

Trial Guide 2005



**Office of the Chief Judge
Navy-Marine Corps Trial Judiciary
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TRIAL GUIDE

MJ: This [general or special] court-martial is called to order at (location) in the case of United States versus (Accused), USN(R) / USMC(R). Trial Counsel, please state the jurisdictional data for this court-martial.

TC: This [general or special] court-martial is convened by (convening authority) by (special) (general) court-martial convening order (number) dated __, 20__ (as amended by _____), copies of which have been furnished to the military judge, defense counsel, accused, and court reporter for insertion in the record of trial. There are no (further) modifications or corrections to the convening order.

The general nature of the charge(s) in this case is (are) _____. The charge(s) was (were) preferred by (accuser), a person subject to the Uniform Code of Military Justice; sworn to before an officer authorized to administer oaths; [investigated by (Article 32 officer); forwarded by (SPCM authority) with recommendations as to disposition;] and has (have) been properly referred to this court-martial for trial by (convening authority), the convening authority [, subject to the following instructions _____].

[NOTE: If the convening authority or referral authority is not normally the commander of the unit, TC should state: "(LCDR/Maj ____) (____) was in command on the date of the referral/convening order. He/She is normally the (XO,____)."]

[NOTE: If the convening authority's power to convene the court is not apparent on the face of the convening order or by the nature of the convening authority's identity, the military judge should inquire further into this matter.]

The charge(s) has (have) not been referred to any court other than that reflected on the referral block of the charge sheet.

The charge(s) was (were) served on the accused on __, 20__. The three (five) day waiting period has (not) expired.

The accused and the following persons detailed to this court-martial are present:

_____ as military judge
_____ as defense counsel
_____ as trial counsel.

TC: The members (and the following person(s) detailed to this court-martial) are absent (_____).

TC: (Name) has been detailed as court reporter for this court-martial and (has previously been) (will now be) sworn.

[NOTE: (Oath for court reporter) TC: Do you (swear) (affirm) that you will faithfully perform the duties of reporter to this court-martial (so help you God)?]

TC: (I) (All members of the prosecution) have been detailed to this court-martial by _____ .

TC: (I am) (All detailed members of the prosecution are) qualified and certified under Article 27(b) and sworn under Article 42(a). (_____.)

[NOTE: If any TC is not certified and/or sworn, then TC should state: "(I have) ((Name of TC) has) not been certified and sworn."]

[NOTE: If any TC needs to be sworn, MJ will state: "(Name of TC) will now be sworn. Do you (swear) (affirm) that you will faithfully perform all the duties of trial counsel in the case now in hearing (so help you God)?"]

TC: (I have not) (No member of the prosecution has) acted in any manner, which might tend to disqualify (me) (him) (or) (her) in this court martial.

MJ: (Defense counsel), please state for the record by whom you (and _____) have been detailed, your (respective) legal qualifications and status as to oath, and whether you (or co-counsel) have acted in any disqualifying manner.

DC: (I) (All detailed members of the defense) have been detailed to this court-martial by (official & authority).

DC: (I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a). (_____.)

[NOTE: If assistant DC is not certified and/or sworn, then DC should state: "(Name of assistant DC) has not been certified and sworn."]

DC: (I have not) (No detailed member of the defense has) acted in any manner, which might tend to disqualify (me) (him) (or) (her) in this court martial.

MJ: Has any other defense counsel been detailed to this case?

DC: Yes/No, sir/ma'am.

MJ: Has any Individual Military Counsel been sought?

DC: Yes/No, sir/ma'am.

MJ: Has any Civilian Counsel been retained?

DC: Yes/No, sir/ma'am.

MJ: **[If individual military counsel]** (Individual military counsel), please state for the record your legal qualifications, status as to oath, and whether you have acted in any disqualifying manner.

IMC: (State qualifications.)

MJ: **[If civilian counsel]** (Civilian counsel), please state for the record your full name, legal qualifications, and business address.

CC: (Name, legal qualifications, and address. Civilian counsel must state that he/she is admitted to practice law before the highest court of the state(s) in which he/she is admitted and is currently in good standing with all State Bars to which he/she is admitted. Civilian counsel must file a written notice of appearance (Rules 6.1-6.2 Uniform Rules of Practice) and acknowledge receipt of the Local Rules of Court.)

[NOTE: If any DC needs to be sworn, MJ will state: "(Name of DC) will now be sworn. Do you (swear) (affirm) that you will faithfully perform all the duties of defense counsel in the case now in hearing (so help you God)"?]

MJ: Are you (Accused), the accused in this case?

ACC: Yes/No, sir/ma'am.

MJ: (Defense counsel), is (Accused) attired in the appropriate uniform (with all awards and decorations to which he/she is entitled)?

DC: Yes/No, sir/ma'am. (If no, state in what respect it differs.)

MJ: (Defense counsel), please state for the record what awards and decorations the accused is entitled to wear?

DC: (List awards and decorations)

RIGHTS TO COUNSEL

MJ: (Accused), you have the right to be represented in this court-martial by _____ (and _____), your detailed defense counsel. You also have the right to be represented by a military counsel of your own selection, provided that the counsel you request is reasonably available. Military defense counsel are provided to you free of charge. If you are represented by military counsel of your own selection, then your detailed defense counsel, _____ (and _____), would normally be excused. However, you could request that _____ (and _____, or one of them), your detailed counsel, continue to represent you along with the military counsel you select, and the detailing authority would have the sole discretion to either grant or deny that request. Do you understand?

ACC: Yes/No, sir/ma'am.

MJ: In addition to your military defense counsel, you have the right to be represented by civilian counsel at no expense to the United States.

Civilian counsel may represent you alone or along with your military defense counsel. Do you understand this?

ACC: Yes/No, sir/ma'am.

MJ: Do you have any questions about your rights to counsel?

ACC: Yes/No, sir/ma'am.

MJ: By whom do you want to be represented?

ACC: Sir/Ma'am, I wish to be represented by _____.

MJ: Do you wish to be represented by any other attorney, either military or civilian?

ACC: Yes/No, sir/ma'am.

DETAILING AND QUALIFICATIONS OF THE MILITARY JUDGE

MJ: I have been detailed to this court-martial by (myself as) (the Circuit Military Judge of the _____ Judicial Circuit,) (the Chief Judge of the) Navy-Marine Corps Trial Judiciary.

MJ: I am certified and sworn as a military judge in accordance with Articles 26 (b) and (c) and 42 (a) of the Uniform Code of Military Justice. I will not be a witness for either side in this case. I am not aware of any matters that I believe may be a ground for challenge against me. Do counsel for either side wish to voir dire or challenge the military judge?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

- >>> If the statutory waiting period has run, go to the next page.
- >>> If the statutory waiting period has not run, use the following rights advisement. Neither the day of service nor the day of trial count in computing the period.

STATUTORY WAITING PERIOD

MJ: (Accused), you have the absolute right to a (3) (5) day delay between the service of the charge(s) upon you and any session of this court. What this means is that, since the charge(s) was/were served upon you on (date), we cannot proceed any further until (date) unless you agree to an earlier date. Do you understand this right?

ACC: Yes/No, sir/ma'am.

MJ: Have you discussed this right with your counsel?

ACC: Yes/No, sir/ma'am.

MJ: Now take a moment to discuss this again with your counsel and tell me if you wish to give up this right and proceed to trial today or if you want to wait.

ACC: I want to go to trial today, sir/ma'am. (or) I want to wait, sir/ma'am.

>>> Continue with FORUM ADVISEMENT AND SELECTION, next page.

FORUM ADVISEMENT AND SELECTION

MJ: (Accused), you have the right to be tried by a court-martial composed of members (including, if you request, at least one-third enlisted persons). If you are found guilty of an offense, the members will determine a sentence. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: You are also advised that you may request to be tried by the military judge alone. If the request is approved, (I) (the military judge) would determine your guilt or innocence; and if you were found guilty, (I) (the military judge) would determine the sentence. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: Have you discussed these choices with your counsel?

ACC: Yes/No, sir/ma'am.

MJ: Do you wish to be tried by a court composed of members, (a court composed of members with enlisted representation,) or by military judge alone?

ACC: Trial by (members) (enlisted members) (judge alone), sir/ma'am.

MJ: **[If Accused requested trial by MJ alone]** Are you requesting trial by the Military Judge alone as part of a pretrial agreement you have with the convening authority? **[Allow accused to respond]** Did anyone force you to forgo trial by members (including enlisted members)?

MJ: [If Accused requested trial by Military Judge alone] [NOTE: Do NOT assemble the court if forum selection has been reserved/deferred, or if another judge may potentially hear the case.] Your request for trial by military judge alone is approved. This court-martial is assembled.

802 CONFERENCES

MJ: [If appropriate] At an 802 conference held between trial and defense counsel and the military judge (in the presence of the accused) on (date)(earlier today), the following matters were discussed:
_____. Do counsel concur with my summation?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

ARRAIGNMENT

[NOTE: If trial of any offense charged may be barred by the statute of limitations, MJ must advise the accused of that fact and obtain an affirmative waiver in order for trial to proceed on the affected offense(s). See Appendix 11 for a procedural guide for use in dealing with this issue. On 14 November 1986, the statute of limitations became 5 years for most offenses.]

MJ: The accused will now be arraigned.

(Trial counsel), are there any corrections or additions to the charges and/or specifications?

TC: Yes/No, sir/ma'am

[MJ resolves any corrections to the charges and/or specifications.]

MJ: Does the defense desire that the charge(s) and specification(s) be read?

DC: (No, sir/ma'am. The accused waives the reading of the charge(s) and specifications.) (Yes, sir/ma'am. The accused wants the charge(s) and specification(s) read.)

MJ: **[If the Accused waives the reading.]** The reading may be omitted.

[If the Accused does not waive] The trial counsel will read the charge(s) and specification(s).

Accused and counsel please rise. (Accused), I now ask you how do you plead, but before receiving your pleas, I advise you that any motions to dismiss any charge or to grant any other relief should be made at this time. (Defense counsel)?

DC: The defense has (no) (the following) motions.

Address each motion.

MJ: And how does the accused plead?

DC: The accused pleads as follows:

Defense counsel enters pleas.

MJ: (Accused) has your counsel correctly stated your pleas?

ACC: Yes/No sir/ma'am.

-OR-

DC: Your Honor, the defense would like to reserve pleas, forum and motions in accordance with the trial schedule.

MJ: You may do so.

MJ: You may be seated.

[NOTE: The DC ordinarily enters Pleas. MJ may properly inquire of the accused: "You have pleaded as follows: (repeat pleas). Is that correct?" Such an inquiry may be appropriate where pleas are complicated, such as when there are detailed exceptions and substitutions.]

>>> If pleas, forum and/or motions are reserved then go to RCM 804 warnings, page A-4-1.

>>> If not guilty to all specifications: If military judge alone, go to MILITARY JUDGE ALONE - CONTESTED CASE ON THE MERITS, page 40.

If members, go to ARTICLE 39(a) SESSION PRIOR TO ASSEMBLY OF MEMBERS, page 47.

>>> If any guilty pleas continue with GUILTY PLEA INQUIRY, next page.

GUILTY PLEA INQUIRY

MJ: (Accused), I will only accept your guilty pleas if you understand their meaning and effect. I am now going to discuss your pleas of guilty with you. Keep a copy of the charge sheet in front of you so you can refer to it readily. If at any time you become confused or have any questions, stop me and I'll give you the opportunity to consult with your defense counsel. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: A plea of guilty is the strongest form of proof known to the law. Based on your pleas of guilty alone, without receiving any evidence, this court can find you guilty of the offense(s) to which you are pleading guilty. Your pleas of guilty will not be accepted unless you understand that by pleading guilty you admit every element of the offense(s) to which you are pleading guilty and you are pleading guilty because you really are guilty. If you do not believe you are guilty, then you should not plead guilty for any reason. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: Even if you believe you are guilty, you still have a legal and moral right to enter a plea of not guilty and to require the government to prove its case against you, if it can, by legal and competent evidence beyond a reasonable doubt. If you were to plead not guilty, then you would be presumed under the law to be innocent, and only by introducing evidence and proving your guilt beyond a reasonable doubt could the government overcome this presumption of innocence. Do you understand this?

ACC: Yes/No, sir/ma'am.

MJ: By your plea of guilty, you waive, or in other words, you give up certain important rights. (You give up these rights only as to the offense(s) to which you have pleaded guilty. You keep them as to the offense(s) to which you have pleaded not guilty). The rights you give up are: First, the right against self-incrimination, that is the right to say nothing at all about this (these) offense(s). Second, the right to a trial of the facts by the court-martial, that is the right to have this court-martial decide whether or not you are guilty based on evidence presented by the prosecution and, if you chose to do so, by the defense. Third, the right to confront the witnesses against you and to call witnesses in your behalf. Do you understand these rights?

ACC: Yes/No, sir/ma'am.

MJ: **[If guilty plea waives right to appeal decision on motion]** By your plea of guilty, you also give up your right to appeal the decision I made on your motion to (_____). Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: If you plead guilty, there will not be a trial of any kind as to the offense(s) to which you are pleading guilty. By pleading guilty, you give up the three rights I have just described. (You keep those three rights as to (all) the offense(s) (and/or language) to which you entered pleas of not guilty.) Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: Have you discussed these matters with your counsel?

ACC: Yes/No, sir/ma'am.

MJ: Do you agree to give up these three rights with regard to the offense(s) to which you have pleaded guilty and answer my questions?

ACC: Yes/No, sir/ma'am.

[NOTE: If Accused does not give up these rights, use the following:

MJ: If you choose not to waive your rights and not to answer my questions, then your pleas of guilty cannot be accepted, and this court must enter pleas of not guilty for you. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: Understanding that, will you give up those three rights and answer my questions?

ACC: Yes/No, sir/ma'am.

MJ: (Defense counsel), what advice have you given (Accused) as to the maximum punishment for the offense(s) to which he/she has pleaded guilty?

DC: Sir/Ma'am, I have advised (Accused) that the maximum punishment is:

Confinement for _____
Forfeiture of _____
A fine
Reduction to pay grade _____
Discharge from the service with a _____

MJ: (Trial counsel), does the government concur?

TC: Yes/No, sir/ma'am.

[NOTE: If discharge authorized as a result of the escalator clause, use the following.]

MJ: (Defense counsel), is the punitive discharge authorized based on the escalator clause of R.C.M. 1003(d)?

DC: Yes/No, sir/ma'am.

[NOTE: If general court-martial, calculate maximum punishment with counsel concurrence before informing the accused.]

MJ: (Accused), the maximum sentence that can be adjudged for the offense(s) to which you have pleaded guilty is (SPCM jurisdictional maximum punishments in parens):

Confinement for _____ (A period of one year)

Forfeiture of _____ (Two-thirds pay per month for up to one year)

A fine (or a combination of forfeitures and fine not to exceed two thirds pay per month for 12 months)

Reduction to pay grade _____ (E-1)

Discharge from the service with a _____ (Bad Conduct Discharge)

Is that your understanding?

[NOTE: If a fine is a punishment likely to be adjudged in a case, MJ must inform the accused that a fine is an authorized punishment that may be imposed in addition to or in lieu of forfeitures. See R.C.M. 1003(b)(3): "Any court-martial may adjudge a fine instead of forfeitures. General courts-martial may also adjudge a fine in addition to forfeitures. Special ... courts-martial may not adjudge any fine in excess of the total amount of forfeitures which may be adjudged in that case."]

[NOTE: If there is a question as to the maximum punishment because of multiplicity for sentencing, MJ should attempt to resolve it on the record at this point. If the maximum punishment may be subject to further dispute, MJ should advise the accused of the alternative possibilities and determine whether this affects the accused's decision to plead guilty.]

ACC: Yes/No, sir/ma'am.

[If the accused entered a guilty plea to any sex offense]:

MJ: (Defense Counsel), have you advised the accused of the major collateral consequences of his plea to include the possibility of various state and Federal sex offender registration and reporting requirements in accordance with U.S. v. Miller?

DC: Yes/No, sir/ma'am.

MJ: (Accused), do agree that your counsel has advised you of these matters?

Acc: Yes/No, sir; ma'am.

[References: US v Miller, 63 MJ 452, 459 (2006); 42 USC § 14071(a)(3)(A), (b)(7); DoD Instr. 1325.7 Enclosure 27 (Listing Offenses Requiring Sex Offender Processing); SECNAVINST 5800.14 (Notice of Military Offenders Convicted of Sex Offenses or Crimes Against Minors); Encl (1), Listing of offenses requiring processing)]

MJ: (Accused), have you had enough time to discuss your case with your counsel?

ACC: Yes/No, sir/ma'am.

MJ: Do you believe that his/her/their advice has been in your best interest?

ACC: Yes/No, sir/ma'am.

MJ: Are you pleading guilty voluntarily and of your own free will?

ACC: Yes/No, sir/ma'am.

MJ: Has anyone forced or threatened you to plead guilty?

ACC: Yes/No, sir/ma'am.

MJ: In a moment, you will be placed under oath and we will discuss the facts of your case. If what you say is not true then your statements may be used against you in a subsequent prosecution for perjury or false statement. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: In addition, the government may later ask that your answers be used against you in the sentencing portion of this trial. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: (Accused), please rise, face the trial counsel, and raise your right hand. (Trial counsel), please administer the oath to the accused.

TC: Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth, (so help you God)?

ACC: I do.

TC: Be seated.

MJ: (Trial counsel), is there a stipulation of fact concerning the pleas of guilty?

TC: Yes/No, sir/ma'am.

>>> If no, go to LISTING OF THE ELEMENTS, page 22

>>> If yes, continue.

STIPULATION OF FACT

MJ: Have it marked as a prosecution exhibit, hand it to me, and ensure that the accused has a copy.

TC: Yes, sir/ma'am. I'm handing the military judge Prosecution Exhibit ____ for identification.

MJ: (Accused), I am showing you Prosecution Exhibit ____ for identification, a stipulation of fact. Did you sign this stipulation?

ACC: Yes/No, sir/ma'am.

MJ: Prior to signing this stipulation, did you read it and discuss it with your attorney?

ACC: Yes/No, sir/ma'am.

MJ: Do you understand everything contained within this stipulation of fact?

ACC: Yes/No, sir/ma'am.

MJ: Is everything in the stipulation the truth?

ACC: Yes/No, sir/ma'am.

MJ: Do counsel for both sides agree to the stipulation and that these are your signatures?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: (Accused), at this point, we are going to discuss the stipulation of fact to ensure that you understand it and agree to its uses. A stipulation of fact is an agreement between the trial counsel, the defense counsel, and yourself that the contents of the stipulation are true and if entered into evidence are uncontradicted facts in the case. You have the right not to enter into this stipulation, and this stipulation will not be accepted without your consent. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: Has anyone forced or threatened you to enter into this stipulation?

ACC: Yes/No, sir/ma'am.

MJ: If I admit this stipulation into evidence, it will be used in two ways. First, I will use it to determine if you are, in fact, guilty. **[MJ alone case]** Second, I will use it in selecting an appropriate sentence. Do you understand that?
[Members case] Second, the trial counsel will read it later to the court members, and they will have it with them when they decide upon the sentence. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: Do you agree to those uses?

ACC: Yes/No, sir/ma'am.

MJ: Do counsel for both sides also agree?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: (Accused), a stipulation of fact ordinarily cannot be contradicted. If this stipulation should be contradicted after I have accepted your guilty pleas, I will have to reopen my inquiry into your pleas. Therefore, you should let me know during this inquiry if there is anything whatsoever you disagree with or feel is untrue. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: (Defense counsel), is there any objection to Prosecution Exhibit ____ for identification?

DC: Yes/No, sir/ma'am.

MJ: Prosecution Exhibit ____ for identification, the stipulation of fact, is admitted into evidence. The words "for identification" are stricken. Give me a moment to read it.

LISTING OF THE ELEMENTS

MJ: (Accused), I am now going to explain the elements of the offense(s) to which you have entered pleas of guilty. By "elements" I mean the facts that the government would have to prove beyond a reasonable doubt before you could be found guilty if you pleaded not guilty. When I state each of these elements, ask yourself if it is true, and whether you want to admit that it is true. Then be ready to talk to me about the facts. Please follow along on your copy of the charge sheet as I list the elements of the offense(s) for you.

MJ lists the elements of the offense(s); gives necessary definitions/explanations; and if appropriate, provides theories of liability.

[NOTE: The description of the elements should be tailored to the allegations in the specification(s). Legal terms should be explained.]

MJ: Do you understand the elements of this (these) offense(s)?

ACC: Yes/No, sir/ma'am.

MJ: Do these elements correctly describe what you did?

ACC: Yes/No, sir/ma'am.

[NOTE: MJ should elicit from the accused facts supporting the guilty plea by questioning the accused about the offense(s). The questioning should develop the accused's description of the offense(s) and establish the existence of each element of the offense(s). MJ should be alert to discrepancies in the accused's description or between the accused's description and any stipulation. If the accused's discussion or other information discloses a possible defense, MJ must inquire into the matter and may not accept the plea if a possible defense exists. MJ should explain to the accused the elements of a defense when the accused's description raises the possibility of one. The foregoing inquiry should be repeated as to each offense to which the accused has pleaded guilty.]

MJ: In each specification, is your name, rank, (rate), unit, and organization correctly stated and spelled?

ACC: Yes/No, sir/ma'am.

MJ: Are you currently on active duty in the U.S. (Navy) (Naval Reserve) (Marine Corps) (Marine Corps Reserve)?

ACC: Yes/No, sir/ma'am.

MJ: On (date of the earliest offense) were you a member of the U.S. (Navy) (Naval Reserve) (Marine Corps) (Marine Corps Reserve) on active duty and have you remained on active duty since then?

ACC: Yes/No, sir/ma'am.

MJ: Have you been discharged or released from active duty since that date?

ACC: Yes/No, sir/ma'am.

MJ conducts inquiry into each guilty plea offense. Standard Providence Inquiries are located on the NMCTJ Providency Disk.

MJ: Do counsel for either side desire any further inquiry?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: Finally, (Accused), do you believe and admit that taken together, the elements I have listed for you, (the stipulation of fact,) and the matters we have just discussed, correctly describe what you did (on each occasion)?

ACC: Yes/No, sir/ma'am.

MJ: (Defense Counsel), is there a pretrial agreement in this case?

DC: Yes/No, sir/ma'am.

>>> If yes, go to PTA INQUIRY, page 25

>>> If no, continue.

NO PTA INQUIRY

MJ: (Trial Counsel), do you concur with that?

TC: Yes/No, sir/ma'am.

MJ: (Accused), are you pleading guilty because of any discussions you or your counsel may have had with the trial counsel, convening authority, or other government representative?

ACC: Yes/No, sir/ma'am.

MJ: Has anyone made any promises or agreements with you that you would receive a reduction in sentence, or some other benefit, in exchange for your pleas of guilty here today?

ACC: Yes/No, sir/ma'am.

MJ: You may request to withdraw (any of) your pleas of guilty at any time before sentence is announced in your case, and if you have a good reason for your request, I will grant it. Do you understand this?

ACC: Yes/No, sir/ma'am.

>>> Go to GUILTY PLEA INQUIRY CONTINUED, page 36

PTA INQUIRY

MJ: **[MJ alone case]** (Defense counsel), have the pretrial agreement and the sentence limitation portion marked as the next two appellate exhibits in order.

[Members case] (Defense counsel), have the entire pretrial agreement including the sentence limitation portion marked as the next appellate exhibit in order.

DC: Sir/Ma'am, the pretrial agreement and the sentence limitation portion have (previously) been marked as Appellate Exhibit(s) ___ (and ___). I am handing Appellate Exhibit ___ to the military judge at this time (and I am retaining Appellate Exhibit ___, the sentence limitation portion, at counsel table).

MJ: **[MJ alone case]** (Accused), I have here Appellate Exhibit ___, which is the first part of your pretrial agreement. Is this your signature that appears on page ___ of this document?

[Members case] (Accused), I have here Appellate Exhibit ___, which is your pretrial agreement to include the sentence limitation portion. Is this your signature that appears on pages ___ and ___ of this document?

ACC: Yes/No, sir/ma'am.

MJ: Before you signed this document, did you read it over completely and discuss it with your counsel?

ACC: Yes/No, sir/ma'am.

MJ: **[MJ alone case]** Appellate Exhibit ____ contains the sentence limitation portion of your pretrial agreement. Did you also sign that document?

ACC: Yes/No, sir/ma'am.

MJ: **[MJ alone case]** Before you signed that document, did you read it over completely and discuss it with your counsel?

ACC: Yes/No, sir/ma'am.

MJ: **[MJ alone case]** Now I don't know, and I don't want to know at this time, what the sentence limitation portion is that you have agreed to. However, I would like you to review the sentence limitation portion of your agreement to yourself at this time. [After review by accused] Without telling me what is on that document, do you understand the maximum sentence that the convening authority may approve in your case?

ACC: Yes/No, sir/ma'am.

[NOTE: MJ should explain each provision of the pretrial agreement to the accused and inquire into each specially negotiated provision. The guide below provides questions for an ordinary pretrial agreement. This inquiry tracks the Standard PTA published by Navy JAG Code 20. If a different form is use, you should adjust the inquiry accordingly.]

MJ: In a pretrial agreement, you agree to enter pleas of guilty to (some of) the charge(s) and specification(s), as indicated here in Part I, and, in return, the convening authority agrees to approve and order executed no sentence greater than that set forth in the sentence limitation portion of your agreement. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: If the sentence adjudged by this court-martial is greater than the one provided in the agreement, the convening authority would have to reduce the sentence to one no more severe than the one in your agreement. On the other hand, if the sentence adjudged by this court-martial is less than the one in your agreement, the convening authority cannot increase the sentence adjudged. Do you understand that?

ACC: Yes/No, sir/ma'am.

[Note: If the agreement is for the Convening Authority to refer the charges and specifications to a special court-martial vice a general court-martial (i.e., a "Bareback SPCM"), such agreement should be addressed in Part II (the Maximum Sentence Limitation Appendix).]

MJ: **[MJ alone case]** There are two parts to your Pretrial Agreement. Part I contains the all the terms of your agreement except the sentence limitation portion, which is in Part II of your Pretrial Agreement. Are Parts I and II the entire agreement between the government and yourself?

ACC: Yes/No sir/ma'am.

MJ: Normally, the sentence limitation portion of a pretrial agreement is in five distinct parts to include: (1) punitive discharge, (2) confinement and/or restraint, (3) forfeiture and/or fine, (4) reduction in pay grade and (5) other lawful punishment that may be adjudged. Are each of these

distinct parts covered in the sentence limitation portion of your pretrial agreement?

MJ: **[Members case]** The maximum sentence that the convening authority can approve pursuant to this agreement is: (State the maximum from the sentence limitation portion of the agreement). Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: Paragraph 4/____, states, I am satisfied with my defense counsel in all respects and consider (him/her/them) qualified to represent me at this court-martial. Is that true?

ACC: Yes/No sir/ma'am. [If "NO," MJ must clarify. Recess and enter R.C.M. 802 conference with counsel.]

MJ: Paragraph 5/_____, states, "I am entering into this agreement freely and voluntarily. Nobody has made any attempt to force or coerce me into making this agreement or into pleading guilty." Is that true?

ACC: Yes/No sir/ma'am. [If "No," conduct inquiry.]

MJ: Paragraph 6/_____ addresses Administrative Processing. Administrative processing is separate from this trial and your pretrial agreement. Therefore, any agreement you may have regarding a punitive discharge does not prevent the Service from initiating administrative discharge proceedings against you that could result in an other than honorable discharge, even if part or all of the sentence, including a punitive discharge, is suspended or disapproved for any reason. Do you understand that?

ACC: Yes/No, sir/ma'am.

[Note: If the agreement includes the accused waiving an administrative discharge board, such waiver may be addressed either here or in paragraph 15, *infra*, the "Specially Negotiated Provisions," at the discretion/election of the parties.]

MJ: Paragraph 7/___ covers withdrawal of your pleas. You may request to withdraw (any of) your pleas of guilty at any time before sentence is announced in this case and, if you have a good reason for your request, I will allow you to do so. Do you understand?

ACC: Yes/No, sir/ma'am.

MJ: Paragraph 8/___ states events that would render this pretrial agreement null and void, that is, of no effect. They are: (1) if you fail to plead guilty as required by the agreement; (2) if I refuse to accept (any of) your pleas of guilty; (3) if I accept your pleas of guilty, but prior to the time sentence is announced, I set aside any or your pleas of guilty for whatever reason, including if you request permission to withdraw (any of) your pleas of guilty; (4) you fail to satisfy any material term of this agreement, and (5) you fail to plead guilty as required by this agreement at a rehearing. [If there are any other ways listed, include them here.] Do you understand this?

ACC: Yes/No, sir/ma'am.

MJ: Paragraph 9/___ states that you understand that if this agreement becomes null and void, then your offer to plead guilty and enter into this agreement cannot be used against you in any way in determining whether you are guilty or not guilty of the charges alleged against you at this court-martial or in determining an appropriate sentence. Do you understand that?

ACC: Yes/No sir/ma'am.

MJ: Paragraph 10/___ states that you understand that if the approved sentence includes a punitive discharge or confinement in excess of 90 days (or 3 months), whether the sentence is suspended or not, Article 58a of the UCMJ and § 0152 of the JAGMAN require that you suffer automatic administrative reduction in pay grade to the lowest enlisted pay grade, E-1, unless the Convening Authority takes action to remit or suspend the automatic reduction. Do you understand that?

ACC: Yes/No sir/ma'am.

MJ: Paragraph 11/___ states that you understand that if the adjudged sentence includes either a punitive discharge and confinement, or confinement in excess of six months, whether the sentence is suspended or not, Article 58b of the UCMJ requires the automatic imposition of forfeitures of (2/3 pay per month) (all pay and allowances) due during any period of confinement served, unless the Convening Authority takes action to waive or defer the automatic forfeiture provision. Forfeitures, whether adjudged or automatic, take effect upon the convening authority's action in this case or 14 days after sentence is adjudged, whichever is earlier. You also understand that you may

request in writing that the convening authority defer execution of forfeitures until the convening authority takes action in this case. You also understand that you may request that the convening authority waive automatic forfeitures for a period up to six (6) months from the date of the convening authority's action. Finally, you understand that if you are held in confinement beyond your End of Active Obligated Service (EAOS) date, then you will not receive any pay or allowances by operation of law, regardless of the terms of this agreement. Do you understand this paragraph?

ACC: Yes/No sir/ma'am.

MJ: Paragraph 12/___ is a misconduct provision. It states that you understand that should you commit any misconduct (i.e., any act or omission in violation of the UCMJ which constitutes a material breach of this agreement) after the signing of this pretrial agreement but before the date of trial, such misconduct may be the basis for the convening authority to unilaterally withdraw from the pretrial agreement, rendering the entire agreement null and void. You further understand that if you commit misconduct after the date of trial, but before the date of the convening authority's action, the convening authority may, after first complying with notice and hearing requirements consistent with Article 72, UCMJ and R.C.M. 1109, withdraw from the sentence limitation provisions of this agreement. Should the Convening Authority withdraw from the sentence limitation provisions of this agreement based on misconduct occurring after the date of trial but before action is taken in your case, you understand that any provisions in the pretrial agreement relating to suspension of any aspect of your sentence would become null and void in all respects, and that the entire sentence adjudged at

this court-martial may be approved and imposed upon you. Do you understand this paragraph?

ACC: Yes sir/ma'am.

MJ: Paragraph 13/___ is also a misconduct provision addressing a different time period. It states you also understand that should you violate any of the conditions of the suspension stated in this agreement during the period in which any part of your sentence is suspended, the Convening Authority may, after complying with the procedures set forth in R.C.M. 1109, vacate any periods of suspension agreed to in this pretrial agreement or as otherwise approved by the Convening Authority, and that any previously suspended portion of your sentence could be imposed upon you. Do you understand this paragraph?

ACC: Yes/No sir/ma'am.

MJ: Paragraph 14/___ states that you understand that you may be placed on appellate leave under the provisions of Article 76a of the UCMJ. You also understand that an individual placed in to an appellate leave status will normally not receive any pay or allowances. You further understand that receipt of pay and/or allowances while in an appellate leave status will depend on the amount of your accrued leave and will be determined and applied in conjunction with the sentence awarded by this court-martial. (Furthermore, you agree that, should a punitive discharge be adjudged, you will submit, within ___ days from the date of the conclusion of your trial, a written request to be placed on appellate leave without pay or allowances.) Do you understand this paragraph?

ACC: Yes/No sir/ma'am.

MJ: [Address paragraph 15: Specially Negotiated Provisions as applicable.
See Appendix 20.]

PLEAS OF THE ACCUSED

MJ: The final unnumbered paragraph indicates how you intended to plead and, you have complied with that paragraph. Do you understand?

ACC: Yes/No sir/ma'am.

[NOTE: At this point, MJ should explain to the accused all other provisions of the pretrial agreement, including any specially negotiated provisions. When finished, continue.]

MJ: Are there any other agreements in this case?

ACC: Yes/No, sir/ma'am.

MJ: Do counsel for both sides agree with that?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: (Accused), do you have any questions about any of the provisions of your agreement?

ACC: Yes/No, sir/ma'am.

MJ: Do you feel that you understand each and every provision?

ACC: Yes/No, sir/ma'am.

MJ: Do counsel for both sides agree with the court's interpretation of the pretrial agreement?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: (Accused), once again, are you entering into this pretrial agreement voluntarily?

ACC: Yes/No, sir/ma'am.

MJ: Has anyone tried to force or threaten you to enter into this agreement?

ACC: Yes/No, sir/ma'am.

MJ: Have you fully discussed this agreement with your counsel, and are you satisfied that his/her/their advice is in your best interest?

ACC: Yes/No, sir/ma'am.

MJ: Do you have any questions about your plea of guilty, your pretrial agreement, or anything we have discussed?

ACC: Yes/No, sir/ma'am.

MJ: **[MJ Alone case]** At this point, I find the pretrial agreement to be in accord with appellate case law, not contrary to public policy or my own notions of fairness, and the agreement is accepted.

[Members case] I find the pretrial agreement as a whole to be in accord with appellate case law, not contrary to public policy or my own notions of fairness, and the agreement is accepted.

>>> Go to GUILTY PLEA INQUIRY CONTINUED, next page

GUILTY PLEA INQUIRY CONTINUED

MJ: (Accused), do you have any questions about the meaning and effect of your pleas of guilty?

ACC: Yes/No, sir/ma'am.

MJ: Do you still wish to plead guilty?

ACC: Yes/No, sir/ma'am.

MJ: I find that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by this court-martial, and to confront the witnesses against you. I further find that your pleas are made voluntarily and with a factual basis, and they are accepted.

MJ: **[If other offenses remain]** (Trial counsel), does the government intend to go forward on the offense(s) to which the accused has pleaded not guilty?

TC: Yes/No, sir/ma'am.

MJ: (Defense counsel), In your opinion has the accused been subjected to any form of unlawful pretrial punishment or restraint?

DC: Yes/No sir/ma'am.

ACCUSED HAS PLEADED GUILTY TO AN LIO

[NOTE: Use the following if the accused has pleaded guilty to an LIO and the Government is going forward on the greater offense.]

MJ: You have pleaded guilty to _____. Your plea of guilty admitted every element of the greater offense of _____, except _____. Do you understand that for you to be found guilty of the greater offense, the Government would have to prove only _____? Do you understand that, in the event the Government successfully proves _____, you can be found guilty of the offense as charged despite your pleas?

ACC: Yes/No, sir/ma'am.

ACCUSED HAS PLEADED GUILTY BY EXCEPTIONS AND SUBSTITUTIONS

[NOTE: Use the following if the accused has pleaded guilty by exceptions and substitutions and the government is going forward on the excepted language.]

MJ: You have pleaded guilty to _____ by exceptions and substitutions, which differs from the offense charged in that _____. Do you understand that the Government need prove only _____? Do you understand that, in the event the Government successfully proves _____, you can be found guilty of the offense as charged despite your pleas?

ACC: Yes/No, sir/ma'am.

[NOTE: In a military judge alone case, if the accused has providently pleaded guilty to certain offenses and no contested offenses remain or if the prosecution indicates no intention of going forward with the remaining offenses, findings as to those offenses should be announced by the military judge immediately after pleas have been accepted. If the accused has providently pleaded guilty to only some of the offenses charged, or to a lesser included offense, and the prosecution intends to offer evidence on the remaining or greater offense, the announcement of all findings should be reserved until the conclusion of the evidence on the merits.]

[NOTE: In a members case, if pleas of guilty have been accepted on any offenses as charged, findings as to those offenses should be announced by the military judge immediately after pleas have been accepted. If the accused has entered a provident plea of guilty to a lesser included offense and the prosecution intends to offer evidence on the offense charged, findings of guilty should not be announced. The members should be told by the military judge, prior to opening statements, about the meaning of the accused's plea to the lesser included offense as it relates to the contest on the greater offense. Also, during instructions on findings, the members should be advised that if they find the accused not guilty of the greater offense (and any other contested lesser included offenses contained within the greater offense), then they must enter a finding of guilty to the lesser included offense to which the accused pleaded guilty.]

[NOTE: Also, in a members case, the military judge should not inform the members of pleas and findings of guilty prior to presentation of evidence on another charge to which the accused has pleaded not guilty. The two exceptions to this rule are cases in which the accused has specifically requested, on the record, that the military judge instruct on prior pleas of guilty, and cases in which a plea of guilty was to a lesser included offense within the contested offense charged in the specification.]

>>> If no contested offenses remain or if the prosecution indicates no intention of going forward with remaining offenses, go to ANNOUNCEMENT OF FINDINGS - GUILTY PLEA.

>>> If any remaining offenses are contested before military judge alone go to MILITARY JUDGE ALONE - CONTESTED CASE ON THE MERITS, page 40.

>>> If any remaining offenses are contested before members, go to ANNOUNCEMENT OF FINDINGS - GUILTY PLEA and announce any appropriate guilty findings; if not appropriate to announce any guilty findings at this point, then go instead to ARTICLE 39(a) SESSION PRIOR TO ASSEMBLY OF MEMBERS, page 47.

ANNOUNCEMENT OF FINDINGS - GUILTY PLEA

MJ: Accused and counsel, please rise.

(Accused), it is my duty as military judge to inform you that in accordance with your pleas, this court-martial finds you:

*** Announce findings ***

MJ: You may be seated.

>>> Resolve any outstanding multiplicity or unreasonable multiplication issues.

>>> If military judge alone, go to MILITARY JUDGE ALONE SENTENCING, page 43.

>>> If members, go to ARTICLE 39(a) SESSION PRIOR TO ASSEMBLY OF MEMBERS, page 47.

MILITARY JUDGE ALONE - CONTESTED CASE ON THE MERITS

MJ: Trial counsel may make an opening statement.

TC: Opening statement.

MJ: Defense counsel may make an opening statement now or reserve until the close of the prosecution's case.

DC: Opening statement, unless reserved.

MJ: The prosecution may proceed.

Presentation of evidence for the prosecution.

TC: Your honor, the government rests.

MJ: **[If the defense has reserved opening]** The defense counsel may make an opening statement.

DC: Opening statement, if not made earlier.

MJ: The defense may proceed.

Presentation of evidence for the defense.

DC: Your honor, the defense rests.

MJ: Does the prosecution have a case in rebuttal?

TC: Yes/No, sir/ma'am.

If yes, presentation of rebuttal evidence.

TC: Your honor, the prosecution has nothing further.

MJ: **[If the prosecution has presented rebuttal evidence]** Does the defense have a case in surrebuttal?

DC: Yes/No, sir/ma'am.

If yes, presentation of surrebuttal evidence.

DC: Your honor, the defense has nothing further.

MJ: The court is prepared to hear argument. (Trial counsel), you may argue.

TC: TC argument on findings.

MJ: (Defense counsel), you may argue.

DC: DC argument on findings.

MJ: (Trial counsel), do you desire to make a closing argument?

TC: Yes/No, sir/ma'am.

If yes, Government closing argument on findings.

MJ: The court will be closed for deliberations.

MJ: The court will come to order. All parties present when the court closed are again present.

MJ: Accused and counsel, please rise.

(Accused), it is my duty as military judge to inform you that this court-martial finds you:

*** Announce findings ***

MJ: You may be seated.

>>> If complete acquittal, go to ACQUITTAL ADJOURNMENT, page 108.

>>> If not complete acquittal, continue.

MILITARY JUDGE ALONE SENTENCING

MJ: Are there any corrections or additions to the personal data listed on the charge sheet?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: [If pretrial confinement] I calculate ____ days of credit for pretrial confinement. Do counsel for both sides concur?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: (Trial counsel), does the prosecution desire that the matters addressed during the providence inquiry be considered in sentencing?

TC: Yes/No, sir/ma'am.

MJ: [If yes] Any objection from the defense?

DC: Yes/No, sir/ma'am. (I object to your consideration of ____.)

MJ: [If any objection] Your objection is (overruled) (sustained).

[NOTE: If matters involving misconduct not charged were developed during the providence inquiry, MJ should indicate for the record that these matters will not be considered for the purpose of determining an appropriate sentence.]

MJ: The Court will note the personal data on the charge sheet [and consider the matters addressed during the providence inquiry (as well as the stipulation of fact, Prosecution Exhibit ____) (except for ____)].

MJ: (Accused), at this point in the trial, you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself which you want the court-martial to consider in deciding a sentence. Included in your right to present such matters are the rights you have to testify under oath, to make an unsworn statement, or to remain silent. If you testify under oath, you may be cross-examined by the trial counsel and questioned by me. If you decide to make an unsworn statement, you may not be cross-examined by trial counsel or questioned by me. However, the prosecution does have the right to rebut any statement of fact in your unsworn statement. You may make an unsworn statement orally or in writing, personally, or through your counsel, or you may use a combination of these methods. If you decide to exercise your right to remain silent, that cannot be held against you in any way. Do you understand your rights?

ACC: Yes/No, sir/ma'am.

MJ: (Trial counsel), does the prosecution have any evidence to present on sentencing?

TC: Yes/No, sir/ma'am.

MJ: [If yes] The prosecution may proceed.

TC presents sentencing evidence.

TC: Your honor, the prosecution has nothing further.

MJ: (Defense counsel), does the defense have any evidence to present on sentencing?

DC: Yes/No, sir/ma'am.

MJ: [If yes] The defense may proceed.

DC presents sentencing evidence.

DC: Your honor, the defense has nothing further.

MJ: Does the prosecution have a case in rebuttal?

TC: Yes/No, sir/ma'am.

TC rebuttal, if any.

MJ: Does the defense have a case in surrebuttal?

DC: Yes/No, sir/ma'am.

DC surrebuttal, if any.

MJ: The court is prepared to receive argument on sentencing, (Trial counsel).

TC: TC argument on sentence.

MJ: (Defense Counsel)?

DC: DC argument on sentence.

MJ: The court is closed for deliberations.

Deliberations on sentence.

MJ: The court will come to order. All parties present when the court closed are again present. Accused and counsel, please rise. (Accused), it is my duty as military judge to inform you that this court sentences you:

***** Announce sentence *****

MJ: You may be seated.

>>> If no pretrial agreement, go to APPELLATE RIGHTS, page 106.
If there was a pretrial agreement, continue.

MJ: (Defense counsel), may I have the sentence limitation portion of the pretrial agreement?

DC: Yes/No, sir/ma'am.

MJ examines the sentence limitation portion of the pretrial agreement and informs the accused of its effect, if any, on the sentence adjudged.

MJ: (Accused), do you understand the effect that the sentence limitation portion of your agreement has on the sentence adjudged by the court?

ACC: Yes/No, sir/ma'am.

MJ: Do counsel for both sides concur with my explanation to (Accused) of the provisions and effect of the sentence limitation portion of the pretrial agreement?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: [Once agreement reached concerning effect of sentence limitation portion by all parties] I find the pretrial agreement as a whole to be in accord with appellate case law, not contrary to public policy or my own notions of fairness, and the agreement is accepted.

>>> Go to APPELLATE RIGHTS, page 106.

ARTICLE 39 (a) SESSION PRIOR TO ASSEMBLY OF MEMBERS

Before calling the members, the military judge should discuss with counsel any preliminary matters, trial procedures, and evidentiary issues that can be considered prior to assembly. Address and, when necessary, mark the following:

- Cleansed charge sheet
- Court-martial member questionnaires
- TC / DC witness lists
- MJ voir dire questions
- TC / DC requested voir dire
- TC / DC request for instructions (Findings / Sentence)
- Prosecution exhibits
- Defense exhibits
- Applicable motions
- Judicial notice
- Stipulations
- Members' folders (convening order and any modifications; cleansed charge sheet w/MJ approval; question forms, note pads and pen/pencil)
- Members' name plates, water and cups provided

>>> If contested offenses, go to **ASSEMBLY OF MEMBERS**, page 52.

>>> If members for sentencing only, continue with **PRE-SENTENCING (MEMBERS)**, on the next page, after discussing the following:

- Ascertain maximum sentence if general court-martial.
- Ensure current pay chart is available and marked as an appellate exhibit for use by the members.
- If special court-martial, obtain a "two thirds pay chart" for use by the members and verify the math.
- Remind counsel to begin thinking about any special instructions for Sentencing.

[NOTE: This material was commonly referred to in the past as "PAGE 43 MATTERS" due to the page number in the 2003 TRIAL GUIDE.]

PRE-SENTENCING SESSION (MEMBERS)

MJ: Are there any corrections or additions to the personal data listed on the charge sheet?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: [If pretrial confinement] I calculate ____ days of credit for pretrial confinement. Do counsel for both sides concur? [**NOTE:** Include the first day and all subsequent days or pretrial confinement served up to, but not including the day of sentencing. The day of sentencing is the first day of adjudged confinement.]

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: The trial counsel will read the personal data to the members at the appropriate time.

TC: Yes, sir/ma'am.

MJ: (Trial counsel), does the prosecution have any evidence on sentencing to be offered and admitted at this time?

TC: Yes/No, sir/ma'am.

If yes, mark and admit prosecution exhibits on sentencing.

MJ: (Accused), you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself which you want the court-martial to consider in deciding a sentence. Included in your right to present such matters are the rights you have to testify under oath, to make an unsworn statement, or to remain silent. If you testify under oath, you may be cross-examined by the trial counsel and questioned by the members and me. If you decide to make an unsworn statement, you may not be cross-examined by trial counsel or questioned by the members or me. However, the prosecution does have the right to rebut any statement of fact in your unsworn statement. You may make an unsworn statement orally or in writing, personally, or through your counsel, or you may use a combination of these methods. If you decide to exercise your right to remain silent, that cannot be held against you in any way. Do you understand your rights?

ACC: Yes/No, sir/ma'am.

MJ: Does the defense have any evidence on sentencing to be offered and admitted at this time?

DC: Yes, sir/ma'am.

Mark and admit defense exhibits on sentencing.

MJ should address any evidentiary issues.

MJ: (Trial Counsel), what do you calculate the maximum sentence to be?

TC: I calculate the maximum sentence to be _____.

MJ: (Defense Counsel), do you agree?

DC: Yes/No, sir/ma'am.

MJ resolves any dispute as to maximum authorized sentence.

MJ: [If the accused elected not to testify] (Defense Counsel), do you want me to instruct on the fact that the accused did not testify?

DC: Yes/No, sir/ma'am.

MJ: I intend to give the (standard sentencing) (following) instructions to the court members: (_____). Does counsel for either side have any objections?

TC: Yes/No, sir/ma'am

DC: Yes/No, sir/ma'am

MJ resolves any objections.

MJ: Does counsel for either side have any requests for additional instructions?

TC: Yes/No, sir/ma'am

DC: Yes/No, sir/ma'am

MJ resolves any requests for instructions.

MJ: (Trial Counsel), please have the sentence worksheet marked as an Appellate Exhibit, provide a copy to the defense, and give the worksheet to me.

TC complies.

MJ: (Defense Counsel), do you have any objections?

DC: Yes/No, sir/ma'am

MJ resolves any objections.

MJ: I will give the court members Prosecution Exhibit(s) (____) (through (____)), Defense Exhibit(s) (____) (through (____)), and Appellate Exhibit (____), the sentence worksheet. (Does counsel for either side desire that any other exhibits be given to the court members?)

TC: Yes/No, sir/ma'am

DC: Yes/No, sir/ma'am

MJ resolves any requests for additional exhibits to be given to the court members.

MJ: Is there anything else, which needs to be resolved prior to calling the court members?

TC: Yes/No, sir/ma'am

DC: Yes/No, sir/ma'am

MJ should address opening statements by counsel.

ASSEMBLY OF MEMBERS

MJ: Bailiff, ask all the members to enter the courtroom.

Members enter courtroom.

MJ: Everyone may be seated. This (General/Special) court-martial will come to order in the case of United States versus (Accused). Trial counsel please state the jurisdictional data for this court-martial.

TC: This court is convened by (convening authority) by (special)(general) court-martial convening order (number) dated ____, 19__ (as amended by _____), copies of which have been furnished to each member.

The accused, (rank/rate, name, service, unit), and the following persons detailed to this court-martial are present:

(Rank, name, service), as military judge;
(Rank, name, service), as TC / assistant TC;
(Rank, name, service), as DC / IMC / CC / assistant DC; and,
(Rank/rate, name, service), as members.

MJ: Members of the court, please review the convening order (and modification(s)) before you in your folder and ensure that your name appears on the convening order with the correct rank (and rate), initials, spelling of last name, and branch of service. If a correction needs to be made, please raise your hand.

MBR:(Response, if any)

MJ: (A negative response by all members.) (The trial counsel is directed to make the correction(s) to the convening order.)

MJ: The members will now be sworn.

TC: All rise. As I call your name, please raise your right hand. Do you, (Members named by seniority), (swear) (or affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court-martial upon the (findings or) (sentence) unless required to do so in due course of law, (so help you God)?

MBR:I do.

MJ: Everyone may be seated.

MJ: This (General/special) court-martial is assembled. Trial Counsel, is the government ready to proceed?

TC: Yes/No sir/ma'am. The prosecution is ready to proceed with trial in the case of United States versus (Accused).

The general nature of the charge(s) in this case is (are): _____.
The charge(s) was (were) preferred by (accuser) [(investigated by (Article 32 officer);) and forwarded with recommendations as to disposition by (SPCM authority)].

The records of this case disclose (no grounds for challenge) (grounds for challenge of (member) for the following reason(s): _____).

If any member is aware of any matter that may be a ground for challenge by any party, the member should so state.

MBR:(Response, if any.)

TC: (Negative response from all members.) (_____)

MJ: [If the cleansed charge sheet has not already been provided to the members] (Trial counsel), please distribute a copy of the charge sheet to the members.

MJ: Members of the court please review the charge(s) and specification(s) (before you in your folder). When you have completed your review, please look up toward me.

MJ: Members of the court, have each of you had an adequate amount of time to review the charges and specification(s) in this case?

MBR: Response Affirmative/Negative.

PRELIMINARY INSTRUCTIONS

MJ: Members of the court, it is appropriate that I give you some preliminary instructions. It is my duty, as military judge, to ensure this trial is conducted in a fair and orderly manner. I rule upon objections and instruct you on the law to be applied in this case. You are required to follow my instructions on the law and may not consult any other source as to the law pertaining to this case unless it is admitted into evidence. This rule applies throughout the trial including closed session deliberations and periods of recess or adjournment. Any questions you have should be asked of me in open court.

[NOTE: If trial in absentia, MJ should provide the members with the following instruction: "Members of the court, an accused person has a right to be present at trial. The accused in this case, (Accused), has waived this right and accordingly we will proceed with the trial in his/her absence. You may not speculate as to why he/she is not present, and you will not draw any inference adverse to the accused from the fact that he/she is not present at this trial. His/her absence must not be considered as an admission of guilt, nor may you draw an inference of guilt from the accused's absence. The accused's absence must be completely disregarded by you."]

>>> If an offense is PARTIALLY contested in that the accused pleads guilty to LIO and prosecution is going forward on greater offense, go to MIXED PLEAS - MEMBERS ADVISED OF PLEA TO LIO, page 57

>>> If the offenses are PARTIALLY contested and the members, at the request of the defense, ARE ADVISED of guilty pleas, go to MIXED PLEAS - MEMBERS ADVISED OF GUILTY PLEAS, page 58

>>> If the offenses are contested, even partially, and members are NOT ADVISED of guilty pleas, go to GENERAL MEMBER DUTIES - CONTESTED CASE, page 59.

>>> If the accused plead guilty and no contested offenses remain, continue with GENERAL MEMBER DUTIES - SENTENCING ONLY, next page.

GENERAL MEMBER DUTIES - SENTENCING ONLY

MJ: At a session held earlier, (Accused) pleaded guilty to the charge(s) and specification(s) that you have before you. I accepted those pleas and entered findings of guilty. Therefore, you will not have to determine whether the accused is guilty or not guilty as that has been established by his/her pleas and my findings. Your duty will be to determine what punishment, if any, should be imposed as the result of my findings of guilty. That duty is a grave responsibility requiring the exercise of wise discretion. Your determination must be based upon all of the evidence presented and the instructions I will give you as to the applicable law. Since you cannot properly reach your determination until all the evidence has been presented and you have been instructed, it is of vital importance that you keep an open mind until all the evidence and instructions have been presented to you.

>>> Go to PRELIMINARY INSTRUCTIONS - CONTINUED, page 60.

MIXED PLEAS - MEMBERS ADVISED OF PLEA TO LIO

[NOTE: In the usual case, the members should not be informed of the offense(s) to which the accused has pleaded guilty until the sentencing phase. As an exception to this rule, where the accused has pleaded guilty to a lesser included offense (e.g. wrongful appropriation), which includes elements of the greater offense that the prosecution is attempting to prove (e.g. larceny), the members should be told of the guilty pleas so that they will know that the elements included within the guilty pleas are already established by the pleas and need not be proven by the prosecution.]

MJ: At an earlier session, the accused was arraigned and entered the following pleas: (list pleas). I have accepted the accused's plea of guilty to the lesser included offense(s) of _____. The accused's plea of guilty to the lesser included offense of _____ admits some of the elements of the offense charged in (the) specification ____ of charge _____. These elements are therefore established by the accused's plea without need of further proof. However, the accused's plea of guilty to this lesser included offense does not provide a sufficient basis or support an inference of guilt for a finding of guilty of the greater charged offense because there still remains in issue the element(s) of (list element(s)). No inference of guilt to the remaining element(s) may be drawn from the accused's plea. Before the accused may be found guilty of the greater offense charged, the prosecution must prove the remaining element(s) to a standard known as beyond a reasonable doubt.

[NOTE: The elements of the greater and lesser offenses may be given at this time so that the members will understand which element(s) are proven by the plea and which are contested.]

>>> If members advised of additional guilty pleas, go to MIXED PLEAS - MEMBERS ADVISED OF GUILTY PLEAS, next page.

>>> Otherwise, go to GENERAL MEMBER DUTIES - CONTESTED, page 59.

MIXED PLEAS - MEMBERS ADVISED OF GUILTY PLEAS

[NOTE: If the accused has pleaded guilty to some offenses but not to others, the military judge should defer informing the members of the offenses to which the accused has pleaded guilty until after findings on the remaining offenses have been entered. Exceptions to this rule include cases in which the accused has specifically requested, on the record, that the military judge instruct the members of the prior pleas of guilty and cases, as noted above, in which a plea of guilty was to a lesser included offense within the contested offense charged in the specification.]

MJ: (At an earlier session, the accused was arraigned and entered the following pleas: (list pleas).) I accepted the accused's pleas of guilty to (offense(s)) and found him guilty of that/those offense(s). You will not be required to reach findings regarding (name charge(s) and specification(s)). Findings will be required, however, as to (name charge(s) and specification(s)), to which the accused has pleaded not guilty. You may not consider the fact that the accused pleaded guilty to (one) (some of the) offense(s) in any way in deciding whether the accused is guilty of the offense(s) to which he/she has pleaded not guilty.

>>> Go to GENERAL MEMBER DUTIES - CONTESTED, next page.

GENERAL MEMBER DUTIES - CONTESTED

MJ: At an earlier session of this court-martial the accused was arraigned on the charges before the court and entered pleas of “not guilty” to the Charge(s) and Specification(s). As court members, it is your duty to hear the evidence and determine whether the accused is guilty or not guilty and, if you find him/her guilty, to adjudge an appropriate sentence. Under the law, the accused is presumed to be innocent. The government has the burden of proving the accused's guilt beyond a reasonable doubt. The accused, through counsel, need not present any evidence during this trial and may rely on that presumption of innocence. The fact that (a) charge(s) (has) (have) been preferred against this accused and referred to this court for trial does not permit or support any inference of guilt. You must make your determination of whether or not the accused is guilty solely upon the evidence presented here in court and the instructions that I will give you. Since you cannot properly make that determination until you have heard all of the evidence and received instructions, it is of vital importance that you retain an open mind until all the evidence has been presented and the instructions have been given to you. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to (whether the accused is guilty or not guilty and, if necessary,) an appropriate sentence.

>>> [Go to PRELIMINARY INSTRUCTIONS - CONTINUED, next page.](#)

PRELIMINARY INSTRUCTIONS - CONTINUED

MJ: With regard to sentencing, should it become necessary, you may not have any preconceived idea or formula as to either the type or the amount of punishment that should be adjudged (if the accused were to be convicted of (this) (any of these) offense(s)). You must first hear the evidence in extenuation and mitigation, as well as that in aggravation if any, the law with regard to sentencing, and again only when you are in your closed session deliberations may you properly make a determination as to an appropriate sentence after considering all of the alternative punishments that I will later explain. While you are in your closed session deliberations, only the members will be present, you must remain together, and you may not allow any unauthorized intrusion into your deliberations. Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. The senior member's vote counts as one, the same as the junior member's. In addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations and will speak for the panel in announcing the results. It is the duty of the trial counsel, (name(s)), to represent the Government in the prosecution of this case and it is the duty of defense counsel, (name(s)), to represent the accused.

MJ: In a few minutes, I will ask you some questions. Counsel will also be given an opportunity to ask you questions. If you know of any matter that you believe might affect your impartiality to sit as a member in this case, you must disclose that matter when asked to do so. Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement. For example, if you have read a report of investigation of (the) (any) incident alleged in the specification(s), you should so state. Do not, however, state in front of the other members either what the report said or any opinion or conclusion you may have arrived at as a result of having read it. If you believe that what you say might disqualify the other members who hear it, you should request to make a statement outside their presence. Some of the grounds for challenge would be if you were the accuser in this case, if you had investigated any offense charged, if you had formed or expressed an opinion as to the guilt or innocence of the accused, or any other matter that might affect your impartiality. (Also, as to the enlisted member(s), if you belong to the same unit as the accused, that is, (unit), that would be a ground for disqualification.) Questions by counsel and me are not intended to embarrass you; they are not an attack on your integrity; they are merely asked in order to determine whether a basis for challenge exists.

MJ: There are two types of challenges. One is known as a "challenge for cause." That is self-explanatory. The other is known as a "peremptory challenge," which gives counsel for both sides the opportunity to excuse one panel member for no reason at all. It is no adverse reflection upon a panel member to be excused from a particular case. You may be questioned either individually or collectively, but in either event you should indicate an individual response to the question asked. Unless I indicate otherwise, you are required to answer all questions.

MJ: I anticipate the following general order of events in this case: voir dire of the members, challenges and excusals, opening statements of counsel, presentation of evidence, closing argument of counsel, instructions on the law you must follow, deliberations and announcement of the verdict. If the accused is convicted of anything, there will also be sentencing proceedings. I anticipate this case will last _____ days. The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. Are there any questions over these preliminary matters? If so, please raise your hand.

MBR:(Response, if any.)

MJ: [If no questions] Negative response from the members.

MJ: Members of the court, I will now put some questions to you as a panel (and then allow counsel for each side the opportunity to pose additional questions). If your response is yes, please signify "yes" by raising your hand. If you do not raise your hand, I will record your response as "no." If you are asked a question individually, you should respond verbally. Do any of you have any questions about this procedure? If so, please indicate "yes" by raising your hand.

MBR:(Response)

MJ: [If no response] Negative response from the members.

General voir dire conducted by military judge. Questions may be selected from those listed in the appendix (A-1).

MJ: Do counsel for either side desire any group voir dire of the members?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

Counsel conduct group voir dire within discretion of MJ.

After group voir dire has been completed, continue.

MJ: The members will please depart the courtroom for the deliberation room while I address some matters with counsel outside your hearing.

Members depart.

If required or in the discretion of MJ, individual members will be recalled for individual voir dire.

After individual voir dire has been completed and all members have departed the courtroom, continue.

MJ: Does the prosecution have any challenges for cause?

TC: The prosecution (has no challenges for cause) (challenges (name(s) of members) for cause on the ground(s) that _____).

MJ rules on challenge after allowing DC to be heard.

MJ: Does the defense have any challenges for cause?

DC: The defense (has no challenges for cause) (challenges (name(s) of members) for cause on the ground(s) that _____).

MJ rules on challenge after allowing TC to be heard.

[NOTE: If challenges for cause reduce the court below quorum, the court should recess until new members are detailed. The new members should then be instructed, questioned, and subjected to challenge for cause. Only after the court is returned to quorum should counsel be allowed one peremptory challenge against the panel as a whole.]

(Quorum count matrix)

Members Remaining	Enlisted Minimum	Members Remaining	Enlisted Minimum
12	4	7	3
11	4	6	2
10	4	5 (GCM Minimum)	2
9	3	4	2
8	3	3 (SPCM Minimum)	1

MJ: Does the prosecution have a peremptory challenge?

TC: The prosecution (has no peremptory challenge) (exercises its peremptory challenge against (name of member)).

MJ rules on challenge after allowing DC to be heard.

MJ: Does the defense have a peremptory challenge?

DC: The defense (has no peremptory challenge) (exercises its peremptory challenge against (name of member)).

MJ rules on challenge after allowing DC to be heard.

[NOTE: If a peremptory challenge appears to violate Batson and its progeny, MJ should have counsel enumerate a lawful bias for challenge.]

[NOTE: If peremptory challenges reduce the panel below quorum, the court should recess until new members are detailed. The new members should then be instructed, questioned, and subjected to challenges. The additional peremptory challenge given to counsel can be used to excuse a new member only.]

MJ: Bailiff, ask all the members to return to the courtroom.

Members return to courtroom.

MJ: [If any member is excused] (Name(s) of member(s)), you are excused from further participation in this case and may return to your normal duties. Thank you for your attendance here today.

[NOTE: After any excused members have withdrawn, seating should, if necessary, be rearranged by seniority.]

MJ: [If challenges reduce court below quorum] The court is now below the required quorum, and we cannot proceed until additional members have been detailed. I am going to recess the court until that is accomplished. The members are excused until further notice.

FURTHER PRELIMINARY INSTRUCTIONS

MJ: Members, I have some further preliminary instructions. First, when a witness is called, the counsel who calls the witness will question the witness first, and then opposing counsel will be given a chance to ask questions. In the event counsel makes an objection to a question or item of evidence and I sustain the objection, you must disregard the question or the item of evidence. The alternative completely is that I might overrule an objection, in which case you may consider the question or item of evidence. When counsel have finished, if you believe there are substantial questions that you would like me to ask for you, you will be given an opportunity to do so. Write out your questions on one of the forms provided in your folder and sign it at the bottom. This method gives counsel and myself an opportunity to review the question before it is asked since your questions, like mine, and questions of counsel, are subject to objection. Please ensure your questions are relevant to the issues before this court and are not biased to aid one side or the other. Do not allow any other member to see your question. Whether or not your question is asked, it will be attached to the record as an appellate exhibit. Thus, please write legibly. Bear in mind that the counsel are responsible for preparing and presenting their cases. In questioning witnesses, you must not depart from your role as an impartial trier of fact and become an advocate for either the prosecution or the defense.

MJ: Second, during any recess or adjournment, you may not discuss the case with anyone, nor may you discuss the case among yourselves. You must not listen to or read any account of the trial in the news media or anywhere else or consult any source, written or otherwise, as to matters involved in this case. Do not visit the scene of any alleged incident. You must hold your discussion of the case until you are all together in your closed session deliberations so that all of the members will have the benefit of your discussion. If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. The only exception to this rule is that you may be notified of the time your presence will next be required and the proper uniform.

MJ: Third, each of you may take notes, if you desire, and use them to refresh your memory during deliberations, but they may not be read or shown to other members. At the time of any recess or adjournment, you may leave your notes and they will be properly secured. During an overnight adjournment, you may take your notes home or leave them at your seat and the court reporter will safeguard them. When you leave the courtroom, please cover them up so that no one else sees them. When the trial is over, you may take them with you or leave them and the bailiff will destroy them for you.

MJ: Fourth, we'll be taking recesses throughout the trial; however, if you feel the need for a recess before I call one, please let me know, and we will take one. I do not want anything to interfere with your attention to the court proceedings. I will try to estimate the time needed for recesses or hearings out of your presence, referred to as Article 39(a) sessions. These are sessions at which I will resolve matters pertaining to this trial that are within my purview as military judge. Frequently their duration is extended by the consideration of new issues which arise. Your patience and understanding regarding these will contribute greatly to an atmosphere consistent with the fair administration of justice.

MJ: Are there any questions over these preliminary matters? If so, please raise your hand.

MBR:(Response, if any.)

MJ: [If no questions] Negative response from the members.

>>> If issue of guilt remains, go to CONTESTED MEMBERS CASE ON THE MERITS, next page.

>>> If no issue of guilty remains, to go MEMBERS SENTENCING, page 89.

CONTESTED MEMBERS CASE ON THE MERITS

MJ: Members of the court, you are about to hear the opening statements of counsel. You are advised that the opening statements of counsel are not evidence. Trial counsel may make an opening statement.

TC: Opening statement.

MJ: Defense counsel may make an opening statement now or reserve it until the close of the prosecution's case.

DC: Opening statement, unless reserved.

MJ: The prosecution may proceed.

Presentation of evidence for the prosecution.

TC: Your honor, the government rests.

MJ: [If the defense has reserved opening] The defense counsel may make an opening statement.

DC: Opening statement, if not made earlier.

MJ: The defense may proceed.

Presentation of evidence for the defense.

DC: Your honor, the defense rests.

MJ: Does the prosecution have a case in rebuttal?

TC: Yes/No, sir/ma'am.

If yes, presentation of rebuttal evidence.

TC: Your honor, the prosecution has nothing further.

MJ: [If the prosecution has presented rebuttal evidence] Does the defense have a case in surrebuttal?

DC: Yes/No, sir/ma'am.

If yes, presentation of surrebuttal evidence.

DC: Your honor, the defense has nothing further.

MJ: Members of the court, at this point in the trial it is necessary for me to discuss instructions on findings and address some others matters with counsel outside your hearing. I anticipate your presence will be required at (time). Please return to the deliberation room by (time). You may withdraw from the courtroom.

Members depart courtroom

Call Article 39(a) session to order.

Discuss and finalize findings instructions.

>>>Any defenses raised by the evidence?

>>>Any Lesser Included Offenses (LIOs)?

>>>Any Limiting Instructions required?

Finalize and mark findings worksheet - See MCM, App. 10 for forms.

Ensure all original evidence is available for members' review. Prepare copies for the members to mark or highlight.

ARGUMENT ON MERITS

[NOTE: Instructions on findings may be given before or after arguments by counsel. In this trial guide, we have placed the findings instructions after argument.]

MJ: Bailiff, ask all the members to return to the courtroom.

Members enter courtroom

MJ: The court will come to order. All parties present when the court last recessed are again present.

MJ: Members of the court, the court will now hear argument of counsel. You are advised that arguments of counsel are not evidence in this case. (Trial counsel), you may argue.

TC: TC argument on findings.

MJ: (Defense counsel), you may argue.

DC: DC argument on findings.

MJ: (Trial counsel), do you desire to make a closing argument?

TC: Yes/No, sir/ma'am.

If yes, TC closing argument on findings.

FINDINGS INSTRUCTIONS

[NOTE: The following instructions are based on DA Pam. 27-9, Military Judges' Benchbook, and they are provided solely to assist the military judge in preparing his/her instructions. Instructions must be tailored to the facts in each case. The instructions given and their wording is for each military judge to determine. Instructions that must be given include:

A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

A description of the elements of each lesser included offense in issue;

A description of any special defense under R.C.M. 916 in issue;

A direction that only matters properly before the court-martial may be considered;

A charge that:

(a) The accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond a reasonable doubt;

(b) If there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

(c) If there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is no reasonable doubt; and

(d) The burden of proof to establish the guilt of the accused is upon the Government;

Directions on the procedures under R.C.M. 921 for deliberations and voting; and

Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given.

Instructions must be given orally on the record. Written copies of the instructions may also be given to the members for their use during deliberations.]

Members of the court, at this time I will instruct you on the law to be applied in this case. When you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and the instructions which I will now give you. It is my duty to instruct you on the law. It is your duty to determine the facts, apply the law to the facts, and thus determine the guilt or innocence of the accused, bearing in mind, again, that the law presumes the accused to be innocent of the charge(s) against him/her.

You just heard an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel in order to assist you in understanding and evaluating the evidence. You must base the determination of the issues in the case on the evidence as you remember it.

Counsel may have referred to instructions that I will give you, and in that regard, I would merely say that if there is any inconsistency between what counsel say about the instructions and the instructions I give you, you must accept my statement as being correct.

During the trial some of you may have taken notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for evidence admitted in the trial and should not be shown to the other members. You may use your notes to refresh your own recollection.

You may find the accused guilty of an offense only if you are convinced as to guilt by legal and competent evidence beyond a reasonable doubt as to each and every element of that offense. I'll now discuss the offense(s) with you (in the order in which they appear on your copy of the charge sheet) (in chronological order) (_____).

The following instruction should be repeated for each contested specification:

In (the) specification (____) of (the) charge (____), the accused is charged with the offense of (_____). In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt that:

List the elements of the offense.

Check for lesser included offenses.

If a lesser included offense is in issue, add:

The court is further advised that the offense of _____ is a lesser included offense of the offense set forth in (the) specification (____) of (the) charge (____). When you vote, if you find the accused not guilty of the offense charged, that is _____, then you should consider

the lesser included offense of _____, in violation of Article (____). In order to find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt as follows:

List elements of lesser included offense.

The offense charged, _____, and the lesser included offense of _____ differ in that the offense charged requires, as (an) essential element(s), that you be convinced beyond a reasonable doubt that _____, whereas the lesser offense of _____ does not include such (an) element(s). (In other words, the lesser included offense contains the same elements as the offense charged with the exception of _____).

If an additional LIO is contained within a lesser included offense, continue:

You are advised that another lesser included offense of the offense alleged in (the) specification (____) of (the) charge (____) is the offense of _____, in violation of Article (____). In order to find the accused guilty of this lesser included offense, you must be convinced by legal and competent evidence beyond a reasonable doubt as follows:

List elements of lesser included offense.

This lesser included offense differs from the lesser included offense I discussed with you previously in that this offense does not require, as (an) essential element(s), that the accused _____.

[NOTE: Use the following cautionary instruction when the accused pleads guilty to a lesser included offense and the government goes forward on the greater offense:

MJ: Earlier I advised you that I had accepted the accused's pleas of guilty to the lesser-included offense of (LIO). The accused's pleas of guilty to the lesser included offense of (LIO) admits some of the elements of the offense charged in specification ____ of charge _____. These elements are therefore established by the accused's pleas without need of further proof. However, the accused's pleas of guilty to (LIO) provide no basis

for a finding of guilty of the greater charged offense because there still remains in issue the element(s) of: (remaining element(s)). No inference of guilt to the remaining element(s) may be drawn from the accused's plea(s). Before the accused may be found guilty of the greater charged offense, the prosecution must prove the remaining element(s) beyond a reasonable doubt.

Defenses and evidentiary instructions can be inserted at this point.

You are further advised:

First, that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;

Second, if there is a reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and he must be acquitted;

(If applicable: Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in the favor of the lowest degree of guilt as to which there is no reasonable doubt);

The burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of each (the) offense alleged.

Reasonable doubt

[Some of you may have served as jurors in civil cases, or as board members in administrative boards, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.]

By reasonable doubt is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of

the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty.

The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution that does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Credibility of evidence

You should bear in mind that only matters properly before the court as a whole should be considered, and in weighing and evaluating the evidence you are expected to utilize your own common sense and your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind you may properly believe one witness and disbelieve several other witnesses whose testimony is in conflict with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you, the members of the court.

Stipulation(s) of fact

The parties to this trial have stipulated or agreed that _____. When counsel for both sides, with the consent of the accused, stipulate and agree to (a fact) (the contents of a writing), the parties are bound by the stipulation and the stipulated matters are facts in evidence to be considered by you along with all the other evidence in the case.

Comments of the judge

You must disregard any comment or statement made by me during the course of the trial that might seem to indicate to you an opinion on my part as to whether the accused is guilty or not guilty since you, and you alone, have the responsibility to make that determination. As court members, each of you must impartially resolve this ultimate issue in accordance with the law I have given you, the evidence admitted in court, and your own conscience.

Judicial notice

I have taken judicial notice that _____. This means that you are now permitted to recognize and consider this information as fact without further proof. You should consider it as evidence with all other evidence in the case. You may accept as conclusive any matter I have judicially noticed, but you are not required to do so.

Circumstantial evidence

Evidence may be direct or circumstantial. Direct evidence is evidence that tends directly to prove or disprove a fact in issue. Circumstantial evidence is evidence that tends directly to prove not a fact in issue, but some other fact or circumstance from which, either alone or together with some other facts or circumstances you may reasonably infer the existence or nonexistence of a fact in issue. There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the weight and value you believe it deserves. Let me give you an example. If a witness testified that he or she saw it rain during the evening, that would be direct evidence. If there was evidence the street was wet in the morning, that would be circumstantial evidence from which you might reasonably infer it rained during the night.

[If inferences] In this case, evidence has been introduced that _____. Based upon this evidence, you may justifiably infer that _____. The drawing of this inference is not required, and the weight and effect of this evidence, if any, will depend upon all the facts and circumstances as well as other evidence in the case.

[Knowledge] I have instructed you that you must be satisfied beyond a reasonable doubt that the accused knew that _____. This knowledge, like any other fact, may be proved by circumstantial evidence. In deciding this issue you must consider all relevant facts and circumstances including but

not limited to _____(specify significant evidentiary factors bearing on knowledge).

[Intent] I have instructed you that the accused's intent to _____ must be proved beyond a reasonable doubt. Direct evidence of intent is often unavailable. The accused's intent, however, may be proved by circumstantial evidence. In deciding this issue, you must consider all relevant facts and circumstances including but not limited to (specify significant evidentiary factors bearing on intent).

Credibility of witnesses

You have the duty to determine the credibility, that is the believability, of the witnesses. In performing this duty, you must consider each witness's intelligence, ability to observe and accurately remember, in addition to the witness's sincerity and conduct in court, (and) (prejudices) (and) (character for truthfulness). Consider also the extent to which each witness is either supported or contradicted by other evidence, the relationship each witness may have with either side, and how each witness might be affected by the verdict. (In weighing (a discrepancy) (discrepancies) (by a witness) (or) (between witnesses), you should consider whether (it) (they) resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth. The credibility of each witness's testimony should be your guide in evaluating testimony and not the number of witnesses called. (These rules apply equally to the testimony given by the accused.)

Witness's character for truthfulness

Evidence has been received as to the (bad) character for truthfulness of _____. [Evidence of good character for truthfulness has also been introduced.] You may consider this evidence in determining his/her/their credibility.

Stipulation(s) of expected testimony

The parties to this trial stipulated or agreed that if _____ were present in court he/she/they would have testified under oath substantially as was read to you. This/these stipulation(s) does/do not admit the truth of the testimony which may be attacked, contradicted, or explained in the same way as any other testimony. You may consider, along with all other factors affecting believability, the fact that you have not had an opportunity to personally observe this/these witness(es).

Prior inconsistent statement

You have heard evidence that _____ made a statement prior to trial that may be inconsistent with his/her testimony at this trial. Specifically, that _____. If you believe that an inconsistent statement was made, you may consider the inconsistency in evaluating the credibility of the testimony of this witness. You may not, however, consider the prior statement as evidence of the truth of the matters contained in that prior statement.

Prior consistent statement

You have heard evidence that _____ made a statement prior to trial that may be consistent with his/her testimony at this trial. Specifically, that _____. If you believe that such a consistent statement was made, you may consider it for its tendency to refute the charge of recent fabrication, improper influence, or improper motive. You may also consider the prior consistent statement as evidence of the truth of the matters expressed therein.

Accused's silence

The accused has an absolute right to remain silent. You will not draw any inference adverse to the accused from the fact that he did not testify as a witness. You must disregard the fact that the accused has not testified.

Spillover

[NOTE: Generic instruction only. If an exception to this general instruction exists, use format in DA PAM 27-9 at 7-17.]

Each offense charged must stand on its own and you must keep the evidence of each offense separate. The burden is on the government to prove each element of each offense by legal and competent evidence beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense. [Note: But see, M.R.E 413,414]

Add appropriate specific instructions from Military Judges' Benchbook.

Procedural Instructions on Findings

The following procedural rules will apply to your deliberation and must be observed. The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberations should properly include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret written ballot, and all members of the court must vote.

You vote on the specification(s) under the charge before you vote on the charge. (The order in which the several charges and specifications are to be voted on should be determined by the president subject to objection by a majority of the members.) [NOTE: If a charge includes multiple specifications, insert: If you find the accused guilty of any specification under (the) (a) charge, the finding as to (the) (that) charge is guilty.]

The junior member collects and counts the votes, and the count is checked by the president, who immediately announces the result of the ballot to the members.

The concurrence of at least two thirds of the members present when the vote is taken is required for any finding of guilty. Since we have ___ members, that means that ___ members must concur in any finding of guilty. If you have ___ votes of guilty with regard to the offense, then that will result in a finding of guilty for that offense. If fewer than ___ members vote for a finding of guilty, then your ballot resulted in a finding of not guilty.

Number of Members	Two Thirds	Number of Members	Two thirds
3	2	8	6
4	3	9	6
5	4	10	7
6	4	11	8
7	5	12	8

If there are any contested lesser included offenses, add:

If a finding of not guilty is made to an offense, vote next on the lesser included offense(s) (in order of decreasing severity). If a finding of guilty is made, you have convicted the accused of that lesser included offense. If you have voted on the lesser included offense(s) and a finding of not guilty is made (as to all lesser included offenses), you have acquitted the accused of this specification and its lesser included offense(s).

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and I'll give you specific further instructions on how to go about doing that. (If that should occur, when the court has assembled, the president will not announce the findings reached but will announce only that reconsideration of a finding has been proposed. Do not state (1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or (2) which specification (and charge) is involved.)

As soon as the court has reached its findings, and I have examined the findings worksheet, the findings will be announced by the president in the presence of all parties. The format is set out for you in the findings worksheet, Appellate Exhibit _____. The bailiff will deliver Appellate Exhibit _____ to the president of the court at this time.

Tailor the following instructions to fit the findings worksheet.

You may use the findings worksheet as an aid in putting your findings in proper form. The first portion of the worksheet will be used if the accused is acquitted of (the) (all) charge(s) and specification(s). The second part will be used if the accused is convicted as charged of (the) (all) charge(s) and specification(s). (And the third portion will be used if the accused is convicted of some, but not all, of the offenses.) Once you have finished filling in what is applicable, cross out everything that is not applicable.

(You will note that the findings worksheet has been modified to reflect the words that would be deleted (as well as the words that would be substituted therefor) if you found the accused guilty of the lesser included offense(s). These modifications of the worksheet in no way indicate any opinion by myself or by counsel concerning any degree of guilt of this accused. They are merely included to aid you in understanding what findings might be made in this case, and for no other purpose whatsoever. The worksheet is provided only as an aid in finalizing your decision.)

If, during your deliberations, you have any questions concerning the findings worksheet or any other matter, please open the court and I will take those matters up with you. I would ask that if you do have any such question, that you write it down on one of the question forms provided so that an accurate record of your question can be maintained.

In your deliberation room, you will have all the exhibits that have been admitted into evidence. Please do not write on any of the original exhibits except obviously for the findings worksheet or the copies that have been provided to each of you. The Uniform Code of Military Justice prohibits me or anyone else from entering your closed session deliberation. You may not consult the Manual for Courts-Martial or any other legal publication.

MJ: Does any member have any questions concerning my instructions?

MBR: Yes/No, sir/ma'am.

MJ: Do counsel for either side have any objections (not already on the record) to the instructions given or requests for additional instructions (not already on the record)?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: Members of the court, if it is necessary to take a recess or leave the deliberation room for any reason during your deliberations, for example to get a drink of water or to call home or your office, we must return to an open session of court, recess, reassemble, and again formally close for deliberations. This is a vital legal requirement. With that in mind, (President), would you desire to take a brief recess before you begin deliberations, or would you like to begin immediately?

MBR:(Response)

Recess, if necessary, and reassemble.

Once reassembled, or if no recess was taken, continue.

MJ: Members of the court, you may now withdraw to the deliberation room. The court is closed for deliberations.

Members deliberate on findings.

[NOTE: If there are questions by the members during deliberations:

1. Call the court to order with the members present;
2. Mark written question as an appellate exhibit;
3. If question is such that MJ feels he needs to consult with counsel prior to answering it, excuse the members and call 39(a) session to order;
4. Solicit comments and objections from counsel;
5. Notify counsel of intended responses to question;
6. Call members into courtroom and provide them with the response;
7. Close court for members to continue deliberation.]

Members ready to announce findings.

MJ: The court will come to order. All parties present when the court closed are again present. (President), has the court reached findings in this case?

PRES: Yes/No, sir/ma'am.

MJ: Are those findings reflected on the findings worksheet?

PRES: Yes/No, sir/ma'am.

MJ: Have you signed it at the bottom?

PRES: Yes/No, sir/ma'am.

MJ: Bailiff, without reading it, please bring me the findings worksheet.

If, after examining the worksheet, MJ determines that it is in the proper form, continue.

MJ: The findings worksheet appears to be in the proper form. Bailiff, please return it to (President).

MJ: Accused and counsel please rise. (President), please announce the findings of the court.

PRES: (Accused), this court-martial finds you _____ .

MJ: You may be seated. (President), please hand the bailiff the findings worksheet and if the bailiff would give it to the court reporter.

>>> If acquittal and no prior guilty pleas accepted by MJ, go to MEMBERS ADVISEMENT, page 104

>>> If acquittal, but prior guilty pleas accepted by MJ, inform members of the accused's pleas, if not already done, and distribute copies of those offense(s), if necessary. Then continue with MEMBERS PRE-SENTENCING SESSION, next page.

>>> If guilty finding, continue with MEMBERS PRE-SENTENCING SESSION, next page.

MEMBERS PRE-SENTENCING SESSION

MJ: Members of the court, counsel and I now have some matters to address outside your hearing. You may withdraw from the courtroom at this time. Please return at _____ .

Once the members have withdrawn, continue.

MJ: The record should reflect that the members have withdrawn from the courtroom. This 39(a) session is called to order.

[NOTE: At this point, if necessary, MJ should discuss with counsel whether any of the guilty findings are multiplicitous and then make a ruling on the record.]

MJ: Are there any corrections or additions to the personal data listed on the charge sheet?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: [If pretrial confinement] I calculate ___ days of credit for pretrial confinement. Do counsel for both sides concur?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: The trial counsel will read the accused's personal data to the members at the appropriate time.

TC: Yes, sir/ma'am.

MJ: (Trial counsel), does the prosecution have any evidence on sentencing to be offered and admitted at this time?

TC: Yes/No, sir/ma'am.

If yes, mark and admit prosecution exhibits on sentencing.

MJ: (Accused), you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself which you want the court-martial to consider in deciding a sentence. Included in your right to present such matters are the rights you have to testify under oath, to make an unsworn statement, or to remain silent. If you testify under oath, you may be cross-examined by the trial counsel and questioned by me and the members. If you decide to make an unsworn statement, you may not be cross-examined by trial counsel or questioned by me or the members. However, the prosecution does have the right to rebut any statement of fact in your unsworn statement. You may make an unsworn statement orally or in writing, personally, or through your counsel, or you may use a combination of these ways. If you decide to exercise your right to remain silent, that cannot be held against you in any way. Do you understand your right to present matters in extenuation and mitigation?

ACC: Yes/No, sir/ma'am.

MJ: Does the defense have any evidence on sentencing to be offered and admitted at this time?

DC: Yes, sir/ma'am.

Mark and admit defense exhibits on sentencing.

MJ should then address any evidentiary issues.

MJ: (Trial Counsel), what do you calculate the maximum sentence to be based upon the findings of the court?

TC: I calculate the maximum sentence to be _____.

MJ: (Defense Counsel), do you agree?

DC: Yes/No, sir/ma'am.

MJ resolves any dispute as to maximum authorized sentence.

MJ: [If the accused elected not to testify] (Defense Counsel), do you want me to instruct on the fact that the accused did not testify?

DC: Yes/No, sir/ma'am.

MJ: I intend to give the (standard sentencing) (following) instructions to the court members: (_____). Does counsel for either side have any objections?

TC: Yes/No, sir/ma'am

DC: Yes/No, sir/ma'am

MJ resolves any objections.

MJ: Does counsel for either side have any requests for instructions?

TC: Yes/No, sir/ma'am

DC: Yes/No, sir/ma'am

MJ resolves any requests for instructions.

MJ: (Trial Counsel), please have the sentence worksheet marked as an Appellate Exhibit, provide a copy to the defense, and give the worksheet to me.

TC complies.

MJ: (Defense Counsel), do you have any objections to the sentence worksheet?

DC: Yes/No, sir/ma'am

MJ resolves any objections.

MJ: I will give the court members Prosecution Exhibit(s) (____) (through (____)), Defense Exhibit(s) (____) (through (____)), and Appellate Exhibit (____), the sentence worksheet. (Does counsel for either side desire that any other exhibits be given to the court members?)

TC: Yes/No, sir/ma'am

DC: Yes/No, sir/ma'am

MJ resolves any requests for additional exhibits to be given to the court members.

MJ: Is there anything else that needs to be resolved prior to calling the court members?

TC: Yes/No, sir/ma'am

DC: Yes/No, sir/ma'am

Terminate 39(a) session and ready the recall of the members.

When members are ready, continue.

MJ: Bailiff, please recall the members.

Once the members have returned to the courtroom, continue with MEMBERS SENTENCING, below.

MEMBERS SENTENCING

MJ: [In guilty plea/members for sentencing cases only] Does either counsel desire to make an opening statement?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

Opening statements by TC/DC in a guilty plea/members for sentencing case only.

After opening statements by counsel, if any, continue.

MJ: The court will now hear the personal data concerning the accused. (Trial counsel), you may read the data to the members.

TC: (Reads the personal data)

MJ: (Trial counsel), does the prosecution have any evidence to present on sentencing?

TC: Yes/No, sir/ma'am.

MJ: [If yes], the prosecution may proceed.

TC presents sentencing evidence.

TC: Your, honor, the prosecution has nothing further.

MJ: (Defense counsel), does the defense have any evidence to present on sentencing?

DC: Yes/No, sir/ma'am.

MJ: [If yes], the defense may proceed.

DC presents sentencing evidence.

DC: Your honor, the defense has nothing further.

MJ: Does the prosecution have a case in rebuttal?

TC: Yes/No, sir/ma'am.

TC rebuttal, if any.

MJ: Does the defense have a case in surrebuttal?

DC: Yes/No, sir/ma'am.

DC surrebuttal, if any.

[NOTE: MJ may hold an Art. 39(a) session at this point if necessary to finalize sentencing instructions with counsel.]

[NOTE: If the accused did not make a sworn or unsworn statement, MJ must ascertain from DC if defense wishes a cautionary instruction.]

MJ: Members of the court counsel will now present argument on sentencing. (Trial counsel) may argue.

TC: TC argument on sentence.

MJ: (Defense counsel)?

DC: DC argument on sentence.

>>> Go to continue with SENTENCING INSTRUCTIONS, next page.

SENTENCING INSTRUCTIONS

[NOTE: The following instructions are based on DA Pam. 27-9, Military Judges' Benchbook, and they are provided solely to assist the military judge in preparing his/her instructions. Instructions must be tailored to the facts in each case. The instructions given and their wording is for each military judge to determine. Instructions that must be given include:

(1) A statement of the maximum authorized punishment which may be adjudged and of the mandatory minimum punishment, if any;

(2) A statement of the procedures for deliberation and voting of the sentence set out in R.C.M. 1006;

(3) A statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and

(4) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3), and (5).

Instructions must be given orally on the record. Written copies of the instructions or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.

[NOTE: If members have been empaneled for sentencing only, instructions concerning argument of counsel, credibility, note taking, etc. may be given.]

You are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, as well as those in aggravation, you must bear in mind that the accused is to be sentenced only for the offense(s) of which he has been found guilty. You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. (A single sentence shall be adjudged all the offenses of which the accused has been found guilty.)

Maximum Sentence

The maximum punishment for (all) the offense(s) of which the accused has been found guilty is: _____.

Bear in mind that the maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser sentence or a sentence of no punishment at all based upon your own evaluation of the evidence presented.

Each type of punishment is separate and does not, by implication or otherwise, include any other type of punishment (with exception(s) that I will discuss with you shortly).

I will now describe with more detail the various penalties that may be adjudged by this court.

Reprimand

This court may adjudge a reprimand, which is in the nature of a censure. The court shall not specify the terms or wordings of any adjudged reprimand.

Reduction (enlisted only)

This court may adjudge reduction to the lowest or any intermediate enlisted pay grade, either alone or in connection with any other kind of punishment within the maximum limitation. A reduction carries both the loss of military status and the incidents thereof and results in a corresponding reduction of military pay. You should designate only the pay grade to which the accused is to be reduced, rather than the rate or rank.

As a result of Article 58a of the Uniform Code of Military Justice, any sentence of an enlisted person in a pay grade above E1 which includes either a punitive discharge or confinement in excess of 3 months or 90 days, automatically reduces that individual to the lowest enlisted pay grade, E1, by operation of the law. This is the first exception to which I referred earlier. Notwithstanding these provisions of Article 58a, this court may properly include an explicit sentence to a reduction to E1 (or any intermediate pay grade) as a part of any sentence, if the court believes that such a reduction should be part of the sentence.

[NOTE: Loss of Numbers (officer only) has been removed.]

Restriction

This court may adjudge restriction to limits for a maximum period not exceeding 2 months. For such a penalty, it is necessary for the court to specify the limits of the restriction and the period it is to run. (Restriction to limits is not enforced to exempt an accused from any military duty he is assigned.)

Hard Labor without Confinement (Enlisted Only)

This court may sentence the accused to hard labor without confinement for a maximum period not exceeding 3 months. Such hard labor would be performed in addition to other military duties which would normally be assigned. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.

Confinement

As I have indicated, this court may sentence the accused to confinement for (life) (a maximum of _____ (year(s))(month(s))).

(Unless confinement for life is adjudged) a sentence to confinement should be adjudged either in full days (or) full months, (or full years); fractions should not be employed. (For example, confinement for a month and a half should be announced as confinement for 45 days.) (Likewise, confinement for a year and a half should be announced as confinement for 18 months.) (Should you desire to combine the punishments of confinement, restriction, and/or hard labor without confinement, you should request further instructions from me on how to do that.)

[If the accused has been in pretrial confinement, give the following instruction.] In determining an appropriate sentence in this case, you should consider the fact that the accused has spent _____ days in pretrial confinement. In this connection, you should also realize that if you adjudge confinement as part of your sentence, the ___ days the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the convening authority and will be given on a day-for-day basis.

Forfeiture

This court may sentence the accused to forfeit a maximum of (all pay and allowances) (2/3 pay per month for 12 months). A forfeiture is a financial penalty which deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the accused of such a loss of income.

(Unless a total forfeiture is adjudged) a sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue.

[If total forfeitures authorized, give the following instruction.] As indicated (by the information on the charge sheet), the accused is an (E3)() with over (2)() years, the total pay being \$() per month. If reduced to (E2) (), the total pay would be \$() per month. This court may adjudge any forfeiture up to and including forfeiture of all pay and allowances.

[If 2/3 forfeiture authorized, give the following instruction.] If the accused is sentenced to both a reduction in pay grade and forfeiture of pay in the same sentence, the maximum forfeiture of pay is computed from the base pay of the pay grade to which the accused is reduced. (The maximum 2/3 forfeiture for each pay grade at issue is provided for you on the sentence worksheet.) (As indicated (by the information on the charge sheet), the accused is an E-() with over (2)() years, the total pay being \$() per month. If retained in that grade, the maximum forfeiture would be \$() pay per month. If reduced to E-(), the maximum forfeiture would be \$() pay per month, and if reduced to E1, \$() pay per month; each of those for a maximum period of 12 months.)

The court is at liberty to arrive at any lesser figure or to adjudge a sentence containing no forfeiture at all.

Automatic Forfeitures of Pay and Allowances

As a result of Article 58b of the UCMJ, by operation of law, any approved court-martial sentence that includes either (death,) a punitive discharge and confinement, or confinement for more than six months, results in the forfeiture of (two-thirds of) all pay (and allowances) due during the period of confinement served. This is the other exception to which I referred earlier. Notwithstanding the provisions of Article 58b, and without regard to whether the court includes confinement or a punitive discharge in its sentence, this court may properly include an explicit sentence to forfeit (all pay and

allowances) (two-thirds pay per month for 12 months) or any lesser amount and duration as part of any sentence, if the court believes that such forfeiture of pay (and allowances) should be part of the sentence.

Fine

[NOTE: A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted.]

The Court may sentence the accused to pay a fine to the United States as an alternative to or in addition to forfeiture of pay. A fine, when order executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. A fine normally should not be adjudged against an accused unless he/she was unjustly enriched as a result of the offense(s) for which he/she was convicted.

[If total forfeitures are not authorized, add the following instruction.] If you should desire to adjudge a fine, you are advised that the amount of fine may not exceed the total amount of forfeitures which could be adjudged. If you desire to award both fines and forfeitures together, they cannot exceed the total amount of forfeiture which could be adjudged.

In determining the amount of fine, if any, the court should consider the accused's income, earning capacity and financial resources, the burden the fine would impose on the accused or any other person dependent on the accused, (the need to deprive the accused of gains obtained from the offense,) and whether the accused can pass the cost of the fine on to others.

[Provision for additional confinement to enforce a fine.] In your discretion, you may adjudge a period of confinement to be served in the event an adjudged fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge. The total of all confinement adjudged, however, may not exceed (12 months) (the maximum confinement for the offense(s)).

Punitive Discharge

This court may adjudge a punitive discharge in the form of (either) a (dismissal) (dishonorable discharge or a) (bad conduct discharge). Such a punitive discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and, for that matter, by the Department of the Navy. [A (dismissal) (dishonorable discharge) should be reserved for

those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of (a) serious offense(s) of either a civil or military nature warranting such severe punishment.] [A bad conduct discharge is a severe punishment (although less severe than a dishonorable discharge) and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of either a civil or military nature.)] In this case, if the court determines to adjudge a punitive discharge, it may sentence the accused to a (dismissal) (dishonorable discharge or a) (bad conduct discharge). No other type of discharge or separation may be adjudged. Accordingly, you are not authorized to adjudge any type of administrative discharge.

No Punishment

Finally, if you wish, you may sentence the accused to no punishment.

Evidence on Sentencing

In selecting a sentence, you should consider all matters in extenuation and mitigation (as well as those in aggravation), (whether introduced before or after your findings). (Thus, all the evidence you have heard in this case is relevant on the subject of sentencing.)

Among the matters you should consider are: [appropriate selections may be made from the following list]

1. The accused's age.
2. The accused's good military character as evidenced by Defense Exhibit(s) _____ and the testimony of _____.
3. The accused's record in the service for good conduct.
4. The prior honorable discharge(s) of the accused.
5. The combat record of the accused.
6. The duration of the accused's pretrial restriction from ____ through _____.
7. The duration of the accused's pretrial confinement from ____ through _____. The law does not require that you use any specific formula in considering such pretrial confinement, but it does require that you consider such pretrial confinement and give it the weight you deem appropriate.
8. The accused's education which includes _____.
9. That the accused is a graduate of the following schools: _____.
10. That the accused's enlisted evaluations indicate: _____.
11. That the accused is entitled to wear the following medals and awards:
12. The nature of the offense(s) of which the accused has been convicted.
13. Prosecution Exhibit(s) _____; Defense Exhibit(s) _____; and the testimony of the witnesses, including character witnesses heard before findings.
14. The accused's (testimony prior to findings being entered and) (his) (testimony) (unsworn statement) (and expression of his desire to remain in the naval service) (made during the sentencing portion of trial).

Mitigating Effect of Guilty Plea

In this case, the accused pleaded guilty to (one of) (some of) the offense(s). A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government may have been saved by a plea of guilty. Such a plea may be the first step toward rehabilitation.

Accused's Failure to Testify

[NOTE: If the accused made no statement, sworn or unsworn, in the sentencing phase, the following instruction should be given only if requested by the defense.]

The accused has an absolute right to remain silent. The court will not draw any inference adverse to the accused from the fact that he/she did not elect to testify under oath as a witness during the sentencing portion of the trial. (While you may consider the accused's testimony made prior to findings, the fact that he/she has not testified after findings were entered must be disregarded by you.)

Accused's Unsworn Statement

The court will not draw any inference adverse to the accused from the fact that he/she did not elect to testify under oath as a witness. You are advised that an unsworn statement is an authorized means for an accused to bring information to the attention of the court and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, and whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to utilize your common sense and your knowledge of human nature and the ways of the world.

Principles of Sentencing

Our society recognizes five principal reasons for the sentence of those who violate the law. They are: (1) protection of society from the wrongdoer; (2) punishment of the wrongdoer; (3) rehabilitation of the wrongdoer; (4) preservation of good order and discipline in the military; and (5) the deterrence of the wrongdoer and those who know of his/her crime and his/her sentence from committing the same or similar offenses.

Mendacity Instruction

[NOTE: If the trial counsel argues on sentencing that the accused has testified falsely under oath, the military judge must instruct, sua sponte, on the proper procedure for evaluating this issue. In other cases, the military judge may instruct on mendacity if this evidence is likely to be misused by the court members. If necessary, give the following instruction.]

The evidence presented (and the argument of trial counsel) (has) (have) raised the question of whether the accused testified falsely before this court while under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are advised that you may consider this issue only within certain constraints. First, (notwithstanding any argument by trial counsel), this factor should play no role whatsoever in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court. Second, such lies must have been, in your view, willful and material before they can be considered in your deliberations. Finally, you may consider this factor only insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

Voting Procedures on Sentencing

When you close to deliberate and vote, only the members will be present during your closed session deliberation, and your deliberation should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment. When you have completed your discussion, then any member who desires to do so may propose a sentence, and you do that by writing out on a slip of paper a complete sentence. The junior member collects the proposed sentences and

submits them to the president, who will arrange them in order of their severity.

You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain. Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is two thirds or ____ members. (A sentence which includes confinement in excess of ten years requires the concurrence of three-fourths of the members, that is ____ members.)

Number of Members	Two-Thirds	Three-fourths	Number of Members	Two-Thirds	Three-Fourths
3	2	N/A	8	6	6
4	3	N/A	9	6	7
5	4	4	10	7	8
6	4	5	11	8	9
7	5	6	12	8	9

The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you then repeat the process of proposing and voting upon the sentences. The second time around, if a member desires to do so, you may vote on all new proposals or proposals rejected on an earlier vote. But once a proposal has been agreed to by the required concurrence, then that is your sentence.

You may reconsider your sentence at any time prior to its being announced in open court, but after you determine your sentence, if any member suggests you reconsider the sentence, open the court and I shall give you specific instructions on the procedure for doing that. If that should occur, when the court has assembled, the president should announce that reconsideration has been proposed without reference to whether the proposed re-ballot concerns increasing or decreasing the sentence.

As an aid in putting your sentence in proper form, you may use Appellate Exhibit ____, a sentence worksheet. The worksheet is not intended to express any opinion either by me or by counsel as to what would be an appropriate sentence in this case, for you alone have the responsibility to make that determination. (President), with regard to the worksheet, when you finalize your sentence, cross out the inapplicable portions, fill in any applicable blanks, and sign it at the bottom.

If, during your deliberations, you have any questions concerning sentencing matters, please open the court and I will take those matters up with you. I would ask that if you do have any such question, that you write it down on one of the question forms provided so that an accurate record of your question can be maintained. You may not consult the Manual for Courts-Martial or any other writing not admitted, and any instructions must not be interpreted as indicating any opinion on my part as to what would be an appropriate sentence in this case.

In your deliberation room, you will have all the exhibits that have been admitted into evidence. Please do not write on any of these exhibits except obviously for the sentence worksheet.

In accordance with your best judgment, based upon the evidence that has been presented in this case, and your own experience and general background, you should select a sentence which best serves the ends of good order and discipline in the military, the needs of this accused, and the welfare of society.

[NOTE: If the members have a question about an administrative or practical effect that may result from a conviction or a particular punishment and counsel for each side cannot agree on an acceptable answer, a general instruction is available in the appendix: Collateral Effects of Punishment]

[NOTE: If the members have a question concerning parole eligibility, an instruction is available in the appendix: Parole Eligibility]

MJ: Does any member have any questions concerning my instructions?

MBR: Yes/No, sir/ma'am.

MJ: Do counsel for either side have any objections (not already on the record) to the instructions given or requests for additional instructions (not already on the record)?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: Members of the court, if it is necessary to take a recess or leave the deliberation room for any reason during your deliberations, for example to get a drink of water or to call home or your office, we must return to an open session of court, recess, reassemble, and again formally close for deliberations. This is a vital legal requirement. With that in mind, (President), would you desire to take a brief recess before you begin deliberations, or would you like to begin immediately?

MBR:(Response)

Recess, if necessary, and reassemble.

Once reassembled, or if no recess was taken, continue.

MJ: Members of the court, you may now withdraw to the deliberation room. The court is closed for deliberations.

Members deliberate on a sentence.

[NOTE: If there are question by the members during deliberations:

1. Call the court to order with the members present;
2. Mark written question as an appellate exhibit;
3. If question is such that MJ feels he needs to consult with counsel prior to answering it, excuse the members and call 39(a) session to order;
4. Solicit comments and objections from counsel;
5. Notify counsel of intended responses to question;
6. Call members into courtroom and provide them with the response;
7. Close court for members to continue deliberation.]

Members ready to announce sentence.

MJ: The court will come to order. All parties present when the court closed are again present. (President), has the court determined a sentence in this case?

PRES: Yes/No, sir/ma'am.

MJ: Is the sentence reflected on the sentence worksheet?

PRES: Yes/No, sir/ma'am.

MJ: Have you signed it at the bottom?

PRES: Yes/No, sir/ma'am.

MJ: Bailiff, without reading it, please bring me the sentence worksheet.

If, after examining the worksheet, it is in the proper form, continue.

MJ: The sentence worksheet appears to be in the proper form. Bailiff, please return it to (President).

MJ: Accused and counsel, please rise. (President), please announce the sentence of the court.

PRES: (Accused), this court-martial sentences you to _____.

MJ: You may be seated. (President), please hand the bailiff the sentence worksheet and if the bailiff would give it to the court reporter.

>>> Continue on next page.

MEMBERS ADVISEMENT

MJ: Members of the court, you have now completed your duties and you are discharged with my most sincere thanks. Please leave all the exhibits behind. You may take your own personal notes with you or leave those behind and they will be destroyed by the court reporter.

MJ: To assist you in determining what you may discuss about this case now that it is over, the following guidance is provided. When you took your oath as members, you swore not to disclose or discover the vote or opinion of any particular member of this court unless required to do so in due course of law. This means that you may not tell anyone about the way you or anyone else on the court voted or what opinion you or they had, unless I or another judge require you to do so in court. You are each entitled to this privacy. Other than that, you are free to talk to anyone about the case, including me, the attorneys, or anyone else. You can also decline to participate in such discussion if that is your choice.

MJ: Your deliberations are carried on in the secrecy of the deliberation room to permit the utmost freedom of debate and so that each of you can express your views without fear of being subjected to public scorn or criticism by the accused, the convening authority, or anyone else. In deciding whether to answer questions about this case, and if so, what to disclose, you should have in mind your own interests and the interests of the other members of the court. Does any member have any questions at this time?

MBR: Yes/No, sir/ma'am.

MJ: Members of the court, again, I want to thank you for your participation and attentiveness in this case. You may now depart the courtroom and resume your normal duties.

Members depart the courtroom.

>>> If complete acquittal, go to ACQUITTAL ADJOURNMENT, page 108

>>> If not complete acquittal and no pretrial agreement go to APPELLATE RIGHTS, page 106

>>> If not complete acquittal and there was a pretrial agreement, continue with next page.

MJ informs the accused of the effect, if any, of the sentence limitation portion of the pretrial agreement on the sentence adjudged.

MJ: (Accused), do you understand the effect that the sentence limitation portion of your agreement has on the sentence adjudged by the court?

ACC: Yes/No, sir/ma'am.

MJ: Counsel for both sides concur with my explanation to (Accused) of the effect that the sentence limitation portion of the pretrial agreement has on the adjudged sentence?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

APPELLATE RIGHTS

MJ: (Defense counsel), has an appellate rights statement been signed by the accused and marked as an appellate exhibit?

DC: Yes/No, sir/ma'am.

If no, MJ should recess the court and allow DC to advise accused of his appellate rights.

[NOTE: The appellate rights form is found in the appendix to this trial guide.]

DC: Your honor, the appellate rights statement has been marked as Appellate Exhibit ____, and I hand it now to the military judge.

MJ: (Accused), I have here Appellate Exhibit ____, the appellate rights statement. Is this your signature, which appears at the end of this document?

ACC: Yes/No, sir/ma'am.

MJ: Prior to signing this document, did you read it over carefully and discuss it with your defense counsel?

ACC: Yes/No, sir/ma'am.

MJ: Do you understand all of your appellate rights contained within this document?

ACC: Yes/No, sir/ma'am.

MJ: Appellate Exhibit ____ indicates your desires concerning service of the record of trial (and the recommendation of the staff judge advocate/legal officer). It will be attached to the record.

MJ: Anything further from counsel prior to adjournment?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: This court-martial is adjourned.

ACQUITTAL ADJOURNMENT

MJ: (Accused), a copy of the record of this trial is required to be given to you after it has been prepared. You may, however, request that your copy of the record be delivered to your defense counsel instead. To whom should your copy of the record of trial be delivered?

ACC: (Response)

MJ: Anything further from counsel prior to adjournment?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: This court-martial is adjourned.

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1. VOIR DIRE QUESTIONS

1 Each of you completed a court-martial member questionnaire prior to this session of court. Do any of you need to correct the information set forth in your respective court-martial questionnaire?

2 Do you know any of the counsel in this case?

3 Do any of you know the accused in this case (NAME(s) of accused)?

4 The following individuals may be called as witnesses in this case: (names & commands). Do any of you know any of these witnesses?

[If a yes response, ask those members individually:]

Who do you know?

Do you know (name of witness) in a work or social context?

Without being specific, has anything occurred during this acquaintance that would cause you to be more or less inclined to believe him/her under oath than a witness you did not know?

5 When you as a member decide whether to believe or disbelieve a witness, you should consider the witness' intelligence, candor and manner of testifying, relationship to either side of the case, whether the testimony is corroborated by other evidence, and any other factors from your own experience that would indicate to you whether or not the person is telling the truth. Do any of you have any personal prejudices or feelings which would influence your deliberations in any way or prevent you from weighing the testimony of each witness in this case by the same standards as you would the testimony of all witnesses?

6 A person's status, such as an officer or policeman, cannot be used as the sole basis to consider that person's testimony more believable than the testimony of any other witness; however, you may consider that status along with all other factors when weighing the credibility of the person.

[If officer witness] Would any of you give the testimony of an officer any higher credibility than the testimony of an enlisted person solely because of the status as an officer?

[If law enforcement witness] Would any of you give the testimony of a law enforcement official, such as a Master-at-Arms or Naval Criminal Investigative Service agent, any higher credibility solely because of the individual's occupation?

7 [If NCIS witness] As I have noted, one of the witnesses is a special agent of the Naval Criminal Investigative Service. Have any of you had any direct dealings with the Naval Criminal Investigative Service that would affect your ability to evaluate that witness's testimony in an unbiased manner?

8 [If Military laboratory tests] During this court-martial, you may receive evidence of laboratory tests done on physical evidence. Would any of you give laboratory test evidence from a Navy/Military laboratory any higher credibility than the laboratory test results of a civilian laboratory solely because of the status as a Navy/Military laboratory?

9 Do any of you know anything at all about this case?

10 Has anyone mentioned anything to you, or have you read anything, about the incidents alleged in the charge sheet before you?

[If this case is related to another case, inquire into the knowledge of the members as to the related case. Any specific knowledge of either case should be delayed until individual voir dire.]

11 During the court-martial, it may occur that the testimony of a witness or other evidence submitted will cause you to recall something you may have read or heard about this case that you do not recall now. If any of you recall or have heard or read anything about this (or a related) case outside this courtroom, you must totally disregard any recollection or impression you have of such matter, just as if you had never heard or read of it. This applies throughout the court-martial. Now, is there any member who cannot follow this instruction?

Also, you must be able to do this even if what you have previously heard or read or what you recall conflicts with or is different from what you hear in court. Is there any member who cannot follow this instruction?

12 Do any of you sign, prepare, or provide information for the evaluation or fitness reports of any other court member?

13 Do any of you have immediate family members who are law enforcement officers, prosecuting or defense attorneys, or otherwise employed in law enforcement activities?

14 Each court member is entitled to an equal voice and vote with all other members regardless of rate, grade, or rank. Influence through the use of grade, rank, position, or command is prohibited. Is there any member who cannot follow this instruction?

15 It appears that this case may have extended sessions during the day and may last (number) days until (date). When you are assigned as a member of the court-martial, this assignment becomes your primary duty and takes precedence over all other duties you may have. Do any of you have any official duties or personal matters that you believe might affect your ability to properly discharge your duties as a member due to extended sessions of this court?

[If yes, conduct individual voir dire.]

16 [For not-guilty plea cases] As court members, you must keep open minds regarding the verdict until all the evidence is in and you have been instructed as to the law. Is there any member who cannot follow this instruction?

17 I will instruct you prior to your deliberations on the guilt or innocence of (Accused). I will advise you that he/she must be presumed to be innocent until his/her guilt is established by legal and competent evidence beyond a reasonable doubt; that in this case, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he/she shall be acquitted; and that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the government. I will also give you other instructions concerning the law that you must follow. Have any of you formed or expressed an opinion concerning the guilt or innocence of the accused?

18 You may expect or desire the accused to testify. The accused has an absolute right not to testify. The fact that an accused may elect not to testify in his/her own behalf may not be considered adverse to the accused in any way. The burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the offense(s) alleged. Is there any member who cannot follow this instruction?

19 Is there any member who will be unable to follow my instructions on the law that must be applied to this case?

20 [For not guilty pleas cases] In the event the accused is found guilty of (any of) the offense(s), it will be your duty to adjudge an appropriate punishment. I will instruct you on the law you must follow in arriving at an appropriate sentence in this case. Included will be an instruction to the effect that you should consider all matters presented in extenuation and mitigation of the offense(s) by the accused as well as all matters presented in aggravation of the offense(s) by the trial counsel. Is there any member who cannot follow this instruction?

21 [For guilty plea cases] As I have earlier indicated, the accused has been found guilty of the offense(s) before you. It will be your duty to adjudge an appropriate punishment later in this court-martial. I will instruct you on the law you must follow in arriving at an appropriate sentence in this case. Included will be an instruction to the effect that you should consider all matters presented in extenuation and mitigation of the offense(s) by the accused as well as all matters presented in aggravation of the offense(s) by the trial counsel. Is there any member who cannot follow this instruction?

22 As court members, you must keep open minds regarding the sentence until all the evidence is in and you have been instructed as to the law. Your decision as to an appropriate sentence must be based solely on the matters that are properly presented to you during this trial; therefore, as members, you cannot have in your minds a set sentence until the case is over. Is there any member who cannot follow this instruction?

23 In determining an appropriate punishment, you must each give fair consideration to the entire range of permissible punishments in this case, from the least severe, which could be no punishment at all, the conviction itself serving as a punishment, to the most severe, which could include a (dismissal) (dishonorable discharge) (bad conduct discharge) and confinement for (life) (up to ____ (months) (years)). Will each of you be able to give such consideration to the full range of punishments (if sentencing is necessary)?

24 I will instruct you (if sentencing is necessary) that you may not have any preconceived formula or any fixed, inelastic, or inflexible attitudes concerning a particular type of punishment that you feel must or should be imposed, including an opinion as to whether a (dismissal) (dishonorable discharge) (bad conduct discharge) or confinement must be adjudged simply because of the nature (or number) of (the) offense(s) or because the accused has been found guilty. Is there any member who cannot follow this instruction?

25 Have any of you formed or expressed an opinion as to the sentence to be adjudged in this case (if sentencing is necessary)?

26 Having reviewed the charge(s) and specification(s) before you, do any of you, at this time, harbor any thoughts or feelings regarding punishments that might affect your ability to adjudge a completely fair, impartial, and appropriate sentence in this case, if the accused is convicted of (any of) the charged offense(s)?

27 Is there anything at all in your past education, training, or experience, or any other matter, that you feel you would not be able to set aside and that would make it difficult or impossible for you to conduct your deliberations in a completely fair, impartial and unbiased manner?

28 Are any of you aware of anything, whatsoever, whether I have touched on it or not, that you feel should be disclosed or that you feel would have any effect on your ability to sit as a fair and impartial member in this case, or that might in any way improperly influence your deliberations in this case?

29 [Sexual harassment/drug/homosexual offenses] From your training and performance of assigned military duties, you are aware that the service has established administrative procedures for dealing with military personnel who engage in actions similar to those on the charge sheet before you that involve (sexual harassment) (drug abuse) (homosexuality). These administrative procedures are sometimes referred to as "zero tolerance."

Such administrative procedures must be disregarded by you in this criminal trial, and you must base your decision of an appropriate sentence (if required) solely on the evidence presented in this courtroom and the instructions which I will give you. Is there any member who cannot follow this instruction?

30 [If issue of unlawful command influence raised by counsel] Do any of you know (name of convening authority), the convening authority in this case?

[If yes, conduct individual voir dire:]

Has (name of convening authority) ever discussed (his)(her) views on military justice with you?

[If convening authority is reporting senior] Does the fact that (name of convening authority) is your reporting senior in any way affect your ability to render a completely fair and impartial decision according to the instructions I will give you?

31 [If racial/ethnic prejudice involved] Do any of you feel that you have any racial, ethnic, religious, or other prejudices that would prevent you from serving as a fair and impartial member of this court-martial?

Does the fact that the accused is (basis of prejudice) cause you to have any feelings toward him/her that would prevent you from making a fair and impartial determination of this case according to the evidence presented in court and the instructions I will give you?

32 [If absentia trial] I will instruct you later in this court-martial that the fact the accused is not present may not be held against him/her in any way, that you may not speculate as to why he/she is not present, and that no adverse inference may be drawn from his/her absence. His/Her absence must not be considered as an admission of guilt, nor may you draw an inference of guilt from the accused's absence. Is there any member who cannot follow this instruction?

If you find the accused guilty of an offense, it will then be your duty to adjudge a sentence. In that event, I will instruct you that you must not consider the fact that the accused is not present as an aggravating circumstance, nor may the sentence that you adjudge be more severe because of the accused's absence. Is there any member who cannot follow this instruction?

Will any of you, in any way, hold the accused's absence from this courtroom against him/her during this court-martial?

33 [After counsel group voir dire and before individual voir dire] Now, taking into consideration all of the questions that have been asked, your responses and the responses of the other members, and everything else that has been brought out during these proceedings, do any of you now feel that, for any reason, you would be unable to fairly and impartially determine all the issues in this case in accordance with the evidence, my instructions, and the applicable law?

2. STIPULATION OF FACT / TESTIMONY INQUIRY

[Note: Stipulations of fact are marked and published to the members by the offering party, trial or defense. Stipulations of testimony are read to the members and attached as appellate exhibits.]

MJ: (Accused), I have here (Appellate) (Prosecution) (Defense) Exhibit ____, which is a stipulation of (fact) (testimony). Is this your signature which appears at the bottom of this stipulation?

ACC: Yes/No, sir/ma'am.

MJ: Before you signed this document, did you read it over completely and discuss it with your defense counsel?

ACC: Yes/No, sir/ma'am.

MJ: [If stipulation of fact] A stipulation of fact is an agreement between the trial counsel, the defense counsel, and yourself that the stipulated facts are true and if entered into evidence are uncontradicted facts for the purposes of this (motion) (trial). Once this stipulation is received into evidence, those facts cannot be disputed or contradicted by you or by any other party unless I permit this stipulation to be withdrawn. (1) Do you understand this? (2) Is everything in the stipulation the truth?

MJ: [If stipulation of testimony] A stipulation of expected testimony is an agreement between the trial counsel, the defense counsel, and yourself that if (name of declarant) were called as a witness in this case and sworn, he/she would testify under oath substantially as indicated in the stipulation. This stipulation does not admit the truth of the testimony which may be attacked, contradicted, or explained in the same way as other testimony. Do you understand this?

ACC: Yes/No, sir/ma'am.

MJ: You have the right not to enter into this stipulation, and this stipulation will not be accepted without your consent. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: Do you consent to the use of this stipulation as evidence before this court for the purposes of this (motion) (trial)?

ACC: Yes/No, sir/ma'am.

MJ: Do counsel for both sides desire to enter into this stipulation?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: Any objection to the stipulation?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: (Appellate) (Prosecution) (Defense) Exhibit ____ is admitted into evidence (and may be (read) (published) to the members at the appropriate time).

3. BERTELSON INQUIRY INTO CONFESSIONAL STIPULATION OF FACT

[Note: If a stipulation of fact practically amounts to a plea of guilty to a specification (or lesser included offense) to which a not guilty plea is pending, MJ must conduct a Bertelson inquiry before accepting the stipulation. See RCM 811 (c), Discussion; U.S. v. Bertelson, 3 MJ 314 (CMA 1977); and U.S. v. Watruba, 35 MJ 488 (CMA 1992).]

MJ: (Accused), I have here Prosecution Exhibit ____ for identification, which is a stipulation of fact. Is this your signature that appears at the bottom of this stipulation?

ACC: Yes/No, sir/ma'am.

MJ: Before you signed this document, did you read it over completely and discuss it with your defense counsel?

ACC: Yes/No, sir/ma'am.

MJ: A stipulation of fact is an agreement between the trial counsel, the defense counsel, and yourself that certain facts are true and if entered into evidence are uncontradicted facts for the purposes of this trial. This stipulation amounts to a confession of the elements of the offense of (state offense which stipulation admits). Accordingly, I must conduct an inquiry to determine if you wish to have this stipulation admitted against you. You have the right not to enter into this stipulation, and this stipulation will not be accepted without your consent. Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: The elements of the offense which this stipulation of fact admits are as follows: (list/explain elements). Do you have any questions about the elements of the offense that this stipulation of fact would admit?

ACC: Yes/No, sir/ma'am.

MJ: You have pleaded not guilty to (state offense). By pleading not guilty, you have placed the burden on the prosecution to prove its case against you, if it can, by legal and competent evidence beyond a reasonable doubt. By stipulating to (all) (most) of the elements of the offense, you relieve the prosecution of its burden of proving those elements by legal and competent evidence. If you do not agree to this stipulation, then the stipulation could not be used and the prosecution would have to prove these elements, if it could. Do you understand?

ACC: Yes/No, sir/ma'am.

MJ: Is everything in the stipulation the truth?

ACC: Yes/No, sir/ma'am.

MJ conducts inquiry with the accused to establish that a factual basis exists for the stipulation.

MJ: Has anyone forced or threatened you to enter into this stipulation?

ACC: Yes/No, sir/ma'am.

MJ: Has anyone made any promises or agreements with you in exchange for your entering into this stipulation?

ACC: Yes/No, sir/ma'am.

MJ: [If yes, do pretrial agreement inquiry, >>> page ???.]

[If no, continue.] Do both counsel agree with that representation?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: (Accused), the maximum sentence which may be imposed by this court as a result of a plea of guilty to (state offense), and this stipulation (practically) amounts to a plea of guilty, is: (state maximum). Do you understand that?

ACC: Yes/No, sir/ma'am.

MJ: Do counsel for both sides agree with that?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: (Accused), do you understand that since this stipulation of fact (practically) amounts to a plea of guilty, you could lawfully be sentenced to this maximum punishment?

ACC: Yes/No, sir/ma'am.

MJ: Do you have any questions about this stipulation of fact or what we have just discussed?

ACC: Yes/No, sir/ma'am.

MJ: Knowing and understanding the effect of this stipulation, do you voluntarily enter into it because you feel it is in your interest to do so?

ACC: Yes/No, sir/ma'am.

MJ: Do you consent to the use of this stipulation as evidence before this court for the purposes of this trial?

ACC: Yes/No, sir/ma'am.

MJ: Do counsel for both sides desire to enter into this stipulation?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: Any objection to the stipulation?

TC: Yes/No, sir/ma'am.

DC: Yes/No, sir/ma'am.

MJ: I find that (Accused) has knowingly and voluntarily consented to the use of this stipulation as evidence before this court. Prosecution Exhibit ____ for identification is admitted into evidence. The words "for identification" are stricken. (The exhibit may be published to the members at the appropriate time).

4. TRIAL IN ABSENTIA - WARNING TO ACCUSED

MJ: (Accused), Rule for Courts-Martial 804 of the Manual for Courts-Martial states: "The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present, is voluntarily absent after arraignment."

MJ: What this means to you is as follows. You have been arraigned on the charge(s) before the court. I am going to recess this case until (time & date). If this court is called back to order in (this courtroom) (name of location) on (time & date) and you are not present, and I find that your absence is voluntary on your part, (I will enter pleas of not guilty on your behalf and) this court-martial may proceed without your presence (and if you are found guilty of an offense, the court-martial may proceed) through the determination of an appropriate sentence. Do you understand?

ACC: Yes/No, sir/ma'am.

5. FRANCIS PLEAS IN A UA CASE

[Note: This pleading is used where there is an early UA termination and then a second UA within the charged period of UA]

Of (the) Specification ____ of (the) Charge ____, Guilty; except for the date (charged termination date), substituting therefor the date (1st termination date), and further adding the words and figures: "and did thereafter, on (2nd UA commencement date), without authority, absent (himself)(herself) from his unit, to wit: (unit name) and did remain so absent until on or about (2nd termination date);" of the excepted date, Not Guilty; of the substituted date and additional words and figures, Guilty. Of (the) Charge ____, Guilty.

6. RECURRING ADVICE TO WITNESSES AND MEMBERS

Witness Warning (when witness subject to recall)

(Witness), I'm going to excuse you from the courtroom; however, you are subject to being recalled to testify in this case. Therefore, you are instructed not to discuss your testimony with anyone, except the trial and defense counsel, until this case is over. Do you understand?

Court Member Advice on Recess/Adjournment

Members of the court, you are (again) advised that during the (recess) (adjournment) you must not discuss this case among yourselves or with anyone else. You may not consult any source, written or otherwise, as to matters related to this case. Should anyone attempt to discuss this case with you, you must stop that person and notify me of the event at the next session of trial. Do you understand?

Limiting Instruction to Members

Members of the court, (describe evidence/testimony) has been admitted into evidence for the limited purpose to infer that (reason/motive/intent). (This is a permissible inference that you may disregard.)

You are advised that you may consider (evidence/ testimony) solely for that purpose and for no other. Is there any member who cannot follow this instruction?

Instruction to Disregard Improper Matters Revealed to Members

Members of the court, (describe improper question, answer, statement) is (an) (incompetent/improper/incorrect) (testimony/statement of law). You are instructed that you must completely disregard that (question, answer, statement). You may not consider it for any purpose whatsoever. You must cast it out of your minds as if it had never been said. You must decide this case solely on the evidence that properly comes before you. Is there any member who cannot follow this instruction?

7. QUESTIONS FOR PRO SE ACCUSED

The following list of questions should be asked by the military judge and/or counsel if the accused desires to proceed pro se:

- (1) Have you ever-studied law? What education do you have? Do you understand English?
- (2) Have you ever represented yourself or another in a criminal trial?
- (3) From the trial counsel's statement of the charges, do you know the charges against you?
- (4) Are you familiar with the Military Rules of Evidence?
- (5) Do you realize that the Military Rules of Evidence govern what evidence may be introduced and those rules must be followed even though you are representing yourself?
- (6) Are you familiar with the Rules for Courts-Martial?
- (7) Do you realize those rules govern how this case is tried?
- (8) Do you understand that you would be better off with a trained lawyer who would be familiar with the Rules of Evidence and the Rules for Courts-Martial?
- (9) Do you realize that representing yourself is not a matter of telling your story? If you testify, you cannot just give a statement. You must ask yourself questions and then give answers, according to the Rules of Evidence and the Rules for Courts-Martial.
- (10) Do you understand a lawyer has the experience and training in trial procedure to best advocate your position at trial?
- (11) Do you realize that not following the rules of procedure or being familiar with the rules of evidence, you may do something which in effect will have unintended consequences, such as asking a question which might be considered a statement or an admission by you?

(12) Do you understand that proceeding pro se will not allow you to complain on appeal about the competence of your own representation?

(13) Do you realize that your case may be presented less effectively because you will be both your own advocate and the defendant?

(14) Do you realize the maximum penalty in this case is ____?

(15) I think it is unwise for you to represent yourself, not being familiar with those rules. I strongly urge you not to try to represent yourself. Knowing all that I have told you, do you still wish to represent yourself?

(16) Is this decision made as a result of any threats or force against you or is it a decision you make of your own free will?

(17) Do you wish to have a counsel sit with you at the counsel table and be available to assist you? I recommend you do so.

8. QUESTIONS WHEN ACCUSED DOES NOT REMEMBER, BUT PLEADS GUILTY

[Note: MJ may use the following questions during a providence inquiry where the accused wishes to plead guilty to an offense but cannot recall the facts or circumstances due to intoxication or amnesia.]

MJ: (Accused), in a pretrial conference, your counsel informed me that you could not remember what you had done/what your actions were on _____.

What is it you cannot remember?

Why is it that you cannot recall what happened?

How much (alcohol) () did you consume?

MJ: (Accused), now you have pleaded guilty to _____. I need to know what makes you think you are guilty.

Have you read any reports or statements concerning this incident?

What specifically have you read?

Were these in English?

Are you able to read and understand English easily?

Are you satisfied that the reports and statements are true and correct?

Have you talked with the victim(s) or any of the witnesses?

Do you know the victim(s) or any of the witnesses, and if so, how well?

Did your counsel talk with the victim(s) or any of the witnesses?

Do you have any reason to believe that any of the victim(s) or witnesses would lie about what you did on _____.

MJ: (Trial counsel), have you provided to the defense all information in the hands of the prosecution pertaining to the offense(s)?

Does that include all incriminating evidence and all evidence that might be favorable to the accused?

MJ: (Defense counsel), are you satisfied that you have received all the evidence in the possession of the prosecution pertaining to the offense(s), both favorable and unfavorable to the accused?

MJ: (Accused), are you satisfied that you have received all the evidence in the possession of the prosecution pertaining to the offense(s), both favorable and unfavorable to you?

MJ: (Defense counsel), was there an Article 32 investigation conducted in this case?

MJ: [If yes] (Accused), at the Article 32 investigation, did you hear the prosecution witnesses testify?

Did you have an opportunity to review documentary evidence utilized by the prosecution at that hearing, including statements of witnesses?

Did you or your counsel receive a copy of the Article 32 investigation?

Did you discuss the Article 32 investigation with your counsel?

MJ: (Accused), have you personally reviewed the evidence available concerning the offense(s) alleged against you?

Before deciding to plead guilty, did you consider all of the evidence?

After considering all the evidence and discussing the case with your defense counsel, do you believe that you committed the offense(s) charged?

Do you have any doubt whether or not you committed the offense(s)?

MJ: (Accused), what do you personally believe occurred with regard to the offense(s)?

MJ: [If stipulation of fact in conjunction with pleas] I have previously admitted the stipulation of fact marked Prosecution Exhibit ____.
(Accused), do you believe that the stipulation accurately describes the facts and circumstances surrounding the offense(s) of which you are charged, even though you do not remember all the facts?

MJ: (Accused), I have previously described to you the elements that the government must prove beyond a reasonable doubt before you can be found guilty. Do you remember those elements? Do you believe that the prosecution could prove each element of the offense(s) beyond a reasonable doubt?

MJ: [If specific intent/actual knowledge an element] Do you understand that in order for the prosecution to prove your guilt to the offense(s) of _____, it must prove beyond a reasonable doubt that you had (actual knowledge of _____) (the specific intent to _____).

MJ: Do you understand that in considering your ability to have (actual knowledge of _____) (the specific intent to _____), (I) (the court members) would consider the evidence presented on your state of (intoxication) (amnesia) ()?

And do you understand that if you entered a plea of not guilty to the offense(s) of _____ and proceeded to trial on the facts, if the trier of the facts were not convinced beyond a reasonable doubt that you had (actual knowledge of _____) (the specific intent to _____), you would be acquitted of the offense(s)?

Although you cannot remember because of (intoxication) (amnesia) () what occurred with regard to the offense(s) of _____, are you convinced that at the time you _____, you had (actual knowledge of _____) (the specific intent to _____)?

By pleading guilty, you are waiving the possible defense of (intoxication) (amnesia) (). Do you understand that?

Do you wish to waive that defense?

MJ: (Defense counsel), has there been any medical, psychiatric, or other professional evaluation of the accused to rule out the defense of insanity or lack of (actual knowledge) (specific intent)?

What were the results of the tests?

MJ: (Defense counsel), what, if any, defenses do you perceive in this case?

Have you discussed these matters with the accused?

Do you wish to raise any defense?

MJ: (Accused), has your defense counsel discussed possible defenses with you?

Do you wish to raise any defense?

MJ: (Accused), are you convinced of your own guilt even though you cannot remember the facts and circumstances surrounding the alleged offense(s)?

Despite your inability to recall exactly what happened, do you still want to plead guilty?

9. INSTRUCTIONS ON COLLATERAL EFFECTS OF PUNISHMENT / PAROLE

Collateral Effects of Punishment

[Note: Use if the members have a question about an administrative or practical effect that may result from a conviction or a particular punishment and counsel for each side cannot agree on an acceptable answer.]

There are many administrative and practical effects that may result from a conviction or a particular punishment. All effects are not predictable and it would be speculative for me to instruct you on possible collateral effects.

Parole Eligibility

[Note: Use if the members have a question about parole eligibility.]

Parole is available to an accused sentenced by a military court to serve confinement, including life imprisonment. The exercise of parole, however, depends on several factors, including but not limited to: the length of sentenced confinement; the nature of the convicted crimes; and the conduct of the accused during his period of confinement. You should determine, in terms of confinement, what you feel is appropriate for this accused. Under these circumstances, do not be concerned about the impact of parole. When selecting an appropriate sentence, you should select a sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society.

Collateral effect and/or possible waiver of automatic forfeiture provisions

[Note: Use if the members have a question about automatic forfeiture provisions under Article 58b, or in the discretion of the military judge if the adverse impact of the provision is suggested as a reason to limit confinement.]

If the accused has dependents, the convening authority is authorized by the UCMJ to defer and/or waive application of any automatic forfeitures imposed through operation of law by Article 58b for a period up to six months from the date of the convening authority's action. This waiver is discretionary with the

convening authority. [As an adjunct to your sentence, you may recommend to the convening authority that this waiver be applied in favor of the accused's dependents.]

It is the duty of the court to decide an appropriate sentence for the offenses(s) of which the accused has been convicted, after considering all the matters before you. You may consider the effects of Article 58b, if you view those effects germane to your decision on sentence, but you are not required to do so. You may not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. There are many administrative and practical effects that may result from a conviction or a particular punishment, among them the possible forfeiture of pay and allowances under Article 58b. Other administrative regulations may impact on the accused's entitlement to pay and allowances as well. All effects are not predictable and it would be speculative for me to instruct you on all possible collateral effects of the sentence you select.

10. WAIVER OF CONFLICT-FREE COUNSEL

(DC REPRESENTING MULTIPLE ACCUSED)

- (1) (Accused), do you understand that you have a constitutional right to be represented by counsel who has undivided loyalty to you and your case?
- (2) Do you understand that a lawyer ordinarily should not represent more than one client when the representation involves a matter arising out of the same incident?
- (3) For a lawyer to represent more than one client concerning a matter arising out of the same incident, you have to consent to that representation. Do you understand that?
- (4) Have you discussed this matter with your defense counsel?
- (5) After discussing this matter with (him) (her), did you decide for yourself that you would like to have (him) (her) still represent you?
- (6) Do you understand that when a defense counsel represents two or more clients regarding a matter arising out of the same incident, then the lawyer may have divided loyalties; for example, the defense counsel may be put in a position of arguing that one client is more at fault than another client?
- (7) Understanding that even if an actual conflict of interest does not presently exist between your defense counsel representing you and (his) (her) other client(s), but that one could possibly develop, do you still desire to be represented by _____ ?
- (8) Do you understand that you are entitled to be represented by another lawyer who has no conflict of interests?
- (9) Knowing this, please tell me why you want to give up your right to conflict-free counsel and be represented by _____ ?
- (10) Do you have any questions about your right to conflict-free counsel?
- (11) I find that the accused has knowingly and voluntarily waived (his) (her) right to conflict-free counsel and may be represented by _____ at this court-martial.

11. STATUTE OF LIMITATIONS

[NOTE: Unless it affirmatively appears in the record that the accused is aware of his/her right to plead the statute of limitations when it is obviously applicable, the MJ has a duty to advise the accused of the right to assert the statute in bar of trial. This advice should be given before the accused is allowed to enter a plea except in the unusual case where the applicability of the statute first becomes known after evidence is presented or after findings.]

MJ: (Accused), one of the offenses for which you are about to be tried is (specify the offense). This offense is alleged to have been committed more than (five) (___) years before the date upon which the sworn charges in this case were received by a summary court-martial convening authority. It therefore appears that the statute of limitations may properly be asserted by you in bar of trial for this offense. In other words, this specification (and charge) must be dismissed upon your request. Take time to consult with your counsel and then advise me whether you wish to assert the statute of limitations in bar of trial for the offense of (specify the offense).

[NOTE: An election by the accused to assert the statute should be treated as a motion to dismiss. Where the motion to dismiss because of the statute of limitations raises a question of fact, the MJ should defer ruling until all evidence has been presented. When determination of such issue is essential to the question of guilty or innocence of an alleged offense, the issue of fact must be decided by the court pursuant to appropriate instructions. RCM 905 and 907.]

12a. RECONSIDERATION INSTRUCTION (FINDINGS)

[NOTE: Use if the members indicate they wish to reconsider their findings.]

MJ: Reconsideration is a process wherein you are allowed to re-vote on your findings after you have reached a finding of either guilty or not guilty. The process for reconsideration is different depending on whether the proposal to reconsider relates to a finding of guilty or a finding of not guilty. After reaching your findings by the required concurrence, any member may propose that some or all of the findings be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the findings. In order for you to reconsider and re-vote on a finding, the following rules apply:

If the proposal is to reconsider a not guilty finding, then a majority of the members must vote by secret written ballot in favor of reconsideration.

Since we have ___ members, that means ___ members must vote in favor of reconsidering any finding of not guilty. If the proposal is to reconsider a guilty finding, then more than one-third of the members must vote by secret written ballot in favor of reconsideration. Since we have ___ members, that means ___ must vote in favor of reconsidering any finding of guilty.

[If the proposal is to reconsider a guilty finding where the death penalty is mandatory for that offense, which, in this case, means a guilty finding for the offense of _____, then a proposal by any member for reconsideration regarding that offense requires that you reconsider the finding].

If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the findings as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for determining whether the accused is guilty or not guilty, to include the procedural rules pertaining to your voting on the findings and the required two-thirds concurrence for a finding of guilty [*the unanimous vote requirement for a finding of guilty for a capital offense*].

Mr/Madam President, when the findings are announced, do not indicate whether they are the original findings or the result of reconsideration.

12b. RECONSIDERATION INSTRUCTION (SENTENCE)

[NOTE: Use if the members indicate they wish to reconsider their sentence.]

MJ: Reconsideration is a process wherein you are allowed to re-vote on your sentence after you have reached a sentence. The process for reconsideration is different depending on whether the proposal to reconsider relates to increasing or decreasing the sentence. After reaching your sentence by the required concurrence, any member may propose that the sentence be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the sentence. In order for you to reconsider and re-vote on the sentence, the following rules apply:

MJ: If the proposal to reconsider is with a view to increasing the sentence, then a majority of the members must vote by secret written ballot in favor of reconsideration. Since we have ____ members, that means ____ members must vote in favor of reconsideration with a view to increase the sentence. If the proposal to reconsider is with a view to decrease the sentence, then more than one-third of the members must vote by secret written ballot in favor of reconsideration. Since we have

___ members, that means ___ must vote in favor of reconsideration with a view to decrease the sentence.

[However, if the sentence you have reached includes confinement in excess of ten years (or confinement for life)[or confinement for life without possibility of parole, then only more than one-fourth of the members, or at least ___ members must vote in favor of reconsideration with a view to decrease the sentence.] [If the sentence you have reached is death, then a proposal by any member for reconsideration requires you to reconsider].

If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the sentence as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for determining an appropriate sentence, to include the procedural rules pertaining to your voting on the sentence and the required two-thirds (or three-fourths) (or unanimous) concurrence required for a sentence.

Mr/Madam President, when the sentence is announced, do not indicate whether it is the original sentence or the result of reconsideration.

[NOTE: In capital cases, the vote of only one court member is required for reconsideration of a sentence of death.]

13. CLEMENCY

General Instruction

You are reminded that it is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. However, if any or all of you wish to make a recommendation for clemency, it is within your authority to do so after the sentence is announced. Keep in mind your responsibility to adjudge a sentence which you regard as fair and just at the time it is imposed and not a sentence which will become fair and just only if the mitigating action recommended in your clemency request is adopted by the convening or higher authority who are in no way obligated to accept your recommendation.

You are further advised that a recommendation by the court for an administrative discharge or disapproval of a punitive discharge, if based upon the same matters as the sentence, is inconsistent with a sentence to a punitive discharge as a matter of law. You may make the court's recommendation expressly dependent upon such mitigating factors as (the) (attitude) (conduct) (of) (or restitution by) the accused after the trial and before the convening authority's action.

Recommendation for Suspension

You are advised that, although you have no authority to suspend either the entire sentence, or a portion thereof, that you impose, you may recommend such suspension. However, you must keep in mind during deliberation that such a recommendation is not binding on the convening or higher authority. Therefore, in arriving at a sentence, you must be satisfied that your sentence is appropriate for the offense(s) of which the accused has been convicted even if the convening or higher authority refuses to adopt your recommendation or suspension.

If fewer than all members of the court wish to recommend suspension of the entire sentence or a portion thereof, then the names of those making such a recommendation, or not joining in such a recommendation, whichever is less, should be listed at the bottom of the sentence worksheet.

Where such a recommendation is made, then the president, after announcing the sentence, may announce the recommendation, and the number of members joining in that recommendation. Whether to make any recommendation for suspension of the sentence in its entirety or a portion thereof, in its entirety is solely a matter within the discretion of the court.

However, you should keep in mind your responsibility to adjudge a sentence which you regard as fair and just at the time it is imposed, and not a sentence which will become fair and just only if your recommendation is adopted by the convening or higher authority.

14. RELATIVE SEVERITY OF SENTENCE

[NOTE: Before using the following instruction, the MJ should ascertain on the record the position of the parties with regard to the giving of the instruction.]

You are advised that the question as to whether a sentence of _____ is less severe than a sentence of _____ is a question that cannot be resolved with mathematical certainty. However, you are reminded of my advice as to the effect of punitive discharges. You should bear in mind that either type of punitive discharge and its consequences remain with the accused for the rest of his/her life, whereas the (period of confinement once served) (or) (money once forfeited) does not have the same ineradicable stigma. In light of these instructions and the facts and circumstances of this case, you should determine which of the proposed sentences is the least severe and vote on it first. In determining the order of severity, any differences among you must be decided by majority vote. After deciding which of the proposed sentences should be voted on first, you should proceed to deliberate and vote on an appropriate sentence in this case.

15. HUNG JURY INSTRUCTION (SENTENCING)

In view of the fact that the sentence in this case is within your discretion, you each have the right to conscientiously disagree. It is not mandatory that the required fraction of members agree on a sentence and therefore you must not sacrifice conscientious opinions for the sake of agreeing upon a sentence. Accordingly, opinions may properly be changed by full and free discussion during your deliberations. You should pay proper respect to each other's opinions, and with an open mind you should conscientiously compare your views with the views of others.

Discussion may follow as well as precede the voting. All members must have a full and fair opportunity to exchange their points of view and to persuade others to join them in their beliefs. It is generally desirable to have the theories for both the prosecution and the defense weighed and debated thoroughly before final judgment. You must not go into the deliberation room with a fixed determination that the sentence shall represent your opinion of the case at the moment, nor should you close your ears to the arguments of the other members who have heard the same evidence, with the same attention, with an equal desire for truth and justice, and under the sanction of the same oath. But you are not to yield your judgment simply because you may be outnumbered or outweighed.

If, after comparison of views and repeated voting for a reasonable period in accordance with these instructions, your differences are found to be irreconcilable, you should open the court and the president may then announce, in lieu of a formal sentence, that the required fraction of members are unable to agree upon a sentence.

16. INSTRUCTIONS ON DEATH SENTENCE

You are advised that this court is authorized to adjudge a sentence of death (or any lesser punishments) (for Article 118(1) or (4) or life imprisonment).

You may adjudge a sentence of death only under certain circumstances.

First, a death sentence may not be adjudged unless all the court members find beyond a reasonable doubt that (an) (one or more) aggravating factor(s) existed. The alleged aggravating factor(s) (is) (are) as follows:

Read the aggravating factor(s) specified by the trial counsel upon which some evidence has been introduced.

(This) (These) alleged aggravating factor(s) (is) (are) also set out on Appellate Exhibit ____, the Sentence Worksheet for capital cases, which I will discuss in a moment.

All of the members of the court must agree beyond a reasonable doubt that (this) (one or more of the) aggravating factor(s) existed at the time of the offense(s) or resulted from the offense(s).

[NOTE: If more than one aggravating factor is involved, the following instruction should be given.

It is not sufficient that some members find that one aggravating factor existed, while the remaining members find that a different aggravating factor existed; rather, all of you must find beyond a reasonable doubt that the same aggravating factor or factors existed before a sentence of death may be adjudged.]

In this regard, you are again advised that reasonable doubt is defined as follows:

Reasonable doubt

[Some of you may have served as jurors in civil cases, or as board members in administrative boards, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.]

By reasonable doubt is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty.

The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution that does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Give additional definitional or explanatory instructions relevant to the specified aggravating factors.

You must presume (Accused) to be innocent of each of the aggravating factor(s) which (has) (have) been alleged, even though you previously found him guilty of _____.

This presumption remains unless you are satisfied from the evidence beyond a reasonable doubt that he/she is guilty of (the) (an) aggravating factor. This presumption of innocence is sufficient to justify a finding that no aggravating factor exists, unless you are satisfied beyond a reasonable doubt

that the government has proved (Accused) guilty of (any of) the aggravating factor(s).

If you have a reasonable doubt as to the truth or existence of (the) (any) aggravating factor, you shall find that factor does not exist.

(At this time I must advise you of the elements of _____, as they are part of the aggravating factor(s) alleged by the prosecution.)

Elements of aggravating factors if applicable

You may consider all the evidence in the case, including the evidence presented prior to the findings of guilty, as well as the evidence presented during this sentencing hearing. Your deliberations on the aggravating factor(s) should properly include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on (the) (each) aggravating factor must be accomplished by secret written ballot, and all members are required to vote.

If you fail to find unanimously that (at least one of) the aggravating factor(s) existed, then you may not adjudge a sentence of death.

If, however, you determine that at least one of the aggravating factors existed, then you may consider, along with other appropriate sentence possibilities, whether a sentence of death should be adjudged. In this regard, you may not adjudge a sentence of death unless you unanimously find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including such factors as you have found existed in the first step of this procedure.

You will note that some of the aggravating circumstances listed below and some of the extenuating and mitigating circumstances may appear to conflict. If so, it is up to you as members to resolve the conflict.

Thus, in addition to the aggravating factors that you have found by unanimous vote, you may consider the following aggravating circumstances:

(Previous convictions)
(Prior Article 15s)
(Prosecution exhibits, stipulations, etc.)
(Rebuttal testimony of _____)
(Nature of the weapon used in the commission of the offense)
(Nature and extent of injuries suffered by the victim)
(The nature of the harm done to national security)
(Other _____)

After consulting the DC, the MJ should instruct on applicable extenuating and mitigating circumstances.

You must also consider all evidence in extenuation and mitigation and balance them against the aggravating circumstances using the test upon which I previously instructed you.

A mitigating circumstance is anything about (Accused) or the crime which, in fairness and mercy, should be taken into account in deciding punishment. Even where there is no excuse or justification for the crime, our law requires consideration of more than just the bare facts of the crime. Therefore, a mitigating circumstance may stem from any of the diverse frailties of humankind.

Thus, you should consider the following extenuating and mitigating circumstances:

1. The accused's age.
2. The accused's good military character.
3. The accused's (record) (reputation) in the service for (good conduct) (efficiency) (bravery) (_____).
4. The prior honorable discharge(s) of the accused.
5. The combat record of the accused.
6. The (family) (domestic) difficulties or conditions experienced by the accused.
7. The financial difficulties experienced by the accused.
8. The accused's (mental condition) (mental impairment) (behavior disorder) (personality disorder) (character disorder) (nervous disorder) (_____).
9. The accused's (physical disorder) (physical impairment) (addiction).
10. The duration of the accused's pretrial confinement or restriction.
11. The accused's GT score of _____.
12. The accused's education which includes: _____.
13. That the accused is a graduate of the following service schools: _____.
14. That the accused's (OER's) (EER's) indicate: _____.
15. That the accused is entitled to wear the following medals and awards: _____.
16. The nature of the offense(s) of which the accused has been convicted.
17. (The accused's civilian records which indicate: _____.)
18. (The lack of (previous convictions) (or Article 15 punishments).)
19. (The accused's past performance and conduct in the service reflected by (his) (her) DA Form(s) _____.)
20. (Defense exhibits ____.)
21. (The character evidence testimony of _____.)
22. (The accused's (testimony) (statement).)
23. (The testimony of _____.)

You are also instructed to consider in extenuation and mitigation any other aspect of the accused's character, background, and record, and any other aspect of the offense you find appropriate.

In addition, a proper subject of your sentencing deliberations is "residual doubt." Any lingering doubts you may have concerning (Accused)'s

guilt, or any "residual doubt" you may have concerning the evidence presented during the findings stage, may appropriately be considered as a matter in mitigation. "Residual doubt" may apply to any element of any offense, including specific intent.

It is acceptable for panel members to have different views about what sentence is appropriate, and to use their personal views in deciding whether "residual doubt" exists in light of the unique circumstances of this case. You are simply required to consider the evidence fairly and to follow the instructions of the court in deciding the appropriate punishment.

If you unanimously find one or more aggravating factors and even if you unanimously determine that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, you still have the absolute discretion to decline to impose the death sentence.

A sentence of death may be adjudged only upon the unanimous vote of all the members. A sentence of death includes a (dishonorable discharge) (dismissal), and confinement which is a necessary incident of a sentence of death but not a part of it. A sentence of death may not be suspended. If a sentence of death is adjudged by the members, the President must announce which aggravating factor(s) (was) (were) found by the members.

As an aid in putting your sentence in proper form, you must utilize Appellant Exhibit ____, a Sentence Worksheet for capital cases. You should first vote on (the) (each) aggravating factor which (is) listed on the worksheet, and then reflect the court's vote on each aggravating factor in the space provided. (Then strike out any factor not proven.) If (this) (these) vote(s) result in a unanimous finding that (the) (one or more) factor(s) (has) (have) been proven, you may then consider, along with other possible sentences, a sentence of death. On the other hand, if the court cannot establish

unanimously that (the) (any) aggravating factor has been proven, or if the court sentences the accused to a sentence other than death, then you should strike out all of the aggravating factors on Appellate Exhibit ____.

Provide appropriate instructions on alternate sentences.

If a sentence of death is adjudged unanimously, your deliberations are concluded unless reconsideration is proposed by any member, in which case you should reopen court for further instructions. Similarly, if a sentence of death is not adjudged, but any member proposes reconsideration, ask for further instructions.

17. ABSENT ACCUSED INSTRUCTION: PRELIMINARY FINDINGS

Under the law applicable to trials by court-martial, various circumstances may exist whereby a court-martial can proceed to findings and sentence, if appropriate, without the accused being present in the courtroom. I have determined that one or more of these circumstances exist in this case. In this regard you are advised that you are not permitted to speculate as to why the accused is not present in court today and that you must not draw any inferences adverse to the accused because (he) (she) is not appearing personally before you. You may neither impute to the accused any wrongdoing generally, nor impute to (him) (her) any inference of guilt in regard to (his) (her) nonappearance here today. Further, should the accused be found guilty of any offense presently before this court, you must not consider the accused's nonappearance before this court in any manner when you close to deliberate upon the sentence to be adjudged. Is there any member who cannot follow this instruction?

18. BRAIN DEATH INSTRUCTION

[NOTE: Use if evidence introduced shows that actions by medical personnel, in making a determination of brain death or in removal of life support following a determination of brain death, were improper.]

You have heard evidence in this case that the alleged victim was prematurely disconnected from life support following an improper determination by medical personnel of death. Thus, you must consider this issue in your deliberations.

An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. The irreversible cessation of all brain functions is called "brain death." "Brain death" should be determined using reasonable medical standards used by the medical profession. You should consider any evidence of these standards to include expert medical testimony. You must weigh the expert and opinion testimony given to make a determination of whether the alleged victim was actually dead when life support was terminated.

If you are convinced beyond a reasonable doubt that the alleged victim was dead according to reasonable medical criteria prior to removal of life support systems, then no further consideration should be given to this issue.

If you are not so convinced, beyond a reasonable doubt, then you must consider whether the alleged victim's death resulted from intervening medical malpractice which caused the alleged victim to be prematurely disconnected from life support. It can reasonably be anticipated that a victim of an assault will receive medical attention. The nature and intensity of medical treatment will vary with the seriousness of the wounds inflicted. Similarly, the more complex the required treatment is, the more opportunity for error on the part

of attending physicians. The fact that the immediate cause of death was the medical or surgical treatment administered or that such treatment was a factor contributing to the cause of death will not relieve the person who inflicted the original injury from responsibility. The injury inflicted need not be proven to be the direct or sole cause of death, as long as it started a chain of causation which resulted in or substantially contributed to the death. The test of responsibility is whether the act of the accused substantially contributed to the death. To constitute a defense, the treatment of the attending physicians must rise to the level of gross negligence of such a nature as to turn aside the course of probable recovery.

The burden is on the prosecution to prove beyond a reasonable doubt that there was no intervening medical malpractice amounting to gross negligence. If you have a reasonable doubt concerning whether the victim was prematurely terminated from life support, you may not convict the accused of a homicide offense unless you find beyond a reasonable doubt that there was no gross negligence on the part of medical personnel.

Gross negligence is a degree of carelessness greater than simple negligence. Simple negligence is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; that is what "due care" means. Gross negligence is a negligent (act) (or) (failure to act) with a reckless, or wanton, or deliberate disregard for the foreseeable result to others, instead of merely a failure to use due care.