughout the investigative and disposition process to determine whether a service member is prohibited by law and regulation from possessing firearms or ammunition (hereinafter: prohibited person). Once a service member is identified as a prohibited person, coordination between the command and the appropriate LEA continues in order to ensure initial entry of CJI into appropriate law enforcement systems. Upon disposition of offenses, COs shall forward associated documentation to the appropriate LEA to ensure a complete record is provided to the FBI and information is accurately reflected in NICS. This chapter provides policy guidance for judge advocates on how to meet criminal justice information reporting obligations as set forth in statutes, DoD Instructions, Department of the Navy regulations, and Marine Corps Orders. This policy guidance is not intended to confer any additional rights, privileges, or benefits on any party or third person and does not supersede any specific Marine Corps Order on crime reporting.

1403. THE GUN CONTROL ACT OF 1968

140301. Legal Framework

The legal framework governing the impact of criminal justice information on possession of firearms and ammunition is found primarily in the Gun Control Act of 1968 (18 U.S.C. § 921 *et seq.*, as amended) (GCA). Several other statutory and regulatory sources both refine and inform the provisions of the GCA. Collectively, these sources promulgate various restrictions on the receipt, possession, transportation, shipment, and transfer of firearms and ammunition, and establish requirements for conducting background checks prior to certain firearms purchases. The precise terms used by the GCA are further defined in the Code of Federal Regulations (27 CFR § 478.11), published by the ATF to aid practitioners and the public in applying the provisions of the Act.

140302. Restrictions of 18 U.S.C. 922(g)

Under section 922(g) of the GCA, it is unlawful for a person to receive, possess, ship, or transport firearms or ammunition if that person:

1. Has been convicted of any offense punishable by more than one year of confinement, regardless of the amount of confinement actually awarded or imposed. This prohibition is often referred to as the “felony” prohibition, and includes convictions by general court-martial of any offense for which more than one year of confinement is authorized. The ATF currently interprets this provision to not include any conviction by special court-martial because that forum is jurisdictionally limited to one year or less confinement.
2. Is a fugitive from justice. This includes a person who has fled from any state to avoid prosecution, who leaves the state to avoid giving testimony in any criminal proceeding, or knows that charges have been preferred or are otherwise pending before any civilian or military court against such person and leaves the state of prosecution without proper authority.
3. Is an unlawful user of or addicted to any controlled substance. This includes a person determined, via a finding at an NJP, administrative separation proceeding, Summary Court-Martial, SPCM to have wrongfully used any controlled substance in violation of Article 112a, UCMJ. This provision results in a 12-month prohibition on weapons possession from the date of adjudication. Law enforcement agencies follow applicable federal regulations for NICS entries to determine whether unlawful use, possession, or distribution of controlled substances meet the requirements of this provision on a case by case basis. This provision does not apply to possession, distribution, or introduction of controlled substances, or use of otherwise legal substances that are not controlled substances, with the intent to stupefy the central nervous system, in violation of service regulations.
4. Is found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 76b of the UCMJ.
5. Has been discharged under dishonorable conditions. This provision is triggered by final discharge from military service, following completion of appellate review.
6. Is subject to a civilian restraining order. The order must have been issued by a civilian court following a hearing of which such person received actual notice, and at which such person had the opportunity to participate. The order must restrain that person from harassing, stalking, or threatening certain persons, and must include specific findings and restrictions on the person restrained.
7. Has been convicted in any court of a misdemeanor crime of domestic violence. The Lautenberg Amendment to the GCA added another prohibition to the receipt, possession, transfer, shipment, and transportation restrictions under 18 U.S.C. 922(g)(9) in cases where a person has a qualifying conviction for a misdemeanor crime of domestic violence. This prohibition applies regardless of the amount of punishment awarded, and includes all special court-martial convictions. DoDI 6400.06 extends this prohibition to general court-martial convictions, but excludes convictions by summary court-martial. A misdemeanor crime of domestic violence is a federal, state, or local offense that: (1) Is a misdemeanor under Federal or State law or, in states which do not classify offenses as misdemeanors, is an offense punishable by imprisonment for a term of one year or less; (2) Has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; and (3) Was committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim (two persons who are residing at the same location in an intimate relationship with the intent to make that place their home would be similarly situated to a spouse).

140303. Restrictions of 18 U.S.C. 922(n) – Persons Under Indictment

Section 922(n) of the GCA prohibits receipt, shipment, and transport of firearms and ammunition by persons under indictment for a crime punishable by more than one year of confinement. The term “under indictment” is defined under the CFR provisions published to include those military personnel who are the subject of charges that have been referred for trial by general court-martial. Service members under this restriction are not prohibited from continuing to possess firearms and ammunition already in their possession, but may not receive, ship, or transport them.

140304. Restrictions of 18 U.S.C. 922(d) – Transferring to Prohibited Persons

Section 922(d) of the GCA makes it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is prohibited to receive or possess a firearm or ammunition.

140305. Government Use Exception

While the GCA imposes significant criminal penalties for unlawful receipt, possession, transportation, shipment, and transfers, section 925 of the Act provides exceptions to most prohibitions in cases where firearms are issued or used for government use. COs may issue government weapons and ammunition for government use (e.g., rifle qualification) to service members who are prohibited persons. However, there are no such exceptions for personally-owned firearms, nor is there any exception under the Act for government use where an individual has a conviction for a misdemeanor crime of domestic violence under section 922(g)(9).

1404. THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS)

The holder of a Federal Firearms License (FFL) must contact NICS by telephone or other electronic means to determine whether the transfer of a firearm would violate either state law or section 922(d), (g), or (n) of the GCA. When an FFL initiates a NICS background check, a name and descriptor search is conducted to identify any matching records in three nationally held databases managed by the FBI’s Criminal Justice Information Services (CJIS) Division: the Interstate Identification Index (III), the National Crime Information Center (NCIC), and the NICS indices.

1405. ROLES AND RESPONSIBILITIES FOR CRIMINAL JUSTICE REPORTING

All roles and responsibilities for criminal justice reporting will be established by Marine Corps Order. Until such an order is published, follow the guidance contained in MCBUL 5810. To assist commanders and law enforcement personnel in complying with their responsibilities, LSSS OICs must:

- A. At any phase of the court-martial process, ensure trial counsel forward any documents supporting a determination that a Service Member is a prohibited person to the servicing LEA.
- B. At the conclusion of any court-martial, ensure a copy of the statement of trial results and entry of judgement is forwarded to the servicing LEA to facilitate completion of CJI reporting requirements.
- C. Ensure that information submitted to the servicing LEA for NICS entries is documented in the record of trial, in accordance with JAG/CNLSCINST 5814.1D (Post-trial Processing).

SEX OFFENDER NOTIFICATION

1406. GENERAL PROVISION

These paragraphs implement instructions from the Department of Defense and Secretary of the Navy that require military officials to notify state officials upon release or transfer of unconfined service members who are convicted at SPCM or GCM of sexual offenses and offenses against minor children. Service members convicted of either offenses set forth in appendix 4 to Enclosure 2 of DoDI 1325.07 or of a civilian offense that requires sex offender registration are referred to as “military sexual offenders” (MSO) in these paragraphs. MSOs must register with the applicable authorities in the jurisdiction where they reside. Failing to do so is a criminal offense.

1407. COVERED OFFENSES

Appendix 4 to Enclosure 2 of DoDI 1325.07 lists all UCMJ offenses that trigger sex offender notification requirements. Since sex offender registration requirements vary by state, a member convicted of an offense that does not trigger sex offender notification requirements under DoDI 1325.07 may still be required to register as a sex offender under state law. Note also SECNAVINST 5800.14A currently contains a list of covered offenses that is out of date and more narrow than the list contained in DoDI 1325.07. If there is any conflict, the DoDI controls.

140701. Civilian or Foreign Offenses

If a service member, DoD contractor, or DoD civilian is convicted by state or federal civilian court or a foreign government of a sex offense equivalent or closely analogous to a covered offense, that individual is also an MSO and must submit to registration requirements. If the conviction is of a state offense, the state handles notification and registration requirements in accordance with the laws of that state. If the conviction is of a foreign offense, upon release from the authority of the host nation, the commanding officer, in consultation with the SJA, must ensure the MSO completes a DD Form 2791, *Notice of Release/Acknowledgement of Convicted Sex Offender Registration Requirements*. Copies of the DD Form 2791 and any records of the foreign conviction shall be distributed in the same manner described in paragraph 140803 of this chapter.

140702. Non-Reportable Offenses

Notwithstanding the fact that an offense is listed as a covered offense in DoDI 1325.07, paragraph 6 of the instruction lists situations where that offense is nonetheless not a covered offense in certain situations involving consensual conduct. See DoDI 1325.07 for further details.

1408. NOTIFICATION PROCEDURES

140801. Documentation of Qualifying Offense Conviction

Section 0149 of the JAGMAN requires all crime reporting information, including conviction of a qualifying sex offense, to be included on the statement of trial results and entry of judgment forms signed by the military judge. The court reporter must upload both forms to the electronic case management system. For cases referred to trial prior to 1 January 2019, the report of results of trial and court-martial order must document the qualifying conviction.

140802. Military Sexual Offender in Post-Trial Confinement

If a conviction for a qualifying offense includes post-trial confinement, the trial counsel will provide a copy of the statement of trial results (or report of results of trial) to the confinement facility and NCIS or the responsible MCIO. Confinement officials, or the designee responsible for custody of the inmate, ensure compliance with federal and state laws with regards to sex offender registration and notifications to civilian agencies in accordance with department and service regulations.

140803. No Post-Trial Confinement in Service Operated Confinement Facility

If a conviction for a qualifying offense does not include post-trial confinement (or pretrial or other confinement credit completely offsets any awarded confinement) in a service operated confinement facility, the commander of the accused is ultimately responsible for ensuring the accused completes the DD Form 2791 and appropriate notifications are made. See DoDI 5525.20 and SECNAVINST 5800.14A. To facilitate this, detailed trial counsel shall assist commanders with fulfilling their responsibility. To avoid confusion after trial, the following procedures will apply:

A. After conviction of a qualifying offense, as documented on the Statement of Trial Results, the trial counsel will provide a copy of the STR to the MSO's commander and NCIS or the responsible MCIO, notifying both that completion of a DD Form 2791 is required. The commander of the MSO must ensure the MSO completes and signs a DD Form 2791. The commander may route the request through the defense counsel or allow the defense counsel to be present when the MSO completes the DD 2791. However, completing the DD 2791 should not be unreasonably delayed. The commander shall order the MSO to complete and sign the form within a reasonable amount of time after the military judge signs the Statement of Trial Results indicating conviction of a qualifying offense. Failure of the commander to notify the MSO of their registration requirements or an MSO's refusal to sign the DD 2791 does not relieve an MSO of their duty to register with state and local authorities.

B. After the accused signs the DD Form 2791, the commander will distribute copies along with the Statement of Trial Results as follows:

- (1) the MSO;
- (2) IPAC or personnel section, for inclusion in the MSO's Official Military Personnel File (OMPF);
- (3) NCIS or the responsible MCIO;
- (4) the installation commander where the MSO is stationed or resides, via the installation provost marshal; and
- (5) the nearest military confinement facility.

C. Pursuant to SECNAVINST 5800.14A, NCIS is then required to make all required notifications to civilian law enforcement agencies, jurisdictions, and to the Department of Justice's Sex-Offender Registration Exchange Portal as required by that instruction and DoDI 5525.20.

1409. REMOVAL FROM SEX OFFENDER REGISTRIES

A military sexual offender whose conviction for covered offenses is reversed on appeal or otherwise set aside is not subject to any requirements applicable to sexual offenders imposed by military regulations, even if retrial is pending. Removal from civilian sex offender registries is the service member's responsibility, and is done in accordance with state laws applicable to that jurisdiction.

CRIMINAL INDEXING

1410. GENERAL PROVISIONS FOR FINGERPRINT COLLECTION

141001. DoDI 5505.11

DoDI 5505.11 prescribes procedures for defense criminal investigative organizations (DCIOs) and other DoD law enforcement activities (LEAs) to submit fingerprints and report disposition data to the Criminal Justice Information Services (CJIS) Division of the FBI criminal history database. The instruction is pending revision. If anything in this chapter conflicts with DoDI 5505.11, that instruction controls.

141002. Policy

DCIOs and other Marine Corps law enforcement agencies will collect fingerprints and offender criminal history data upon determination of probable cause, and will electronically submit to the CJIS division of the FBI for all:

1. Service members who are investigated for all offenses punishable by imprisonment listed in the punitive articles of the MCM or the U.S.C.
2. Civilians investigated for offenses equivalent to those listed in the punitive articles of the MCM or U.S.C. offenses punishable by imprisonment. This includes foreign nationals, persons serving with or accompanying the Military Services in the field in time of declared war or contingency operations, and persons subject to Chapter 212 of Title 18, U.S.C., also known as the “Military Extraterritorial Jurisdiction Act of 2000.”
3. Military service members, their dependents, and DoD employees and contractors investigated by foreign law enforcement organizations for offenses punishable by imprisonment equivalent to those listed in the punitive articles of the MCM or U.S.C., if available to the DCIO or other DoD LEA.

Juveniles may only be fingerprinted in accordance with Section 5038 of Title 18, U.S.C.

141003. Qualifying Offenses

Enclosure (2) of DoDI 5505.11 lists all qualifying offenses.

141004. Procedures

DoDI 5505.11 prescribes procedures for defense criminal investigative organizations (DCIOs) and other DoD law enforcement activities (LEAs) to submit fingerprints and report disposition data on criminal justice information. Additionally, a Marine Corps Order on criminal justice information will contain additional procedures for law enforcement agencies to collect fingerprints.

DNA COLLECTION AND INDEXING**1411. PURPOSE**

The purposes for DNA collection are similar to those for taking fingerprints. They include making positive identification and providing or generating evidence to solve crimes through database searches of potentially matching samples.

1412. GOVERNING STATUTE AND REGULATIONS

10 U.S.C. § 1565 requires the services to collect DNA samples from each member of the armed forces who has been convicted of a qualifying military offense, and to forward those samples to the FBI for inclusion in the combined DNA Index System (CODIS). The Department of Defense implemented that statute and provided additional policy guidance in DoDI 5505.14 w/CH 1, March 9, 2017.

1413. PROGRAM MANAGEMENT

The Director, Defense Forensic Science Center, serves as the CODIS program manager for DoD. The U.S. Army Criminal Investigations Laboratory (USACIL) is responsible for conducting DNA analyses and submitting the results to the FBI for entry into CODIS. Under the DoDI, USACIL is responsible for developing a DNA collection kit, which will include a notice of general expungement rights. Navy and Marine Corps law enforcement agencies collect and ship DNA samples to USACIL.

1414. QUALIFYING OFFENSES

Enclosure (3) of DoDI 5505.14 lists all qualifying offenses for which DNA collection is required.

1415. PROBABLE CAUSE REQUIREMENT

Marine Corps law enforcement agencies shall collect DNA samples from subjects when probable cause exists to believe that the person has committed a qualifying offense. If a command investigation reveals probable cause, the command and SJA must coordinate with the applicable law enforcement agency to collect a DNA sample, but need not do so if charges are not likely to be adjudicated at a special or general court-martial. A law enforcement agent may collect a DNA sample anytime the agent believes probable cause exists. However, before forwarding a sample to USACIL for inclusion in CODIS, the law enforcement agent must consult with a judge advocate to make the probable cause determination and document that coordination in the law enforcement investigative file. The judge advocate consulted should normally be the SJA for the convening authority. If the SJA is not available, the law enforcement agent may consult with the installation SJA.

1416. TIMING OF SUBMISSION

Enclosure (4) of DoDI 5505.14 lists the situations when law enforcement agents collect DNA samples and expeditiously forward them to USACIL.

1417. DOCUMENTATION OF DNA COLLECTION

Whether DNA processing is required will be indicated on the Statement of Trial Results and Entry of Judgment forms. Because law enforcement agents may forward DNA samples to USACIL at various times during the investigation and prosecution of a case, the trial counsel and SJA must ensure that Statement of Trial Results and Entry of Judgment forms are sent to law enforcement case agents to ensure that DNA is handled appropriately. If a law enforcement agency investigated a qualifying offense that was not referred to special or general court-martial, the SJA will ensure final disposition documentation is forwarded to the law enforcement agency (e.g., decision not to refer certain offenses to trial, NJP records, notification of administrative separation, separation in lieu of trial, or approval of a request for resignation or retirement in lieu of trial).

1418. EXPUNGEMENT PROCEDURES

If a DNA sample was sent for inclusion in CODIS, but the qualifying offenses were resolved in a manner that did not result in any convictions at special or general court-martial, the service member may request expungement of their DNA from CODIS through the procedures outlined in DoDI 5505.14. Service members must send a written request for expungement to their first commanding officer in the grade of O-4 (major or lieutenant commander) or higher. Written requests should normally include proof that all qualifying offenses were disposed in a manner that did not result in a conviction at special or general court-martial. However, service members will not always have access to the necessary documents to show final disposition and a lack of a conviction, such as when law enforcement closed an investigation and a SA-IDA decided not to send any charges to a court-martial. Therefore, commanders in receipt of an expungement request must consult with their SJA to determine if expungement is warranted and if the command, the SJA, or the TSO possesses relevant documents showing expungement is warranted. If, after consultation with the SJA, the commander determines that expungement is not warranted, the commander must notify the service member in writing, and provide a copy of the denial to NCIS or the appropriate MCIO. If expungement is warranted, the commander will forward the request to NCIS or the other law enforcement agency who forwarded the sample to USACIL. The responsible law enforcement agent will forward the request to USACIL as outlined in DoDI 5505.14.

VOLUME 16: CHAPTER 15

COURTROOM SECURITY

SUMMARY OF SUBSTANTIVE CHANGES

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CHAPTER 15

COURTROOM SECURITY

1501. PURPOSE

To promulgate security policies and procedures for Marine Corps courthouses, courtrooms, and legal offices. LSSS OICs are responsible for courtroom security and may create internal policies, procedures, or additional security measures consistent with the recommendations within this chapter.

1502. APPLICABILITY

This chapter applies to all certified LSSS courthouses and courtrooms and designated temporary courtrooms. When it becomes necessary to hold military justice proceedings in non-LSSS courtrooms, in deployed environments for example, the cognizant SJA of the convening authority for the proceedings shall ensure a risk assessment of the facilities and proceedings is completed, and shall ensure the principles of this chapter are followed to the greatest extent practicable. Nothing in this chapter limits the authority of a military judge to exercise control over proceedings during a court-martial or to alter the guidelines under this chapter as required for an individual proceeding.

1503. NEED FOR SECURITY IN LEGAL BUILDINGS

An effective courthouse security program is essential for the proper administration of military justice. Open public access for military justice proceedings requires a secure environment in which all who attend courtroom proceedings are safe and free from physical harm and intimidation. More than any other place on an installation, the courthouse poses a significant risk of violence. The inherently adversarial, often dramatic, process of a trial brings together people from all sides of an intense and emotional issue. The courtroom security threat spans facilities and personnel resources and implicates each installation commander's physical security obligations. Yet trials are also public hearings that do not fit squarely into the "restricted area" framework normally used to ensure security on installations. Therefore, courtroom security measures in this chapter address deterrence, detection, and limitation of risk. Most importantly, the purpose of this chapter is to identify potentially violent situations and remove the opportunity for violence, especially violence with a weapon.

1504. DEFINITIONS

150401. Courthouse

A building or a designated and secured portion of a building that is designed or used to convene military justice proceedings. A courthouse may include the external areas, such as parking lots in the immediate vicinity of the building and the combined internal space of a building, including, but not limited to courtroom(s); judicial chambers; witness, member, and spectator spaces; trial, defense, VLC, court reporter, and other legal office spaces located in the same building.

150402. Courtroom

A room primarily used to convene military justice proceedings, as further defined and classified below.

A. Permanent Courtroom: A space under the control of the designated LSSS OIC, primarily used to conduct military justice proceedings and inspected on a regular basis under the authority outlined in Volume 2 of this Order.

B. Temporary Courtroom: A room not under the control of the LSSS OIC, not originally or necessarily designed for military justice proceedings, but utilized to convene military justice proceedings while the permanent courthouse or courtroom is undergoing renovations or facility updates, or courtrooms used in a deployed setting. Temporary courtrooms utilized for less than six months do not need to meet all the requirements of this

chapter, such as the installation of duress alarms, but LSSS OIC's, SJAs, and commanders should consider using the principles of this chapter to the greatest extent possible under the circumstances to ensure the safety of all participants.

150403. Military Justice Proceeding

Any pre-trial, trial, or post-trial session or proceeding of a special or general courts-martial, including all Article 30a and 39a sessions, and all preliminary hearings directed under Article 32. A military justice proceeding does not include Article 802 conferences, summary courts-martial, NJP hearings, administrative separation boards, or boards of inquiry, which may be held in courtrooms and with enhanced security procedures, as space allows or when doing so is advisable based on the perceived security risk of the hearing.

150404. Courthouse Security Officer

The person designated in writing by the LSSS OIC to implement the requirements of this chapter and the person primarily responsible for overseeing the daily implementation of facility physical security measures within the respective area of responsibility (AOR). They are also responsible to ensure that LSSS security personnel are trained in security measures, such as the use of metal detectors, personnel searches, and the use of non-lethal force.

150405. Trial Security Officer

The person assigned overall security responsibility for a high or medium risk military justice proceeding. The primary and only duty of a person assigned as the trial security officer is maintaining security of the courthouse and courtroom for the duration of the military justice proceeding. The trial security officer supervises and provides guidance to courtroom security personnel, personnel manning the entry control point, the bailiff, and command chasers, if applicable.

1505. RISK ASSESSMENT PROCESS

The risk assessment process ensures appropriate security measures are in place for any military justice proceeding and optimizes manpower and security resources. Every military justice proceeding will be assessed a risk level of high, medium, or low risk. Proceedings assessed as medium or high risk require additional security measures.

150501. Risk Assessment Factors

The following non-exclusive factors are meant to serve as a guide in evaluating the relative risk associated with a particular military justice proceeding:

- (1) The nature of the underlying crime associated with the proceeding;
- (2) The presence of the accused, alleged victim, witnesses, and family members at the proceeding;
- (3) The mental, physical, and criminal history, if known, of the accused, victim, witnesses, family members, or other parties with a direct or indirect interest in the proceedings;
- (4) Any recommendation from the accused's or victim's chain of command, or request from a victim, victim advocate, or VLC regarding the security risk of the proceedings;
- (5) The level of expected media interest;
- (6) The level of expected community impact or interest;
- (7) The location of the proceeding, for example if the proceeding is held in a foreign country, where U.S. personnel normally do not have unrestricted access to personal firearms; and

(8) Any other relevant facts or circumstances that would assist in assessing the risk of a particular proceedings.

150502. Low Risk Proceedings

A low risk military justice proceeding is a proceeding in which the potential for violence or other types of disruption in and around the courthouse is assessed as unlikely. An assessment of low risk means a violent or disruptive act is not reasonably anticipated, not that one will never occur. Low risk proceedings still require vigilance to the possibility of violence or other disruptions during the proceedings. Using the above criteria, a large portion of military justice proceedings will be assessed as low risk. For illustrative purposes only, a guilty plea at a special court-martial for a non-violent offense – where the only sentencing witness is a character witness for the accused – would likely be assessed as a low risk proceeding.

150503. Medium Risk Proceedings

A medium risk military justice proceeding is a proceeding in which the potential for violence or other types of disruption in and around the courthouse is assessed as possible and merits the implementation of additional security measures. Any proceeding in which an alleged victim or victim's family member or designee will be physically present at the same location as the accused should be assessed as medium risk, at a minimum.

150504. High Risk Proceedings

A high risk proceeding is a procedure in which the potential for violence or other types of disruption in and around the courthouse is assessed as foreseeable, or the emotional nature of the proceeding merits additional security measures. For illustrative purposes only, a contested general court-martial for the alleged rape of a child, with the alleged victim, victim's family, and media present during the proceeding would likely be assessed as high risk.

150505. Risk Assessment Form

At least 48 hours before a scheduled military justice proceeding, the courthouse security officer shall ensure that a risk assessment for the proceeding is conducted using the military justice proceeding risk assessment form available through the "FORMS" tab on the Judge Advocate Division (JAD) public website at <https://www.hqmc.marines.mil/sja/JAD-Forms/>. The courthouse security officer will likely need to obtain some information about the case from the trial counsel, but the responsibility for ensuring the form is completed rests with the courthouse security officer. Risk assessment forms may be maintained on file at the LSSS for low risk proceedings. For medium and high risk proceedings, the LSSS OIC may consider whether additional notification is required to: counsel detailed to the proceeding and the VLC, if applicable; the military judge for the proceeding; the commanding officer of the accused (via the S-1 and executive officer); the installation Provost Marshal's Office; or, any other individuals or entities to facilitate safety during the hearing.

1506. ADDITIONAL SECURITY MEASURES FOR MEDIUM AND HIGH RISK PROCEEDINGS

150601. Additional Security for Medium Risk Proceedings

The following security measures shall normally be used for all medium risk proceedings:

(1) *Courthouse Access.* Visitors to LSSS or LSST facilities should not normally have uncontrolled direct access to workspaces, personnel, and courtrooms. If not already established as a part of the minimum physical security requirements, a designated entry control point (ECP) shall be used for entering a courthouse. A public ECP shall be used as the main point of entry to a courthouse. The public ECP should be positioned at the main entrance of the building and allow for smooth flow of foot traffic through the metal detection area. Witnesses, spectators, the accused, members, command representatives, and all other personnel not assigned to the LSSS must enter the building through the public ECP. All persons entering through the public ECP, with the exception of identified law enforcement personnel, shall be screened in accordance with this instruction. The public ECP shall be staffed by a minimum of two appropriately trained personnel through the conclusion of the proceeding

and until all personnel associated with the proceeding not assigned to the LSSS have departed the courthouse. Personnel assigned to staff the public ECP shall not be tasked with any other duties while manning the ECP. A restricted ECP may be used by counsel, the military judge, law enforcement, and other LSSS staff to enter the courthouse. Access through the restricted ECP must be controlled through cipher lock, swipe card, or other means that prevent uncontrolled access.

(2) *Courthouse Inspection.* The trial security officer shall ensure a security inspection of the courthouse and courtroom is conducted prior to opening the courthouse to visitors for the day. If visitors are already present in the building when the ECP is established, the visitors shall leave the building and reenter through the ECP. The security inspection should not inspect judge's chambers, areas containing privileged information such as defense counsel offices, or any controlled spaces not accessible by members of the public. Personnel in control of those spaces should be reminded to look for any unusual or out of place items within their spaces. During the security inspection, the trial security officer should walk through common areas such as the courtroom, witness waiting rooms, heads, and any other rooms in the courthouse that are unlocked and uncontrolled to inspect for any dangerous or prohibited items or any unsecured entry points, such as an open or unlocked window. Additional and random inspections of common areas should be conducted by the trial security officer and courthouse security officer throughout the duration of the proceeding, or as deemed warranted by the circumstances.

(3) *Placards.* Placards shall be prominently displayed at the ECP notifying all personnel they are subject to search at all times. Those not consenting to a search will not be permitted entry. Placards shall also list prohibited items. Those found to possess such items while in the courthouse may be subject to disciplinary action, removal from the courthouse, or both.

(4) *Visitor Logbook.* A visitors log shall be maintained at the entry control point. All adults who enter through the public ECP shall present photo identification and shall be entered into the visitor logbook. Children accompanied by an adult need not present identification or be logged into the logbook, but do need to pass through a metal detection device, if required. The visitor logbook shall contain the date and time the visitor entered and departed the courthouse, the hearing attended, the name of the visitor, whether the visitor is required to be escorted in the building, and the visitor badge number, if applicable. Local LSSS or LSST OIC's shall determine the circumstances under which visitors are or are not required to be escorted, taking into account the missions and functions of the office, as well as the risk assessment of individual military justice proceedings, and the role of the visitor. To protect the privacy of those seeking DSO, legal assistance, or VLC services, if DSO, legal assistance, or VLC offices are co-located inside a courthouse, the LSSS or LSST OIC may develop local procedures to facilitate visitors to those offices signing a visitor logbook maintained by those offices, provided the visitor passes through a metal detection device at the ECP and proceeds directly to those offices. The contents of any visitor logbook shall be locally maintained for two years and shall not be entered into any information technology system. DSO, legal assistance, or VLC visitor logbooks shall be maintained in accordance with the policies of those organizations.

(5) *Metal Detection Device.* Properly calibrated walk-through metal detectors shall be installed at the public ECP to the courthouse. All personnel, with the exception of identified law enforcement personnel, shall be required to pass through the walk-through metal detectors, and screened, as necessary, with properly tested hand-held metal detectors before entering the courthouse. For persons with disabilities in assisted walking devices (wheelchair, motorized wheelchair, etc.), if sufficient space next to the walk-through metal detector permits passage of an assisted walking device, the individual should bypass the walk-through metal detector and be screened with a hand-held metal detector. If there is insufficient space adjacent to the walk-through metal detector, an American Disabilities Act-compliant metal detector should be used.

(6) *Duress Alarms.* At a minimum, duress alarms capable of notifying base security shall be installed at or near the entry control point, at the judge's bench in the courtroom, and in the judge's chambers. Duress alarms should also be installed in the defense, TSO, and VLC offices, if required by inspection checklists promulgated under the authority outlined in Volume 2 of this Order. Duress alarms shall provide a visual alert to personnel within the courthouse facility and be supplemented with an audio system capable of alerting personnel within the courthouse to the nature of the alarm and to direct personnel movement within the courthouse as necessary to respond to the alarm. Duress alarms may also include an audible alarm to augment the visual alarm. Ideally, duress alarms should directly alert law enforcement without the need for additional LSSS intervention after

the alarm is activated. Where installed duress alarms do not directly alert local law enforcement, local LSSS procedures shall include procedures to ensure local law enforcement is immediately notified of the courthouse emergency. The courthouse security officer should test all duress alarms at least monthly.

(7) *Surveillance Systems.* A video surveillance system linked to a centralized monitoring area shall be used to monitor internal and external courthouse facility spaces, not including counsel offices, judge's chambers, members' deliberation rooms, heads, and changing areas. Placards should be prominently displayed near external areas notifying personnel the area is under video monitoring surveillance. Video surveillance monitoring the interior of a courtroom shall be capable of being disabled so as not to monitor closed sessions of court. Ideally, the judge's bench or court reporter table would contain a mechanism to disable any surveillance system anytime the judge closed a session of court.

(8) *Courtroom Security Officer.* At least one courtroom security officer capable of deterring, detecting and defeating threats directed towards the presiding military judge and personnel within the courtroom shall be present for all medium risk military justice proceedings. The courtroom security officer shall be briefed on their responsibilities by the trial security officer before assuming their duties. The bailiff or command chasers, if present, may serve as the courtroom security officer for medium risk proceedings. Courtroom security officers and command chasers are subordinate to the military judge, who is responsible for protecting the right of the accused to a fair trial. The mere presence of security measures, such as restraints, may indicate to a member the person is dangerous. Notwithstanding these concerns, the military judge exercises authority under R.C.M. 801 & 804 to restrain the accused as appropriate in the event the accused exhibits a threat to safety in the courthouse.

150602. Additional Security for High Risk Proceedings

Any high risk proceeding will normally contain all the security measures applicable to medium risk proceedings, with the following additions and modifications:

(1) *Courthouse Access.* The designated public ECP shall be used by all personnel. All other entry points to the courthouse shall be secured. A restricted ECP may be used by the military judge and members of the trial judiciary, so long as the restricted ECP is controlled by cipher lock, swipe card, or some other means which restricts use of the ECP to only those authorized personnel. For high risk proceedings, the courthouse security officer shall request PMO to provide an armed MP to assist in responding to emergencies in the courthouse as needed.

(2) *Visitor Badges.* In addition to the visitor logbook, each visitor entering the courthouse will be issued a visitor badge. Visitor badges shall be prominently displayed by visitors at all times. Visitors without proper identification badges may be required to leave the courthouse.

(3) *Courtroom Security Officer.* At least two courtroom security officers capable of deterring, detecting and defeating threats directed towards the presiding military judge and personnel within the courtroom shall be present for all high risk proceedings. One of the courtroom security officers may also serve as a bailiff or chaser, if applicable. But at least one security officer must have no other duties except maintaining awareness over courtroom security and conducting secondary screening of those who enter the courtroom.

(4) *Secondary Screening.* One of the courtroom security officers shall be positioned outside the courtroom. The security officer shall ensure anyone attempting to enter the courtroom is either LSSS staff or has a visitors badge issued by the ECP. This screening may be omitted if the public ECP to the courthouse is situated in plain sight of the courtroom entrance, such that anyone who enters the courthouse proceeds directly to the courtroom.

(5) *Movement Plans.* Some high risk proceedings may involve threats to witnesses, court personnel, or spectators. In those circumstances, the security plan should contemplate and provide guidance on secure access and movement within the building for the threatened parties; including, where appropriate, secure transportation to and from the proceedings.

1507. COURTHOUSE DESIGN GUIDELINES

Court design guides for U.S. Federal District courts provide optimal security guidelines. Although those security requirements envision a stand-alone federal courthouse manned with fully trained security staff, and implementation of these requirements is impossible without massive funding increases, they can provide a framework to guide future courthouse design and renovation. Additionally, JAGINST 5530.2 lists courthouse design guidelines for Navy courthouses and courtrooms. Marine courthouses and courtrooms should be designed in accordance with these design guidelines to the greatest extent possible.

150701. Firearms in Courthouses

Per SECNAVINST 5430.107A, NCIS special agents are authorized to carry NCIS-approved firearms at all times, while on or off duty, and while on and off installations, aircraft, and ships. NCIS special agents are required to carry NCIS-approved firearms while on official business. Accordingly, properly credentialed NCIS special agents or other properly credentialed law enforcement agents are permitted access to LSSSs, LSSTs, and courthouses while carrying agency-approved firearms on official business. Properly credentialed law enforcement agents may be armed in military courtrooms as long as the weapon is concealed and the presiding judge is notified and approves, or if exigent circumstances exist.

1508. ROLES AND RESPONSIBILITIES

150801. Legal Services Support Sections (LSSS) or Legal Services Support Teams (LSSTs) Officer-In-Charge (OIC)

- A. Serve as the officer primarily responsible for security of LSSS or LSST courthouses and courtrooms within their respective AOR.
- B. Develop standard operating procedures to ensure training of personnel to implement a courthouse security program in accordance with this Chapter.
- C. Designate a courthouse security officer in writing responsible for implementing this chapter. Notify the cognizant Circuit Military judge and local judiciary.
- D. Ensure the courthouse security officer completes a risk assessment for every military justice proceeding.
- E. Assign, or ensure the designated courthouse security officer assigns, a trial security officer for every medium and high risk proceeding.
- F. Coordinate with the installation commander to ensure a punitive general order prohibits bringing prohibited items into a courthouse.
- G. Coordinate with the installation Provost Marshal if necessary to arrange for support for high risk military justice proceedings consistent with this chapter.

150802. Courthouse Security Officer

- A. Serve as the person primarily responsible for overseeing the daily implementation of security measures established by the LSSS or LSST OIC.
- B. Document that training was provided to all personnel serving as the trial security officer for a proceeding, courtroom security personnel, and ECP personnel.
- C. Maintain records of security system and duress alarm checks.

D. Ensure a risk assessment form is completed for every military justice proceeding. Obtain any unknown information related to a proceeding from the trial counsel or other detailed counsel. Maintain a record of all risk assessments.

E. For every medium and high risk proceeding, ensure additional security measures are implemented in accordance with this Chapter.

F. For high risk proceedings, ensure PMO is notified of the hearing either in-person or telephonically, and MP assistance is requested.

150803. Trial Security Officer

A. Serve as the person primarily responsible for overseeing the security of a given military justice proceeding. Brief the personnel manning the ECP, the bailiff, command chasers, and courtroom security personnel on their required duties and provide supervision as required.

B. Conduct security inspections of the courthouse and courtroom as required by this Chapter.

150804. Trial Counsel

A. Inform the courthouse security officer of any scheduled military justice proceedings. Provide information about the proceeding required to allow the courthouse security officer to complete the risk assessment form, such as the nature of the proceeding, witnesses expected to testify, and history of violence of anyone participating in the proceeding.

B. Inform the courthouse security officer of any security concerns raised by the military judge.

150805. Installation Provost Marshal's Office

A. Upon request, coordinate with the courthouse security officer to ensure security support for all proceedings consistent with the Marine Corps Law Enforcement Manual, MCO 5580.2B CH 2.

B. For high risk proceedings, consider providing at least one armed military police officer to be present at the courthouse. The Provost Marshal or designee shall determine how to best employ the military police in support of the trial. Military police officers should not be employed inside the courtroom without prior approval from the military judge, absent exigent circumstances.

150806. Special Court-Martial Convening Authority for the accused

A. Ensure the unit informs the trial counsel of any recent changes to the accused that could impact the security assessment of a proceeding. Examples include: recent violent or angry outbursts; threats of violence; a change in behavior; recent hospitalizations; treatment for mental health or substance abuse issues; or recent suicidal ideations.

B. Provide chasers and a bailiff for proceedings, if required.

C. For high risk proceedings, provide two additional personnel to serve as courtroom security officers or to work at the ECP for the trial.

D. Coordinate with the LSSS OIC to provide additional support for proceedings as required.

VOLUME 16: CHAPTER 16

PRETRIAL AGREEMENTS AND PLEA AGREEMENTS

SUMMARY OF SUBSTANTIVE CHANGES

Hyperlinks are denoted by *bold, italic, blue and underlined font*.

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CHAPTER VERSION	PAGE PARAGRAPH	SUMMARY OF SUBSTANTIVE CHANGES	DATE OF CHANGE

CHAPTER 16

PLEA AGREEMENTS

1601. PLEA AGREEMENTS AND PRETRIAL AGREEMENTS

The term “pretrial agreement” refers to the legal framework prior to the Military Justice Act of 2016 which took effect on 1 January 2019. The term “plea agreement” refers to the current legal framework. Pretrial agreements and plea agreements have different sets of permissible terms and procedures. Practitioners must apply the correct framework to a particular case as outlined in this chapter, the UCMJ, and the Rules for Courts-Martial. See R.C.M. 705 and JAGMAN section 0137 for additional guidance on plea agreements, and section 0126 for special consideration on plea agreements in national security cases.

160101. Pretrial Agreements

Permissible terms of pretrial agreements are governed by Article 60, UCMJ, R.C.M. 705 and R.C.M. 910, along with relevant case law. Pretrial agreements apply to cases where any of the charged offenses occurred prior to 1 January 2019, regardless of when the case was referred to trial. However, in cases with offenses occurring both before and after 1 January 2019 (straddling cases) an accused may elect to opt in to the new procedures and enter into a plea agreement.

160102. Plea Agreements

Plea agreements are governed by the versions of Article 53a, UCMJ, R.C.M. 705 and R.C.M. 910 that are in effect on 1 January 2019, and relevant case law. Plea agreements apply to cases where all of the charged offenses occurred on or after 1 January 2019, and to cases with offenses occurring both before 1 January 2019 and on or after 1 January 2019 (straddling cases) if the accused opts in to the Military Justice Act framework as described above. Note that if all offenses occurred before 1 January 2019, then an accused may not enter into a plea agreement, regardless of the date the charges were referred to courts-martial.

160103. Straddling Offenses

Straddling offenses refer to cases where offenses in the same case occurred both before and after 1 January 2019. In those cases, the following options are available: (1) as described above, the accused may elect to opt into the current framework for all offenses and enter into a plea agreement. If the accused does not opt in, then the parties may not enter into a plea agreement for all charges; (2) The parties may negotiate for the case to be severed and have the convening authority refer the charges to two different proceedings (one applying the pretrial agreement framework and one applying the plea agreement framework); or (3) the parties may enter into a pretrial agreement for all offenses. Option (3) is the least preferred method and should be used with caution. Each term of the pretrial agreement must be carefully considered to avoid scenarios where the convening authority is unable to take action on a sentence to make it conform to the terms of a pretrial agreement.

1602. CONSULTATION BEFORE ENTERING INTO AGREEMENTS

Convening authorities should consult with the SJA and/or trial counsel before acting on an offer to enter into a plea agreement. Some of the factors to be considered when entering into a plea agreement are listed in the Non-Binding Disposition Guidance, Appendix 2.1, MCM. Pursuant to R.C.M. 705(e)(3)(B), convening authorities must provide a victim an opportunity to provide input on a proposed plea agreement. See paragraph 040404. If the victim chooses to provide input, then the convening authority must consider the input. A victim, under this provision, is defined as “an individual who is alleged to have suffered direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under considerations.”

1603. USE OF MODEL PLEA AGREEMENT

To the greatest extent possible, military justice practitioners should use language from model plea agreements, as referenced by the Navy-Marine Corps Trial Judiciary. Approved model plea agreement terms are usually available at http://www.jag.navy.mil/trial_judiciary.htm. Anyone who modifies a standard term in a proposed agreement shall inform the opposing party of the change.

1604. CONDITIONAL GUILTY PLEAS

Pursuant to R.C.M. 910(a)(2), with the approval of the military judge and consent of the government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty.

160401. Authority to Consent to Conditional Plea

The R.C.M. further states that unless the Secretary concerned prescribes otherwise, the trial counsel may consent to a conditional guilty plea on behalf of the government. The Secretary of the Navy has not prescribed otherwise. Therefore, under the rule a trial counsel may consent to a conditional plea on behalf of the government. However, trial counsel must consult with the SJA of the convening authority and supervisory counsel before doing so. The trial counsel's authority to consent to conditional pleas only applies when the accused pleads guilty without a plea agreement or pretrial agreement. If the accused has entered into a plea agreement or pretrial agreement, the conditional nature of any plea must be agreed to by the convening authority and made a part of the written agreement.

160402. Information Required in the Record

If the military judge has approved a conditional plea, the trial counsel shall ensure the following is reflected in the record: (1) the entry of the conditional plea is in writing and clearly details the motion the accused wishes to preserve on appeal; (2) the government's consent to the plea is also in writing or clearly annotated in the record; and (3) the motion preserved was fully litigated before the military judge with all necessary findings of fact and conclusions of law reflected in the record.

160403. Effect of Non-Compliance

There is no constitutional right to enter a conditional guilty plea - compliance with R.C.M. 910(a)(2) is the only mechanism to do so. *United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010). All other pleas of guilty are unconditional, and generally waive all non-jurisdictional defects occurring earlier in the proceeding. *United States v. Lee*, 73 M.J. 166 (C.A.A.F. 2014).

1605. VARIOUS TERMS IN AGREEMENTS

160501. Prohibited Terms

R.C.M. 705 lists prohibited and permissible terms and conditions in an agreement. R.C.M. 905-907 also lists motions that are not waivable. A plea agreement or pretrial agreement may not prohibit the accused from raising certain motions that are not waivable. The following additional guidance applies to certain common terms in agreements.

160502. Specific Sentence in Plea Agreement

R.C.M. 705(d)(1) allows a plea agreement to limit the maximum and/or minimum punishments that can be imposed. There is no requirement that the maximum and minimum be any specified range apart from each other and they may be the same.

160503. Restitution

As discussed in paragraph 1602 above, a victim must be given the opportunity to provide input on a proposed agreement. A convening authority will consider the appropriateness of requiring victim restitution as a term of an agreement when appropriate or requested by the victim. Restitution may be appropriate if a victim has suffered loss, injury, or financial harm as a result of the offenses, regardless of whether an accused has been personally enriched.

160504. Automatic Reduction

A conviction for an offense committed before 1 January 2019 includes automatic reduction to E-1 if the sentence as approved by the convening authority includes either (a) a dishonorable or bad-conduct discharge; or (b) confinement in excess of 90 days. After the President delegates authority for the Secretary to establish conditions for automatic reduction, reduction based on convictions of offenses committed after 1 January 2019 will occur under the same conditions. See JAGMAN section 0153efor further details and additional guidance for convening authorities to remit or suspend automatic reduction. Because automatic reduction provisions will change based on the signing of an executive order, military justice practitioners should exercise care placing automatic reduction provisions in an agreement to ensure the accused has a correct understanding of applicable automatic reduction provisions and the government is able to comply with the agreement.

160505. Conditions During Confinement

An accused's post-trial confinement is governed by service regulations applicable to the confinement facility and is not within a particular convening authority's ability to control. While a convening authority may agree to make recommendations to a confinement facility or corrections authorities, an agreement shall not include terms requiring an accused to be confined at a certain facility, participate in certain treatment programs, or contain any other terms specifying the manner in which confinement will be carried out.

1606. RESIGNATION IN LIEU OF TRIAL FOR OFFICERS

Officer resignations in lieu of trial must be submitted in accordance with Volume 15 of this Order (Officer Misconduct and Substandard Performance of Duty). Such resignations must be approved by the Secretary of the Navy. The submission of a resignation request normally proceeds simultaneously with any court-martial proceedings.

160601. Convening Authority's Sole Discretion to Delay Court-Martial

A resignation request is normally not grounds to delay a court-martial. While a convening authority may elect to take steps to delay a court-martial pending consideration of a resignation request (such as withdrawing charges from a court-martial or excluding delay before referring charges), such actions are a matter of the convening authority's discretion, are not required, nor does anything in this paragraph require the Secretary of the Navy or the Secretary's designee to act on a resignation request in a certain manner or under a certain timeline. The officer requesting resignation may consider including specific language in a request for delay which excludes any requested delay from both R.C.M. 707 and Article 10 calculations as applicable.

160602. When Court-Martial Has Not Been Delayed

If the convening authority has not taken any action to delay the trial, the convening authority shall forward the resignation request as soon as practicable in accordance with Volume 15 of this Order. An accused may include in the resignation any docketing information about the pending case. Note that if findings are announced, the convening authority (pursuant to Art. 60a & Art. 60b), and the Secretary of the Navy (pursuant to Art. 74) have limited or no authority to set aside the findings of a court-martial. Therefore, an officer who submits a resignation in lieu of trial, but who has not negotiated with the convening authority to delay the court-martial, must submit the resignation as soon as possible to allow the Secretary sufficient time to consider and act on it before findings are announced.

PART C: COURT-MARTIAL

SUBPART C3: POST-TRIAL MATTERS

VOLUME 16: CHAPTER 17

GENERAL POST-TRIAL PROCESSING

SUMMARY OF SUBSTANTIVE CHANGES

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PART C - COURT-MARTIAL**SUBPART C3 - POST-TRIAL MATTERS****CHAPTER 17****GENERAL POST-TRIAL PROCESSING**

1701. PURPOSE

This Volume promulgates uniform policies, standards, and procedures for post-trial processing of courts-martial in the United States Marine Corps. Post-trial processing for all Navy and Marine Corps cases is governed by JAG/CNLSCINST 5814.1D. This Volume supplements and is consistent with that instruction and also provides policies, standards, and procedures for miscellaneous transcription requests, records management, hardware and software implementation and use, and court reporter utilization procedures.

1702. APPLICABILITY

This Order applies to Marines and sailors assigned to the Legal Service Support Sections (LSSSs) including court-reporters, personnel in the Post-Trial/Review Offices, trial counsel, defense counsel, and members of the complex trial teams. This Volume applies to Marines serving in a SJA office, Marines assigned to Appellate Government and Appellate Defense, and to Marine Corps Judge Advocate Division (JMJ).

1703. PREPARATION AND DISTRIBUTION OF CERTIFIED RECORDS OF TRIAL

The government will ensure timely post-trial processing of military justice cases. Each case shall have a separate record maintained of the proceedings. Courts-martial records and certified records of trial shall be made available or provided free of charge to authorized requesting parties. Any transcripts created as attachments to official records shall be included in the distribution. Electronic versions of all court-martial documents, including forms and worksheets digitally signed, are approved for forwarding to official reviewing entities as original records.

1704. USE OF ELECTRONIC CASE MANAGEMENT SYSTEM

All post-trial processing shall be tracked electronically using the prescribed electronic case management system. The electronic system will serve as the primary source for court-martial data. Article 140a, UCMJ, 10 U.S.C. § 940a (eff. Dec. 23, 2016), requires the collection and analysis of data in accordance with the standards prescribed by the Secretary of Defense. All LSSSs will ensure data is collected and reflected accurately in accordance with the Secretary of Defense's standards.

1705. SUMMARY COURTS-MARTIAL

170501. DD Form 2329 Required

Upon the conclusion of a summary court-martial, the summary court-martial officer shall create and certify a record of trial using DD Form 2329. If classified information is included in the record of trial of a summary court-martial, R.C.M. 1112(e)(3)(A) shall apply.

170502. Procedure

Commands and SJAs for commands should consult with the cognizant LSST or LSSS before conducting a summary court-martial. Rule for Courts-Martial 1305 governs the procedures for summary court-martial records of trial. A copy of the record of trial shall be served on the accused as soon as it is certified. Service of a certified electronic copy of the record of trial with a means to review the record of trial satisfies the requirement of service. The accused will sign a receipt for the copy of the record of trial and it will be attached to the original record of trial. If the record of trial was not served on the accused personally, the summary court-martial shall attach a statement

explaining how and when such service was accomplished. If the accused was represented by counsel, such counsel may be served with the record of trial. The original record of trial shall be forwarded to the convening authority after compliance with this paragraph. For procedures to correct a defective record of trial refer to R.C.M. 1305(e)(2).

170503. Post-Trial Matters for Consideration

After a sentence is adjudged by a summary court-martial, the accused and any crime victim shall be afforded 7 days to submit matters for consideration pursuant to R.C.M. 1106 and R.C.M. 1106A. Either party or both may be given an additional 20 days to submit matters upon receipt of a proper request at the convening authority's discretion. Parties are reminded to copy all interested individuals or counsel on correspondence with the SJA or CA concerning these matters. Ensuring all parties are notified will continue to streamline the process and avoid unnecessary delays. The accused has 5 additional days from the last date of submission of matters by a crime victim to respond to those matters.

170504. Convening Authority's Action

Upon expiration of matters submission deadlines, the convening authority shall take action on the sentence and may take action on the findings, in accordance with R.C.M. 1306.

170505. Documentation and Service of Action

The convening authority shall state in writing and insert in the record of trial the convening authority's decision as to the sentence, any suspension and the terms of such action, whether any findings of guilty are disapproved, whether any charges or specifications are changed or dismissed and an explanation for such action, and any orders as to further disposition. The convening authority shall sign the action, including their authority to do so. A copy of the convening authority's action shall be served on the accused or his or her counsel, and, upon request, the victim(s).

1706. SPECIAL AND GENERAL COURTS-MARTIAL

170601. General Requirement for Certified Record for Any Guilty Finding

In all general and special courts-martial in which the judgment includes a finding of guilty, a certified record of trial and attachments required under R.C.M. 1112(f) shall be created.

170602. Statement of Trial Results

Once any special or general court-martial is adjourned, the trial counsel will ensure the Statement of Trial Results is created. The STR will be signed by the military judge and provided to the court reporter in accordance with R.C.M. 1101(a).

170603. Copy of Record to be Provided to Victim

Per R.C.M. 1112(e), trial counsel is responsible for informing any victim entitled to receive a copy of the certified record of trial of the opportunity to receive a copy of the certified record of trial. Upon request, the accused and any entitled victim will receive a copy of, or be provided access to, the court-martial record. The court-martial record consists of unsealed recordings of all open sessions of the court-martial, copies of, or access to, evidence admitted, and any appellate exhibits. This information should be provided within 48 hours after receiving a proper request. The Post-Trial Office shall not release recordings of closed sessions, classified material, or any other matter ordered sealed unless otherwise authorized by a military judge. Prior to releasing a court-martial record, the Post-Trial Office shall include a disclaimer limiting the use of uncertified courts-martial records to the submission of post-trial matters under R.C.M. 1106 and 1106A.

170604. Opportunity to Submit Matters to Convening Authority

The accused and any crime victim shall be afforded 10 days after the announcement of the sentence to submit matters for consideration pursuant to R.C.M. 1106 and R.C.M. 1106A. Either party or both may be given an additional 20 days to submit matters upon receipt of a proper request at the convening authority's discretion. The Accused will be given 5 additional days from the date of submission to rebut any matters submitted by a crime victim.

170605. Post-Trial Advice and Possible Convening Authority Action

Upon receipt of all post-trial matters or expiration of the submission deadline, the Post-Trial Office will forward the court-martial record to the SJA for Convening Authority's Action. The CA, after consultation with the cognizant Staff Judge Advocate, will determine what action, if any, will be taken in accordance with this Chapter and R.C.M. 1109 and 1110 and applicable clemency rules in place at the time the misconduct occurred. The cognizant SJA or legal advisor will promptly forward the action (or no action) of the convening authority to the post-trial office. The convening authority action will be incorporated as an attachment to the record of trial.

170606. Entry of Judgment

The post-trial office will forward the CA's action to the military judge, who will enter the judgment of the court-martial. The entry of judgment will be added to the record of trial and a copy will be provided to the accused and any victim and made available to the public. Errors in the entry of judgement must be corrected in accordance with R.C.M. 1111(c). The entry of judgment terminates the trial proceedings and initiates the appellate process.

170607. Certification of Record of Trial

Certification of the record of trial will be conducted in accordance with R.C.M. 1112 and JAG/CNLSCINST 5814.1D. The Post-Trial Office will notify the accused and crime victims of their right to obtain a copy of the certified record, and provide a copy of the record upon request. The Post-Trial Office will ensure that all copies of the record of trial provided to crime victims are released in compliance with applicable statutes and regulations.

170608. Appellate Rights Forms

Use standard appellate and post-trial rights forms promulgated by the trial judiciary. Upload a complete unredacted form to the electronic case management system and transmit the unredacted form electronically to NAMARA. A victim's post-trial election of rights form must be completed in accordance with JAG/CNLSCINST 5814.1D for cases involving crime victims. Use enclosure (3) if the crime victim is represented by VLC.

1707. POST-TRIAL REVIEW OF COURTS-MARTIAL

170701. Article 64 Review of Summary Courts-Martial

A. A judge advocate will review the record for all summary courts-martial in which there is a finding of guilty. The Regional Post-Trial Office will retain review authority over summary courts-martial. The purpose of the summary court-martial record review is to:

(1) ensure the court-martial had jurisdiction over the accused and the offense(s), that the offense(s) stated an offense, and that the sentence was legal; and,

(2) address any allegations of error.

B. If the reviewing officer determines there is an error in the summary court-martial record, the Regional Post-Trial Office will send the record, including a copy of any claims of error that have been reduced to writing, the original convening authority's action, and judge advocate review letter to the first general courts-

martial convening authority in the accused's chain of command for action. The general court-martial convening authority may take any appropriate action in accordance with R.C.M. 1307(f).

C. The Regional Post-Trial Office will cause a copy of any action the general court-martial convening authority has taken to be provided to the accused.

D. The Regional Post-Trial Office will forward a complete copy of any summary court-martial record resulting in a finding of error and corrective action from a general court-martial convening authority to the Navy-Marine Corps Appellate Review Activity (NMARA) (Code 40).

E. The Regional Post-Trial Office will also send the supplemental action of the general court-martial convening authority to the appropriate administration personnel center to ensure any punishments and disposition are included in the accused's official military personnel file (OMPF).

F. A copy of the complete record of trial for all summary courts-martial, including the Article 64 review officer's letters and any supplemental actions of the general court-martial convening authority, will be retained at the Regional Post-Trial Office in accordance with JAG/CNLSCINST 5814.1D..

170702. Article 65 Review of Special and General Courts-Martial

Pursuant to R.C.M. 1116 and section 0158(d) of the JAGMAN, the SJA of the cognizant general court-martial convening authority, or a neutral judge advocate identified in coordination with the LSSS OIC, will review the record of any court-martial resulting in no punitive discharge and six months or less of confinement. The review will be completed in accordance with standards set out in Article 65(d), UCMJ. If an error requiring corrective action is identified during the course of the review, the record of trial and a request for corrective action will be forwarded to the Office of the Judge Advocate General of the Navy via OJAG (Code 40) for action in accordance with Article 65(e), UCMJ.

170703. Article 66 Review of Special and General Courts-Martial

The certified record of every special and general courts-martial resulting in a sentence that includes death, a punitive discharge, or greater than six months confinement, in which the accused has not waived appellate review under Article 61, UCMJ, will be forwarded to NMARA (Code 40) in accordance with procedures established in section 0158(b) of the JAGMAN. The Regional Post-Trial Office will first ensure a complete, bookmarked digital copy of the record is created. The digital copy will be uploaded to NAMARA (Code 40) via an electronic case management system, if applicable, as soon as practicable after its creation. If technology does not allow for electronic transfer, a CD/DVD of the ROT shall be mailed to NAMARA. The CD shall be password protected and the password shall be maintained in a password logbook by the PTAO and emailed directly to the clerk of court for NMCCA. If the ROT contains sealed sessions or documents, two copies of the ROT shall be mailed on CD – one with the sealed sessions for use by the court, and one with the sealed matters removed for copying and distribution to appellate counsel.

170704. Waiver or Withdrawal of Appeal

Article 61, UCMJ, and R.C.M. 1115 permit the accused to waive or withdraw from appellate review in any case that would normally be reviewed pursuant to Article 66, UCMJ. In any case involving a waiver or withdrawal from appellate review, the Post-Trial Review Office will immediately forward the certified record of trial to NMARA (Code 40) in accordance with JAGMAN section 0158(g).

170705. Post-Trial Processing Time Limits

A service member has a statutory and constitutional right to speedy post-trial review of their conviction. Appellate courts and JAG/CNLSCINST 5813.1D establish timelines for post-trial processing. A written description of the primary cause of any delay exceeding those requirements must be appended to the record of trial.

VOLUME 16: CHAPTER 18

TRANSCRIPTION

SUMMARY OF SUBSTANTIVE CHANGES

Hyperlinks are denoted by ***bold, italic, blue and underlined font.***

The original publication date of this Marine Corps Order (MCO) Volume (right header) will not change unless/until a full revision of the MCO has been conducted.

All Volume changes denoted in **blue font** will reset to black font upon a full revision of this Volume.

CHAPTER VERSION	PAGE PARAGRAPH	SUMMARY OF SUBSTANTIVE CHANGES	DATE OF CHANGE

CHAPTER 18

TRANSCRIPTION

1801. PURPOSE

This Chapter establishes transcription standards when verbatim and summarized transcripts are required under the rules and procedures established by the Military Justice Act of 2016 and the 2019 Manual for Courts-Martial (MCM). This format will also be applied to all administrative transcriptions generated by the post-trial office. This Chapter supplements JAGINST 5813.1D and JAG/CNLSCINST 5814.1D.

1802. APPLICABILITY

This Chapter applies to all personnel involved in the preparation and certification of GCM and SPCM verbatim transcripts and summarized reports required to accompany the record of trial.

1803. GENERAL

180301. Verbatim Transcript Required

R.C.M. 1114 requires a verbatim transcript of the record of trial to be prepared whenever the sentence includes death, dismissal, a dishonorable or bad conduct discharge, or confinement for more than six-months; as otherwise required by a court rule or court order; or under regulations prescribed by the Secretary of the Navy. JAG/CNLSCINST 5814.1D contains additional regulatory guidance and requires a verbatim transcript in any general or special courts-martial where a guilty finding is reached.

180302. Acquittals

When a case ended without any guilty finding and a verbatim transcript is not required, a party may apply to have a certified verbatim transcript of relevant portions of the record of trial prepared. *See* R.C.M. 1114(b). The LSSS or LSST OIC may approve or deny a party's application on behalf of the Judge Advocate General. Factors to consider include the workload of the post-trial and court reporting sections, the ability to prepare the transcript without disrupting other functions, and the likelihood of the transcript being necessary at later military justice or administrative proceedings.

1804. FORMAT

Appendix I contains examples of all formatting requirements. No other formatting styles shall be used by the Post-Trial Office for transcript preparation. Only the Code 40 PTAO may make exceptions to this policy after consulting with the Chief Judge, Navy-Marine Corps Court of Criminal Appeals (NMCCA), and the Chief Judge, Navy-Marine Corps Trial Judiciary.

1805. SEALED AND CLASSIFIED INFORMATION

At no time will classified information be uploaded to any electronic case management system. Classified information included as exhibits will be handled in accordance with rules applicable to the handling of classified information. Sealed material may only be uploaded to a case management system if the permissions protecting that material are sufficient to prevent unauthorized release or review. The NAMARA PTAO must approve all transmittals of sealed information via an electronic case management system. If sealed information is part of a certified ROT, it will be password protected and separated from the ROT. Passwords will be sent to the appropriate authorities separately from the ROT. Passwords will be maintained by the Regional Post-Trial Office. The sealing order will accompany sealed portions at all times.

1806. EVIDENCE OF A SENSITIVE NATURE

For cases in which evidence of a sexual nature is introduced into evidence in a digital format, and published to the military judge or members on a computer, trial counsel will provide the court reporter a password protected CD or DVD containing the electronically formatted evidence for inclusion on the record of trial. The original evidence should be returned to the cognizant law enforcement agency for storage as evidence until certification of the record of trial and completion of the appellate process. The password to any protected CD or DVD in the record of trial shall be provided via encrypted email by the trial counsel to the military judge and those with record of trial review responsibilities, including the Clerk of Court for the Navy-Marine Corps Court of Criminal Appeals.

1807. DIGITAL RECORDS

In addition to the original record of trial, an electronic copy of the record of trial, including the certified transcripts, shall be created. The electronic copy must be an exact duplicate of the hard copy record of trial and be in a bookmarked portable document format (pdf), the Eclipse Bridge File format if the reviewing authority uses Eclipse Bridge, or another format specified in JAGINST 5813.1D as technology advances.

1808. ARTIFICIAL INTELLIGENCE ENABLED COMPUTER AIDED TRANSCRIPTION SOFTWARE (AI-CATS)

The use of artificial intelligence speech-to-text engines in conjunction with computer aided transcription software is authorized. Reference (as) contains the approved software and hardware required for use with AI-CATS systems.

PART D: MISCELLANEOUS

VOLUME 16: CHAPTER 19

MISCELLANEOUS

SUMMARY OF SUBSTANTIVE CHANGES

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PART D – MISCELLANEOUS**CHAPTER 19****1901. MISCONDUCT BY PRISONERS**

When a prisoner commits misconduct and has part of their court-martial sentence suspended as the result of a plea agreement, the convening authority exercising court-martial jurisdiction over the prisoner may, at their discretion, initiate a hearing under R.C.M. 1108 to vacate the suspension of sentence. When the prisoner is a long-term prisoner, the convening authority is the commander of the long-term prisoner unit to which the prisoner is assigned.

1902. TRANSFER OF PRISONERS

Marines serving confinement after completion of convening authority action in their courts-martial are classified as long-term prisoners (LTP). Once a Marine prisoner is transferred to a long-term prisoner unit (LTPU) they will not be transferred back to the previous command unless specifically requested by the previous command. The Army serves as the single point of contact for Marine Corps prisoners transferred to the Federal Bureau of Prisons. Commands requesting a prisoner be transferred back to a military confinement facility should contact Judge Advocate Division, Military Justice Branch (JMJB) for assistance.

1903. HOSPITALIZATION OF THE ACCUSED BY THE ATTORNEY GENERAL

An accused who is found incompetent to stand trial under R.C.M. 909 shall be hospitalized by the Attorney General as provided in 18 U.S.C. § 4241(d). An accused who is found not guilty only by reason of a lack of mental responsibility, who has not satisfied the standard in R.C.M. 1105(c)(3) during the post-trial hearing, may also be committed to the custody of the Attorney General. A general court-martial convening authority commits the accused to the custody of the Attorney General by forwarding the military judge's findings to the Commandant of the Marine Corps (PSL), who will arrange the physical transfer of the accused for hospitalization.