

# JOINT TRIAL GUIDE

## 2019



1 JANUARY 2019

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**Section I**  
**Initial Session Through Arraignment**

**2-1. PROCEDURAL GUIDE FOR ARTICLE 39(a) SESSION**

**MJ: Please be seated. This Article 39(a) session is called to order.**

TC: This court-martial is convened by Court-Martial Convening Order No. \_\_, HQ, \_\_\_\_\_, dated \_\_\_\_\_ (as amended by CMCO \_\_, same Headquarters, dated \_\_\_\_\_) copies of which have been furnished to the military judge, counsel, and the accused, and which will be inserted at this point in the record.

(TC: The following corrections are noted in the convening orders: \_\_\_\_\_.)

**NOTE: The MJ should examine the convening order(s) and any amendments for accuracy. Only minor changes may be made at trial to the convening orders. Any correction that affects the identity of the individual concerned must be made by an amending or correcting order. If a CAPITAL CASE, go to Chapter 8.**

(TC: (An) Article 30a proceeding(s) (was) (were) held in connection with this case on \_\_\_\_\_.)

**NOTE: A record of every pre-referral proceeding conducted pursuant to Article 30a, UCMJ shall be prepared and such record shall be included in the record of trial. See RCM 309(e).**

TC: The charge(s) (has) (have) been properly referred to this court for trial and (was) (were) served on the accused on \_\_\_\_\_. The (three) (five) day statutory waiting period has (not) expired.

**NOTE: In peacetime, if less than 3 days (SPCM) or 5 days (GCM) have elapsed from the date of service, the MJ must inquire. If the accused objects, the MJ must grant a continuance. When computing the days, do not count the day of service or day of trial. If a waiver must be obtained, see paragraph 2-7-1, WAIVER OF STATUTORY WAITING PERIOD.**

TC: The prosecution is ready to proceed (with the arraignment) in the case of *United States v.*\_\_\_\_\_. The accused and the following persons detailed to this court are present: \_\_\_\_\_, Military Judge (Military Magistrate); \_\_\_\_\_, Trial Counsel; and \_\_\_\_\_, Defense Counsel. The members (and the following persons detailed to this court) are absent: \_\_\_\_\_.

TC: \_\_\_\_\_ has been detailed reporter for this court and (has been previously sworn) (will now be sworn).

TC: (I) (All members of the prosecution) have been detailed to this court-martial by \_\_\_\_\_. (I am) (All members of the prosecution are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the prosecution has) acted in any manner that might tend to disqualify (me) (us) in this court-martial.

**NOTE: If any trial counsel needs to be sworn, the MJ will provide the following oath: “Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) counsel in the case now in hearing (so help you God)?”**

### ***2-1-1. RIGHTS TO COUNSEL***

**MJ: \_\_\_\_\_, you have the right to be represented by \_\_\_\_\_, your detailed military defense counsel. (He) (She) is a lawyer, certified by The Judge Advocate General as qualified to act as your defense counsel (and (he) (she) is a member of the Army’s Trial Defense Service). (His) (Her) services are provided at no expense to you.**

**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. If you were represented by military counsel of your own selection, then your detailed defense counsel would normally be excused. However, you could request that your detailed counsel continue to represent you, but your request would not have to be granted. Do you understand that?**

ACC: (Responds.)

**MJ: In addition to your military defense counsel, you have the right to be represented by a civilian counsel at no expense to the government. Civilian counsel may represent you along with your military defense counsel or you could excuse your military counsel and be represented only by your civilian counsel.**

**Do you understand that?**

ACC: (Responds.)

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

ACC: (Responds.)

**MJ: By whom do you wish to be represented?**

ACC: (Responds.)

**MJ: And by (him) (her) (them) alone?**

ACC: (Responds.)

**NOTE: If the accused elects pro se representation, see paragraph 2-7-2, PRO SE REPRESENTATION. The MJ must be aware of any possible conflict of interest by counsel, and if a conflict exists, the MJ must obtain a waiver from the accused or order new counsel appointed for the accused. See paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.**

**MJ: Defense Counsel, please announce your detailing and qualifications.**

DC: (I) (All detailed members of the defense) have been detailed to this court-martial by \_\_\_\_\_. (I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense has) acted in any manner that might tend to disqualify (me) (us) in this court-martial.

**NOTE: If any defense counsel needs to be sworn, the MJ will provide the following oath: “Do you swear or affirm that you will faithfully perform all the duties of defense counsel in the case now in hearing (so help you God)?”**

Civilian DC: I am an attorney and licensed to practice law in the state(s) of \_\_\_\_\_. I am a member in good standing of the (\_\_\_\_\_) bar(s). I have not acted in any manner which might tend to disqualify me in this court-martial.

**NOTE: In all cases with a civilian defense counsel, the MJ will provide the following oath: Do you, \_\_\_\_\_, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?**

**MJ: I have been properly certified and sworn, and detailed (myself) (by \_\_\_\_\_) to this court-martial.**

**NOTE: If a military magistrate has been detailed to preside over a special court-martial consisting of a military judge alone, as authorized by Article 19(c) and RCM 503(b)(4), the military magistrate must confirm the consent of the parties to his/her detailing by reading the parenthetical below. If a party does not consent, the military magistrate must recess the proceeding and inform the military judge who detailed him/her.**

**(MJ: I am a military magistrate detailed to preside at this special court-martial consisting of a military judge alone. The law requires that all parties consent to me presiding at this court-martial. If any party does not consent, then a military judge will be detailed to preside. Do the parties consent to me presiding at this court-martial?)**

TC/DC/ACC: (Respond.)

**MJ: I am not aware of any matter that might be a ground for challenge against me (\_\_\_\_\_). Does either side desire to question or challenge me?**

TC/DC: (Respond.)

**MJ: Counsel for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn. Trial Counsel will announce the general nature of the charge(s).**

TC: The general nature of the charge(s) in this case is \_\_\_\_\_. The charge(s) (was) (were) preferred by \_\_\_\_\_, (and) forwarded with recommendations as to disposition by \_\_\_\_\_. (An Article 32 preliminary hearing was conducted by \_\_\_\_\_.) (The Article 32 preliminary hearing was waived.)

**NOTE: If the accused waived the Article 32 preliminary hearing, the MJ should ensure that it was a knowing and voluntary waiver. Paragraph 2-7-8, PRETRIAL/PLEA AGREEMENT: ARTICLE 32 WAIVER, may be used as a guide.**

**NOTE: The military judge must provide the appropriate forum rights from one of the following three paragraphs: paragraph 2-1-2 (special court-martial consisting of MJ alone), paragraph 2-1-3 (general and special courts-martial referred on or after 1 January 2019), or paragraph 2-1-4 (general and special courts-martial referred prior to 1 January 2019).**

***2-1-2. FORUM RIGHTS (Special Court-Martial consisting of a Military Judge Alone)***

**NOTE: Special Court-Martial consisting of a Military Judge Alone. If the charges are referred to a special court-martial consisting of a military judge alone pursuant to Article 16(c)(2)(A), provide the following advice on forum rights.**

**NOTE: If the charges contain any offenses alleged to have been committed prior to 1 January 2019, the judge must conduct the**



**below colloquy with the accused to determine if he elects to be sentenced under the sentencing rules that became effective on 1 January 2019. To proceed with a special court-martial consisting of a military judge alone, the accused must agree to be sentenced under the sentencing rules that became effective on 1 January 2019. See Executive Order 13825, Section 10, and RCM 902A.**

**If all charges allege offenses committed on or after 1 January 2019, skip to the next NOTE.**

**MJ: Because you are charged with offenses allegedly occurring both before 1 January 2019 and on or after 1 January 2019, you may only be tried at a special court-martial consisting of a military judge alone if you elect to be sentenced under the sentencing rules that went into effect on 1 January 2019. If you make this election, and are later convicted of any offense, no matter when the offense occurred, you will be sentenced under the sentencing rules in effect on 1 January 2019. You must make this election prior to arraignment. Your election regarding the applicable sentencing rules is irrevocable. If you do not elect to be sentenced under the sentencing rules that went into effect on 1 January 2019, we will be unable to proceed with this trial at this forum. Do you understand what I have said?**

ACC: (Responds.)

**MJ: Have you discussed this with your defense counsel?**

ACC: (Responds)

**MJ: Did your defense counsel fully explain the choices that you have?**

ACC: (Responds)

**MJ: Do you have any questions about your right to elect the applicable sentencing rules?**

ACC: (Responds.)

**MJ: Do you agree to be sentenced under the sentencing rules that became effective on 1 January 2019?**

ACC: (Responds)

**NOTE: In all cases, continue below.**

**MJ: \_\_\_\_\_, because this case has been referred to a special court-martial consisting of a military judge alone, the military judge will decide whether you are guilty, and if found guilty, the military judge will determine your sentence. Do you understand that?**

ACC: (Responds.)

**MJ: You have the right to object to the trial of any specification by a special court-martial consisting of a military judge alone if: (1) the maximum authorized confinement for the offense alleged in the specification would be greater than two years if the offense were tried by a general court-martial, with the exception of a specification alleging wrongful use or possession of a controlled substance in violation of Article 112a, UCMJ or an attempt thereof under Article 80, UCMJ; or (2) the specification alleges an offense for which sex offender notification would be required under regulations issued by the Secretary of Defense.**

**MJ: If you object to trial by special court-martial consisting of a military judge alone for (the) (any) specification, the convening authority will have the option of referring (that) (those) specification(s), (along with the other specifications on the charge sheet), to a general or special court-martial, at which the maximum punishment authorized would be increased.**

**MJ: Do you understand what I have said so far?**

ACC: (Responds.)

**MJ: Have you discussed these issues with your defense counsel?**

ACC: (Responds.)

**MJ: Do counsel or accused believe the accused has a right to object to (the) (any) specification being tried at this Special Court-Martial consisting of a Military Judge Alone?**

ACC/DC/TC: (Respond.)

((IF NECESSARY:) MJ: \_\_\_\_\_, do you object to trial by special court-martial consisting of a military judge alone for (the) (any) specification?

ACC: (Responds.))

**NOTE: If the accused objects to the trial of any specification by special court-martial consisting of a military judge alone, recess the proceedings and allow trial counsel to refer the matter to the convening authority. If the accused does not object, announce that the court is assembled, as stated below, and then proceed to paragraph 2-1-6, ARRAIGNMENT. However, before announcing assembly of the court, the military judge should consider the impact of doing so on the ability to later change the military judge pursuant to RCM 505(e).**

MJ: The court is assembled.

***2-1-3. FORUM RIGHTS (General and Special Courts-Martial referred on or after 1 January 2019)***

**NOTE: General and Special Courts-Martial. If the charges are referred to a general or special court-martial on or after 1 January 2019, provide the following advice on forum rights.**

MJ: \_\_\_\_\_, you have a right to be tried by a court consisting of (four) (eight) members. (FOR GCM ONLY: After impanelment, as a result of excusals, the court could be reduced to no fewer than six members.) You are also advised that no member of the court would be junior in rank to you.

(IF ACCUSED IS AN OFFICER:) MJ: The members of the court will be commissioned (and/or warrant) officers.

(IF ACCUSED IS ENLISTED:) MJ: You may request that the members of the court be comprised entirely of officers, that is commissioned and/or warrant officers, or of at least one-third enlisted members. If you do not make such a request, then the court shall be comprised of members in accordance with the convening order.

MJ: Do you understand what I have said so far?

ACC: (Responds.)

**MJ: If you are tried by court members, the members will vote by secret, written ballot and three-fourths of the members must agree before you could be found guilty of any offense.**

**NOTE: The military judge must use one of the following three options to advise the accused of the sentencing forum. The dates of the alleged offenses will dictate which option must be used.**

(OPTION 1. TO BE USED IF ALL SPECIFICATIONS ALLEGE OFFENSES COMMITTED PRIOR TO 1 JANUARY 2019:)

**MJ: If you are found guilty in a trial with members, you will also be sentenced by the members. Three-fourths of the members must agree in voting on a sentence.**

(OPTION 2. TO BE USED IF ALL SPECIFICATIONS ALLEGE OFFENSES COMMITTED ON OR AFTER 1 JANUARY 2019:)

**MJ: If you are found guilty in a trial with members, you will have the option of electing sentencing by the military judge alone or sentencing by court members. If you elect to be sentenced by court members, three-fourths of the members must agree in voting on a sentence. If you do not elect to be sentenced by the members, then the military judge will decide an appropriate sentence for you.**

(OPTION 3. TO BE USED IF THE SPECIFICATIONS ALLEGE SOME OFFENSES COMMITTED PRIOR TO 1 JANUARY 2019 AND SOME OFFENSES COMMITTED ON OR AFTER 1 JANUARY 2019:)

**MJ: If you are found guilty in a trial with members, you will also be sentenced by the members. Three-fourths of the members must agree in voting on a sentence. However, if you elect to be sentenced under the sentencing rules that became effective on 1 January 2019, you will also have the option of electing sentencing by the military judge. If you elect to be sentenced under these new sentencing rules, and then elect to be sentenced by the military judge following conviction of any offense, the military judge will decide an appropriate sentence for you.**

**NOTE: IF CAPITAL CASE, use procedural guide in Chapter 8. In capital cases, there is no right to request trial by judge alone.**

(IN NONCAPITAL CASE:) **MJ: Alternatively, you may request to be tried by military judge alone. If your request is approved, there will be no court members.**

**The military judge will decide whether you are guilty or not guilty, and if found guilty, the military judge will determine your sentence.**

**MJ: Do you understand the difference between trial before members and trial before military judge alone?**

ACC: (Responds.)

**MJ: Do you understand the choices that you have?**

ACC: (Responds.)

**MJ: By what type of court do you wish to be tried?**

ACC: (Responds.)

**NOTE: If accused elects trial by members and the request is written, mark it as an appellate exhibit and proceed to paragraph 2-1-5, SENTENCING RIGHTS, if applicable, or paragraph 2-1-6, ARRAIGNMENT. If accused elects trial by judge alone, continue below:**

**MJ: Is there a written request for trial by military judge alone?**

DC: There is (not).

**MJ: Does the accused have a copy in front of (him) (her)?**

DC: (Responds.)

**MJ: \_\_\_\_\_, Appellate Exhibit \_\_ is a request for trial by military judge alone. Is that your signature on this exhibit?**

ACC: (Responds.)

**MJ: At the time you signed this request, did you know I would be the military judge in your case?**

ACC: (Responds.)

**MJ: Is your request a voluntary one? By that, I mean are you making this request of your own free will?**

ACC: (Responds.)

**MJ: If I approve your request for trial by me alone, you give up your right to be tried by a court composed of members. Do you understand that?**

ACC: (Responds.)

**MJ: Do you still wish to be tried by me alone?**

ACC: (Responds.)

**MJ: Your request is approved.** (MJ should indicate so by signing and dating the written request, if one exists).

**NOTE: If the MJ disapproves the request, the MJ should develop the facts surrounding the denial, require argument from counsel, and state reasons for denying the request.**

**MJ: The court is assembled.**

**NOTE: Proceed to paragraph 2-1-5, SENTENCING RIGHTS, if applicable, or 2-1-6, ARRAIGNMENT.**

***2-1-4. FORUM RIGHTS (General and Special Courts-Martial referred prior to 1 January 2019)***

**NOTE: General and Special Courts-Martial. If the charges are referred to a general or special court-martial prior to 1 January 2019, provide the following advice on forum rights.**

**MJ: \_\_\_\_\_, you have a right to be tried by a court consisting of at least (three) (five) officer members (that is, a court composed of commissioned and/or warrant officers).**

**(IF ACCUSED IS ENLISTED:) MJ: Also, if you request it, you would be tried by a court consisting of at least one-third enlisted members, but none of those enlisted members could come from your unit.**

**You are also advised that no member of the court would be junior in rank to you. Do you understand what I have said so far?**

ACC: (Responds.)

**MJ: If you are tried by court members, the members will vote by secret, written ballot and two-thirds of the members must agree before you could be found guilty**

of any offense. If you were found guilty, then two-thirds must also agree in voting on a sentence (and if that sentence included confinement for more than 10 years, then three-fourths would have to agree).

**NOTE: IF CAPITAL CASE, use procedural guide in Chapter 8. In capital cases, there is no right to request trial by judge alone.**

(IN NONCAPITAL CASE:) **MJ: You also may request to be tried by military judge alone. If your request is approved there will be no court members and the military judge alone will decide whether you are guilty or not guilty, and if found guilty, the military judge alone will determine your sentence. Do you understand the difference between trial before members and trial before military judge alone?**

ACC: (Responds.)

**MJ: Do you understand the choices that you have?**

ACC: (Responds.)

**MJ: By what type of court do you wish to be tried?**

ACC: (Responds.)

**NOTE: If accused elects trial with court members and the request is written, mark it as an appellate exhibit. Proceed to paragraph 2-1-6, ARRAIGNMENT. If accused elects trial by judge alone, continue below:**

**MJ: Is there a written request for trial by military judge alone?**

DC: There is (not).

**MJ: Does the accused have a copy in front of (him) (her)?**

DC: (Responds.)

**MJ: \_\_\_\_\_, Appellate Exhibit \_\_ is a request for trial by military judge alone.**

**Is that your signature on this exhibit?**

ACC: (Responds.)

**MJ: At the time you signed this request, did you know I would be the military judge in your case?**

ACC: (Responds.)

**MJ: Is your request a voluntary one? By that, I mean are you making this request of your own free will?**

ACC: (Responds.)

**MJ: If I approve your request for trial by me alone, you give up your right to be tried by a court composed of members. Do you understand that?**

ACC: (Responds.)

**MJ: Do you still wish to be tried by me alone?**

ACC: (Responds.)

**MJ: Your request is approved.** (MJ should indicate so by signing and dating the written request, if one exists).

**NOTE: If the MJ disapproves the request, the MJ should develop the facts surrounding the denial, require argument from counsel, and state reasons for denying the request.**

**MJ: The court is assembled.**

**NOTE: Proceed to paragraph 2-1-6, ARRAIGNMENT.**

### ***2-1-5. SENTENCING RIGHTS***

**NOTE: This paragraph only applies in general and special courts-martial with specifications alleging offenses committed both before 1 January 2019 and on or after 1 January 2019. If so, the applicable sentencing rules are the sentencing rules in effect prior to 1 January 2019. However, an accused may, instead, elect to be sentenced under the sentencing rules in effect on and after 1 January 2019. The military judge shall ascertain, prior to arraignment, whether the accused elects to be sentenced under the sentencing rules in effect on and after 1 January 2019. See RCM 902A. The accused may not defer this election – it must be made prior to arraignment.**

**MJ: Because you are charged with offenses allegedly occurring both before 1 January 2019 and on or after 1 January 2019, the applicable sentencing rules for this court-martial are the sentencing rules in effect prior to 1 January 2019. If you are convicted of any offense, no matter when the offense was committed, this court-martial will apply the sentencing rules in effect prior to 1 January 2019.**



However, you may elect to be sentenced under the sentencing rules in effect as of 1 January 2019. If you make this election, and are later convicted of any offense, no matter when the offense occurred, you will be sentenced under the sentencing rules in effect on 1 January 2019. You must make this election prior to arraignment. Your election regarding the applicable sentencing rules is irrevocable, unless I find good cause for a later request to withdraw the election.

**MJ: Have you discussed all of this with your defense counsel?**

ACC: (Responds)

**MJ: Did your defense counsel fully explain the choices that you have?**

ACC: (Responds)

**MJ: Do you have any questions about your right to elect the applicable sentencing rules?**

ACC: (Responds.)

**MJ: If you are convicted of any offense, under which sentencing rules do you wish to be sentenced?**

ACC: (Responds)

**NOTE: If accused elects sentencing rules in writing, mark it as an appellate exhibit. See RCM 902A(c).**

## **2-1-6. ARRAIGNMENT**

**MJ: The accused will now be arraigned.**

TC: All parties to the trial have been furnished with a copy of the charge(s). Does the accused want (it) (them) read?

DC: The accused (waives the reading of the charge(s)) (wants the charge(s) read).

**MJ: (The reading may be omitted.) (Trial Counsel will read the charge(s).)**

TC: The charge(s) (is) (are) signed by \_\_\_\_\_, a person subject to the Code, as accuser; (is) (are) properly sworn to before a commissioned officer of the armed forces authorized to administer oaths; and (is) (are) properly referred to this court for trial by \_\_\_\_\_, the Convening Authority.

**MJ: Accused and Defense Counsel, please rise. \_\_\_\_\_, how do you plead? Before receiving your plea, I advise you that any motions to dismiss or to grant other appropriate relief should be made at this time. Your defense counsel will speak for you.**

**DC: The defense (has (no) (the following) motions.) (requests to defer motions.)**

**NOTE: Whenever factual issues are involved in ruling on a motion, the MJ shall state essential findings of fact. If trial counsel requests a delay to determine whether to file notice of appeal under Article 62 (See RCM 908), the MJ should note the time on the record so that the 72-hour period may be accurately calculated.**

**DC: The accused, \_\_\_\_\_, pleads as follows:**

**NOTE: The MJ must ensure that pleas are entered after all motions are litigated. IF GUILTY PLEA, go to paragraph 2-2-1, GUILTY PLEA INTRODUCTION.**

**IF NOT GUILTY (JUDGE ALONE), go to Section III.**

**IF NOT GUILTY (MEMBERS), mark the flyer as an Appellate Exhibit; ensure each court member packet contains copies of the flyer, convening orders, note paper, and witness question forms; then go to Section V.**

**NOTE: The following admonition is suggested after arraignment. See RCM 804(c)(1).**

**MJ: \_\_\_\_\_, what has just happened is called an arraignment. An arraignment has certain legal consequences, one of which I'd like to explain to you now. Under ordinary circumstances, you have the right to be present at every session and stage of your trial. However, if you are voluntarily absent at any point in this trial going forward, you may forfeit the right to be present. Future sessions and the trial could go forward even if you were not present, up to and including sentencing, if necessary. Do you understand this?**

**ACC: (Responds.)**

**MJ: It is important that you keep your defense counsel and your chain of command apprised of your whereabouts at all times between now and all future**

**sessions of this court-martial. Do you have any questions about what I've told you?**

ACC: (Responds.)

**Section II**  
**Guilty Plea Inquiry**

**2-2-1. GUILTY PLEA INTRODUCTION**

**MJ: \_\_\_\_\_, your counsel has entered a plea of guilty for you to [indicate the charge(s) and specification(s)]. Your plea of guilty will not be accepted unless you understand its meaning and effect. I am going to discuss your plea of guilty with you. You may consult with your defense counsel prior to answering any of my questions. If you have questions, feel free to ask them.**

**A plea of guilty is equivalent to a conviction and is the strongest form of proof known to the law. On your plea alone, and without receiving any evidence, this court can find you guilty of the offense(s) to which you have pled guilty. Your plea will not be accepted unless you realize that by your plea you admit every act or omission, and element of the offense(s) to which you have pled guilty, and that you are pleading guilty because you actually are guilty. If you do not believe that you are guilty, then you should not plead guilty for any reason. Do you understand what I have said so far?**

**ACC: (Responds.)**

**MJ: By your plea of guilty, you give up three important rights (but you give up these rights solely with respect to the offense(s) to which you have pled guilty).**

**First, the right against self-incrimination, that is, the right to say nothing at all.**

**Second, the right to a trial of the facts by this court, that is, your right to have this court-martial decide whether or not you are guilty based upon evidence the prosecution would present and on any evidence you may introduce.**

**Third, the right to be confronted by and to cross-examine any witness called against you.**

**Do you have any questions about these rights?**

**ACC: (Responds.)**

**MJ: Do you understand that by pleading guilty you no longer have these rights (with respect to the offenses(s) to which you pled guilty)?**

ACC: (Responds.)

**MJ: If you continue with your guilty plea, you will be placed under oath and I will question you to determine whether you are guilty. Anything you tell me may be used against you in the sentencing portion of the trial. Do you understand this?**

ACC: (Responds.)

**MJ: If you tell me anything that is untrue, your statements may be used against you later for charges of perjury or making false statements. Do you understand this?**

ACC: (Responds.)

**(MJ: Your plea of guilty to a lesser included offense may also be used to establish certain elements of the charged offense, if the government decides to proceed on the charged offense. Do you understand this?)**

ACC: (Responds.)

**MJ: Trial Counsel, please place the accused under oath.**

TC: \_\_\_\_\_, please stand and face me. 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: (Responds.)

**MJ: Is there a stipulation of fact?**

TC: (Yes) (No), Your Honor.

**NOTE: If no stipulation exists, go to paragraph 2-2-3, GUILTY PLEA FACTUAL BASIS. If a stipulation exists, continue below.**

### **2-2-2. STIPULATION OF FACT INQUIRY**

**MJ: Defense Counsel, does the accused have a copy of the stipulation of fact?**

DC: (Responds.)

**MJ: \_\_\_\_\_, I have Prosecution Exhibit \_\_ for Identification, a stipulation of fact. Did you sign this stipulation?**

ACC: (Responds.)

**MJ: Did you read this document thoroughly before you signed it?**

ACC: (Responds.)

**MJ: Do both counsel agree to the stipulation and that your signatures appear on the document?**

TC/DC: (Responds.)

**MJ: \_\_\_\_\_, a stipulation of fact is an agreement among the trial counsel, your defense counsel, and you that the contents of the stipulation are true and if entered into evidence are uncontradicted facts in this case. No one can be forced to enter into a stipulation, so you should enter into it only if you truly want to do so. Do you understand this?**

ACC: (Responds.)

**MJ: Are you voluntarily entering into this stipulation because you believe it is in your best interest to do so?**

ACC: (Responds.)

**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 guilty of the offense(s) to which you pled guilty.**

**(IF JUDGE ALONE TRIAL:) Second, I will use it to determine an appropriate sentence for you.**

**(IF MEMBERS TRIAL:) Second, the trial counsel may read it to the court members and they will have it with them when they decide your sentence.**

**Do you understand and agree to these uses of the stipulation?**

ACC: (Responds.)

**MJ: Do both counsel also agree to these uses?**

TC/DC: (Responds.)

**MJ: \_\_\_\_\_, a stipulation of fact ordinarily cannot be contradicted. If it should be contradicted after I have accepted your guilty plea, I will reopen this inquiry. You should, therefore, let me know if there is anything you disagree with or feel is untrue. Do you understand that?**

ACC: (Responds.)

**MJ: At this time, I want you to read your copy of the stipulation silently to yourself as I read it to myself.**

**NOTE: The MJ must read the stipulation and be alert to resolve inconsistencies between what is in the stipulation and what the accused says during the providence inquiry.**

**MJ: Have you finished reading it?**

ACC: (Responds.)

**MJ: Is everything in the stipulation true?**

ACC: (Responds.)

**MJ: Is there anything in the stipulation that you do not wish to admit is true?**

ACC: (Responds.)

**MJ: Do you agree under oath that the matters contained in the stipulation are true and correct to the best of your knowledge and belief?**

ACC: (Responds.)

**MJ: Defense Counsel, do you have any objections to Prosecution Exhibit \_\_\_ for Identification?**

DC: (Responds.)

**MJ: Prosecution Exhibit \_\_\_ for Identification is admitted into evidence subject to my acceptance of the accused's guilty plea.**

### **2-2-3. GUILTY PLEA FACTUAL BASIS**

**MJ: \_\_\_\_\_, I am going to explain the elements of the offense(s) to which you have pled guilty. By "elements," I mean those facts which the prosecution**

would have to prove beyond a reasonable doubt before you could be found guilty if you had pled not guilty. When I state each element, ask yourself two things: First, is the element true; and second, do you wish to admit that it is true. After I list the elements for you, be prepared to talk to me about the facts regarding the offense(s). Do you have a copy of the charge sheet(s) in front of you?

ACC: (Responds.)

**NOTE: For each specification to which the accused pled guilty, proceed as follows:**

**MJ: Please look at [indicate the Specification and Charge]. There, you pled guilty to [state general nature of offense], a violation of Article \_\_\_ of the Uniform Code of Military Justice. The elements of that offense are:**

**NOTE: List elements and explain appropriate definitions using applicable language from Chapter 3.**

**MJ: Do you understand the elements (and definitions) as I have read them to you?**

ACC: (Responds.)

**MJ: Do you have any questions about any of them?**

ACC: (Responds.)

**MJ: Do you understand that your plea of guilty admits that these elements accurately describe what you did?**

ACC: (Responds.)

**MJ: Do you believe and admit that the elements (and definitions taken together) correctly describe what you did?**

ACC: (Responds.)

**MJ: At this time, I want you to tell me why you are guilty of the offense listed in [indicate the Specification and Charge]. Tell me what happened.**

ACC: (Responds.)



**NOTE: The MJ must elicit the facts leading to the guilty plea by conducting a direct and personal examination of the accused as to the circumstances of the alleged offense(s). The MJ must do more than elicit legal conclusions. The MJ's questions should be aimed at developing the accused's version of what happened in the accused's own words and determining if the acts or omissions encompass each and every element of the offense(s) to which the guilty plea relates. The MJ must be alert to the existence of any inconsistencies or possible defenses raised by the stipulation or the accused's testimony, and if they arise, the MJ must discuss them thoroughly with the accused. The MJ must resolve them or declare the plea improvident to the applicable specification(s).**

**NOTE: After obtaining the factual basis from the accused, the MJ should secure the accused's specific admission as to each element of the offense, e.g., as follows:**

**MJ: Do you admit that you (left your unit on \_\_\_\_\_) (\_\_\_\_\_)?**

ACC: (Responds.)

**MJ: Do you admit that you (left without authority from someone who could give you leave) (\_\_\_\_\_)?**

ACC: (Responds.)

**MJ: And that (you did not return until \_\_\_\_\_) (\_\_\_\_\_)?**

ACC: (Responds.)

**NOTE: After covering all offenses to which the accused pled guilty, the MJ continues as follows:**

**MJ: Do counsel believe any further inquiry is required?**

TC/DC: (Respond.)

#### ***2-2-4. MAXIMUM / MINIMUM PUNISHMENT INQUIRY***

**MJ: Trial Counsel, what do you calculate to be the maximum punishment authorized (and the minimum punishment required) by law in this case based solely on the accused's guilty plea?**

TC: (Responds.)

**MJ: Defense Counsel, do you agree?**

DC: (Responds.)

**MJ: \_\_\_\_\_, the maximum punishment authorized by law in this case based solely on your guilty plea is \_\_\_\_\_. (The mandatory minimum punishment required by law is (a dishonorable discharge) (a dismissal) (confinement for life)). (A fine may also be adjudged.) Do you understand that?**

**NOTE: Before total forfeitures and a fine can be approved resulting from a guilty plea at a GCM, the accused must be advised that the pecuniary loss could exceed total forfeitures. Moreover, to have any fine approved, the MJ must advise the accused of the possibility of a fine during the providence inquiry.**

**MJ: Do you have any questions about the maximum punishment authorized (and the minimum punishment required) by law as a result of your guilty plea?**

ACC: (Responds.)

**MJ: Trial Counsel, is there a (pretrial agreement) (plea agreement) in this case?**

TC: (Responds.)

**NOTE: "Pretrial agreement" refers to agreements executed under the sentencing rules in effect prior to 1 January 2019. Agreements executed under the sentencing rules which became effective on 1 January 2019 are referred to as "plea agreements." See Article 53a, UCMJ. MJs must be aware of the differences between a "pretrial agreement" and "plea agreement."**

**NOTE: If no pretrial agreement or plea agreement exists, continue to paragraph 2-2-5 below. If a pretrial agreement exists and trial is by military judge alone, go to paragraph 2-2-6, PRETRIAL AGREEMENT (JUDGE ALONE). If a pretrial agreement exists and trial is with court members, go to paragraph 2-2-7, PRETRIAL AGREEMENT (MEMBERS). If a plea agreement exists, go to paragraph 2-2-8, PLEA AGREEMENT.**

#### ***2-2-5. IF NO PLEA AGREEMENT OR PRETRIAL AGREEMENT EXISTS***

**MJ: Counsel, even though there is no formal (pretrial agreement) (plea agreement), are there any unwritten agreements or understandings in this case?**

TC/DC: (Respond.)

**MJ: ( \_\_\_\_\_ ), has anyone made any agreements with you or promises to you to get you to plead guilty?**

ACC: (Responds.)

**NOTE: Go to paragraph 2-2-9, ACCEPTANCE OF GUILTY PLEA.**

**2-2-6. PRETRIAL AGREEMENT (JUDGE ALONE)**

**MJ: \_\_\_\_\_, we will now discuss your pretrial agreement.**

**MJ: Defense Counsel, does the Accused have a copy of the entire pretrial agreement?**

DC: (Responds)

**MJ: \_\_\_\_\_, I have Appellate Exhibit \_\_, which is the offer portion of your pretrial agreement, and your defense counsel is showing to you the same Appellate Exhibit, along with the quantum portion which is Appellate Exhibit \_\_. Did you sign this pretrial agreement?**

ACC: (Responds.)

**MJ: Did you read it thoroughly before you signed it?**

ACC: (Responds.)

**MJ: Do you understand the contents of your pretrial agreement?**

ACC: (Responds.)

**MJ: Did anyone force you in any way to enter into this agreement?**

ACC: (Responds.)

**MJ: Does this agreement contain all the understandings or agreements that you have in this case?**

ACC: (Responds.)

**MJ: Has anyone made any promises to you that are not written into this agreement in an attempt to get you to plead guilty?**

ACC: (Responds.)

**MJ: Counsel, are Appellate Exhibits \_\_ and \_\_ the full and complete agreement in this case and are you satisfied that there are no other agreements?**

TC/DC: (Responds.)

**MJ: \_\_\_\_\_, basically, a pretrial agreement means you agree to plead guilty and in return, the convening authority agrees to take some favorable action in your case, usually in the form of limiting the sentence that (she) (he) will approve. Do you understand that?**

ACC: (Responds.)

**MJ: The law requires that I discuss the conditions of your agreement with you. Let's look at Appellate Exhibit \_\_\_\_, the offer portion of your pretrial agreement.**

**NOTE: Pretrial Agreement Terms. The military judge must discuss each provision in a pretrial agreement with the accused and obtain the accused's understanding of the agreement. Special attention must be given to terms that purport to waive motions. RCM 705(c) prohibits any term in a pretrial agreement to which the accused did not freely and voluntarily agree or any term which deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in pretrial agreements, they have voided pretrial agreement terms which require the accused to waive all motions or to waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues during the accusatory phase of the court-martial. The pretrial agreement cannot make a trial an empty ritual. See Section VII for scripts for the following clauses that may appear in pretrial agreements:**

**Dismissal of charge: paragraph 2-7-4**

**Testify truthfully in another case: paragraph 2-7-5**

**Operation of Article 58a on suspended sentence: paragraph 2-7-6**

**Suspension without deferment: paragraph 2-7-7**

**Waiver of Article 32 Preliminary Hearing: paragraph 2-7-8**

**Waiver of members: paragraph 2-7-9**

**Waiver of certain motions: paragraphs 2-7-10 and 2-7-11**

**MJ: I am not going to look at Appellate Exhibit \_\_\_\_, the quantum portion, until after I announce the sentence in your case. But, I want you to now look at the quantum portion and read it silently to yourself. Does that document correctly state what you and the convening authority agreed to?**

ACC: (Responds.)

**MJ: Counsel, are there any conditions or terms in the quantum portion other than a limitation on sentence?**

TC/DC: (Responds.)

**NOTE: If other conditions exist, the MJ should cover the conditions without discussing the sentence limitation.**

**MJ: \_\_\_\_\_, you get the benefit of whichever is less, each element of the sentence of the court or that contained in your pretrial agreement. If the sentence adjudged by this court is greater than the one provided in the pretrial agreement, the convening authority must reduce the sentence to one no more severe than the one in your pretrial agreement. On the other hand, if the sentence of this court is less than the one in your agreement, the convening authority cannot increase the sentence adjudged. Do you understand that?**

ACC: (Responds.)

**NOTE: The MJ may ask the following question if appropriate:**

**(IF ACCUSED IS CLOSE TO ETS DATE) (MJ: If you are sentenced to confinement and your ETS date arrives while you are serving confinement, then all of your military pay and allowances will stop on your ETS date. Do you understand that?**

ACC: (Responds))

**MJ: Have you had enough time to discuss this agreement with your defense counsel?**

ACC: (Responds.)

**MJ: Are you satisfied with your defense counsel's advice concerning this pretrial agreement?**

ACC: (Responds.)

**MJ: Did you enter the agreement of your own free will?**

ACC: (Responds.)

**MJ: Has anyone tried to force you to make this pretrial agreement?**

ACC: (Responds.)

**MJ: Do you have any questions about your pretrial agreement?**

ACC: (Responds.)

**MJ: Do you fully understand all the terms of the pretrial agreement and how they affect your case?**

ACC: (Responds.)

**MJ: Are you pleading guilty not only because you hope to receive a lighter sentence, but also because you are convinced that you are, in fact, guilty?**

ACC: (Responds.)

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

TC/DC: (Respond.)

**NOTE: Go to paragraph 2-2-9, ACCEPTANCE OF GUILTY PLEA.**

***2-2-7. PRETRIAL AGREEMENT (MEMBERS)***

**MJ: \_\_\_\_\_, we will now discuss your pretrial agreement.**

**MJ: Defense Counsel, does the Accused have a copy of the entire pretrial agreement?**

DC: (Responds)

**MJ: \_\_\_\_\_, I have Appellate Exhibit \_\_\_\_, the offer portion, and Appellate Exhibit \_\_\_\_, the quantum portion, of your pretrial agreement. Did you sign these documents?**

ACC: (Responds.)

**MJ: Did you read them thoroughly before you signed them?**

ACC: (Responds.)

**MJ: Do you understand the contents of your pretrial agreement?**

ACC: (Responds.)

**MJ: Did anyone force you in any way to enter into this agreement?**

ACC: (Responds.)

**MJ: Does this agreement contain all the understandings or agreements that you have in this case?**

ACC: (Responds.)

**MJ: Has anyone made any promises to you that are not written into this agreement in an attempt to get you to plead guilty?**

ACC: (Responds.)

**MJ: Counsel, are Appellate Exhibits \_\_ and \_\_ the full and complete agreement in this case and are you satisfied that there are no other agreements?**

TC/DC: (Responds.)

**MJ: \_\_\_\_\_, basically, a pretrial agreement means you agree to plead guilty and in return, the convening authority agrees to take some favorable action in your case, usually in the form of limiting the sentence that (she) (he) will approve. Do you understand that?**

ACC: (Responds.)

**MJ: The law requires that I discuss the conditions of your agreement with you. Let's look at the offer portion of your pretrial agreement.**

**NOTE: Pretrial Agreement Terms.** The military judge must discuss each provision in a pretrial agreement with the accused and obtain the accused's understanding of the agreement. Special attention must be given to terms that purport to waive motions. RCM 705(c) prohibits any term in a pretrial agreement to which the accused did not freely and voluntarily agree or any term which deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in pretrial agreements, they have voided pretrial agreement terms which require the accused to waive all motions or to waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues during the accusatory phase of the court-martial. The pretrial agreement cannot make a trial an empty ritual. See Section VII for scripts for the following clauses that may appear in pretrial agreements:

**Dismissal of charge: paragraph 2-7-4**

**Testify truthfully in another case: paragraph 2-7-5**

**Operation of Article 58a on suspended sentence: paragraph 2-7-6**

**Suspension without deferment: paragraph 2-7-7**

**Waiver of Article 32 preliminary hearing: paragraph 2-7-8**

**Waiver of members: paragraph 2-7-9**

**Waiver of certain motions: paragraphs 2-7-10 and 2-7-11**

**MJ: Appellate Exhibit \_\_, the quantum portion of your pretrial agreement states: \_\_\_\_\_.** Is that a correct statement of what you and the convening authority agreed to?

**ACC: (Responds.)**

**MJ: \_\_\_\_\_, you get the benefit of whichever is less, each element of the sentence of the court or that contained in your pretrial agreement. If the sentence adjudged by this court is greater than the one provided in the pretrial agreement, the convening authority must reduce the sentence to one no more severe than the one in your pretrial agreement. On the other hand, if the sentence of this**



**court is less than the one in your agreement, the convening authority cannot increase the sentence adjudged. Do you understand that?**

ACC: (Responds.)

**NOTE: The MJ may want to ask the following question if appropriate:**

*(IF ACCUSED IS CLOSE TO ETS DATE)* **(MJ: If you are sentenced to confinement and your ETS date arrives while you are serving confinement, then all of your military pay and allowances will stop on your ETS date. Do you understand that?**

ACC: (Responds.)

**MJ: Have you had enough time to discuss this agreement with your defense counsel?**

ACC: (Responds.)

**MJ: Are you satisfied with your defense counsel's advice concerning this pretrial agreement?**

ACC: (Responds.)

**MJ: Did you enter the agreement of your own free will?**

ACC: (Responds.)

**MJ: Has anyone tried to force you to make this pretrial agreement?**

ACC: (Responds.)

**MJ: Do you have any questions about your pretrial agreement?**

ACC: (Responds.)

**MJ: Do you fully understand all the terms of the pretrial agreement and how they affect your case?**

ACC: (Responds.)

**MJ: Are you pleading guilty not only because you hope to receive a lighter sentence, but because you are convinced that you are guilty?**

ACC: (Responds.)

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

TC/DC: (Respond.)

**NOTE: Go to paragraph 2-2-9, ACCEPTANCE OF GUILTY PLEA.**

**2-2-8. PLEA AGREEMENT**

**MJ: \_\_\_\_\_, we will now discuss your plea agreement.**

**MJ: Defense Counsel, does the Accused have a copy of the plea agreement?**

DC: (Responds)

**MJ: \_\_\_\_\_, I have Appellate Exhibit \_\_, your plea agreement. Did you sign this document?**

ACC: (Responds.)

**MJ: Did you read it thoroughly before you signed it?**

ACC: (Responds.)

**MJ: Do you understand the contents of your plea agreement?**

ACC: (Responds.)

**MJ: Did anyone force you in any way to enter into this agreement?**

ACC: (Responds.)

**MJ: Does this agreement contain all the understandings or agreements that you have in this case?**

ACC: (Responds.)

**MJ: Has anyone made any promises to you that are not written into this agreement in an attempt to get you to plead guilty?**

ACC: (Responds.)

**MJ: Counsel, is Appellate Exhibit \_\_ the full and complete agreement in this case and are you satisfied that there are no other agreements?**

TC/DC: (Respond.)

**MJ: \_\_\_\_\_, the law requires that I discuss the conditions of your agreement with you. Let's look at the terms of your agreement.**

**NOTE: Plea Agreement Terms. The military judge must discuss each provision in a plea agreement with the accused and ensure that (1) the accused understands the agreement, and (2) that the parties agree to the terms of the agreement. See RCM 910(f)(4). If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall: (1) conform, with the consent of the government, the agreement to the accused's understanding, or (2) permit the accused to withdraw the plea.**

**Special attention must be paid to sentence limitations contained in the agreement, especially when segmented sentencing is required in a military judge alone trial.**

**Special attention must also be given to terms that purport to waive motions. RCM 705(c) prohibits any term in a plea agreement to which the accused did not freely and voluntarily agree or any term which deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete presentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in plea agreements, they have voided plea agreement terms which require the accused to waive all motions or to waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues during the accusatory phase of the court-martial. The plea agreement cannot make a trial an empty ritual. See Section VII for scripts for the following clauses that may appear in plea agreements:**

**Dismissal of charge: paragraph 2-7-4**

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**Waiver of Article 32 preliminary hearing: paragraph 2-7-8**

**Waiver of members: paragraph 2-7-9**

**Waiver of certain motions: paragraphs 2-7-10 and 2-7-11**

**MJ: If I accept your plea agreement, the court and the parties, to include you, will be bound by the terms of the agreement (to include imposing a sentence that comports with the limitations contained in the agreement). Do you understand that?**

ACC: (Responds.)

**NOTE: The MJ may want to ask the following question if appropriate:**

*(IF ACCUSED IS CLOSE TO ETS DATE)* **(MJ: If you are sentenced to confinement and your ETS date arrives while you are serving confinement, then all of your military pay and allowances will stop on your ETS date. Do you understand that?**

ACC: (Responds.)

**MJ: Have you had enough time to discuss this agreement with your defense counsel?**

ACC: (Responds.)

**MJ: Are you satisfied with your defense counsel's advice concerning this plea agreement?**

ACC: (Responds.)

**MJ: Did you enter the agreement of your own free will?**

ACC: (Responds.)

**MJ: Has anyone tried to force you to make this plea agreement?**

ACC: (Responds.)

**MJ: Do you have any questions about your plea agreement?**

ACC: (Responds.)

**MJ: Do you fully understand all the terms of the plea agreement and how they affect your case?**

ACC: (Responds.)

**MJ: Are you pleading guilty not only because you hope (to receive a lighter sentence) (to receive the relief set forth in the plea agreement), but because you are convinced that you are, in fact, guilty?**

ACC: (Responds.)

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

TC/DC: (Respond.)

**MJ: The plea agreement is (accepted) (not accepted).**

**NOTE: The military judge shall reject a plea agreement that (1) contains a provision that has not been accepted by both parties, (2) contains a provision that is not understood by the accused, (3) contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense, unless such a provision is permissible, (4) is prohibited by law, or (5) is contrary to, or is inconsistent with, a regulation prescribed by the President with respect to terms, conditions, or other aspects of plea agreements. See Article 53a(b). If the military judge does not accept the plea agreement, the military judge shall: (1) issue a statement explaining the basis for the rejection, (2) allow the accused to withdraw any plea, and (3) inform the accused that if the plea is not withdrawn the court-martial may impose any lawful punishment. See RCM 910(f)(7).**

**NOTE: Go to paragraph 2-2-9, ACCEPTANCE OF GUILTY PLEA.**

### **2-2-9. ACCEPTANCE OF GUILTY PLEA**

**MJ: Defense Counsel, have you had enough time and opportunity to discuss this case with (\_\_\_\_\_)?**

DC: (Responds.)

**MJ: \_\_\_\_\_, have you had enough time and opportunity to discuss this case with your defense counsel?**

ACC: (Responds.)

**MJ: Have you, in fact, consulted fully with your defense counsel and received the full benefit of (his) (her) (their) advice?**

ACC: (Responds.)

**MJ: Are you satisfied that your defense counsel's advice is in your best interest?**

ACC: (Responds.)

**MJ: And are you satisfied with your defense counsel?**

ACC: (Responds.)

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

ACC: (Responds.)

**MJ: Has anyone made any threat or tried in any way to force you to plead guilty?**

ACC: (Responds.)

**MJ: Do you have any questions as to the meaning and effect of a plea of guilty?**

ACC: (Responds.)

**MJ: Do you fully understand the meaning and effect of your plea of guilty?**

ACC: (Responds.)

**MJ: Do you understand that even though you believe you are guilty, you have the legal right to plead not guilty and to place upon the government the burden of proving your guilt beyond a reasonable doubt?**

ACC: (Responds.)

**NOTE: If the accused has pleaded guilty to an offense listed in DoD Instruction 1325.07, Appendix 4 of Enclosure 2: Listing of Offenses Requiring Sex Offender Processing, the MJ must ask the following question:**

**MJ: Defense Counsel, did you advise the accused prior to trial of the sex offender reporting and registration requirements resulting from a finding of guilty of (state Specification(s) and Charge(s))?**

DC: (Responds.)

**MJ: Are you a citizen of the United States?**

ACC: (Responds.)

**NOTE: The MJ should ask the following questions if the accused is not a citizen. See Padilla v. Kentucky, 130 S.Ct. 1473 (2010).**

**MJ: Do you understand that a conviction for the offense(s) to which you have pled guilty may have an adverse impact on your immigration status?**

ACC: (Responds.)

**MJ: Have you discussed this with your defense counsel?**

ACC: (Responds.)

**MJ: Based upon what I have told you and what your defense counsel told you previously, do you understand your guilty plea carries with it a risk of deportation, removal, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States?**

ACC: (Responds.)

**NOTE: The DC may have documented his discussion with the client on this issue. If so, the MJ should inquire below:**

**MJ: Defense Counsel, did you document your discussion on this issue with your client?**

DC: (Responds.)

**MJ: Please have that document marked as the next appellate exhibit.**

DC: (Responds.)

**MJ: Take a moment now and consult again with your defense counsel, then tell me whether you still want to plead guilty? (Pause.) Do you still want to plead guilty?**

ACC: (Responds.)

**MJ: \_\_\_\_\_, I find that your plea of guilty is made voluntarily and with full knowledge of its meaning and effect. I further find that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against you. Accordingly, your plea of guilty is provident and is accepted. However, I advise you that you may request to withdraw your guilty plea at any time before**

the sentence is announced, and if you have a good reason for your request, I will grant it.

**NOTE:** If the accused pled guilty to only some of the charges and specifications or pled guilty to lesser included offenses, ask the trial counsel if the government is going forward on the offenses to which the accused has pled not guilty. If the government is going forward on any offense(s), do not enter findings except to those offenses to which the accused pled guilty as charged in a members' trial (*i.e.*, if the plea was to a LIO or by exceptions and substitutions and the government is going forward as charged, do not enter findings).

**NOTE:** If issues of guilt remain in a judge alone (contest), go to Section III and in a court members (contest) go to Section V. The MJ should not inform the court members of plea and findings of guilty prior to presentation of the evidence on another specification to which the accused pled not guilty unless the accused requests it or the guilty plea was to a LIO and the prosecution intends to prove the greater offense. Unless one of these two exceptions exists, the flyer should not have any specifications/charges which reflect provident guilty pleas if other offenses are being contested.

**NOTE:** If no issues of guilt remain, continue below:

**MJ:** Accused and Defense Counsel, please rise. \_\_\_\_\_, in accordance with your plea of guilty, this court finds you: \_\_\_\_\_.

**NOTE:** Forum election for sentencing. If all findings have been entered, the MJ must determine the appropriate sentencing forum.

If the accused elected trial by military judge alone, the military judge will determine the sentence.

If the accused elected trial by members, and all referred specifications allege offenses committed prior to 1 January 2019, the members will determine the sentence.

If the accused elected trial by members, and all referred specifications allege offenses committed on or after 1 January 2019, the military judge will determine the sentence. However, the accused may elect, instead, to be sentenced by members following the announcement of findings.

If the accused elected trial by members, and the referred specifications allege some offenses committed prior to 1 January 2019 and some offenses committed on or after 1 January 2019, the members will determine the sentence. However, if the accused, prior



**to arraignment, elected to be sentenced under the “new” sentencing rules which became effective on 1 January 2019, the accused may elect, instead, to be sentenced by the military judge following the announcement of findings.**

**Only if an accused has the option of electing the sentencing forum, then the military judge must provide the following advice and obtain the accused’s forum election for sentencing. Do not give this advice, or obtain the accused’s election, until findings have been announced for all offenses.**

((If appropriate:) **MJ: \_\_\_\_\_, you have the right to elect sentencing by members or sentencing by the military judge. If you choose to be sentenced by members, three-fourths of the members must agree in voting on a sentence. If you choose to be sentenced by the military judge, the military judge alone will determine your sentence.**

**MJ: Have you discussed this right with your defense counsel?**

ACC: (Responds.)

**MJ: Did your defense counsel explain the difference between sentencing by members and sentencing by the military judge?**

ACC: (Responds.)

**MJ: Do you understand the difference between sentencing by members and sentencing by the military judge?**

ACC: (Responds.)

**MJ: Do you have any questions about the difference between sentencing by members and sentencing by the military judge?**

ACC: (Responds.)

**MJ: How do you choose to be sentenced, by members or by the military judge?**

ACC: (Responds.)

**NOTE: For judge alone (sentencing), go to Section IV and for court members (sentencing only), after marking the flyer, go to Section VI.**

**Section III**  
**2-3. Judge Alone (Contested Findings)**

**MJ: Does the government have an opening statement?**

TC: (Responds.)

**MJ: Does the defense have an opening statement or do you wish to reserve?**

DC: (Responds.)

**MJ: Trial Counsel, you may call your first witness.**

**2-3-1. TRIAL PROCEEDS WITH GOVERNMENT CASE**

**NOTE: The TC administers the oath/affirmation to all witnesses. After a witness testifies, the MJ should instruct the witness along the following lines**

**MJ: You are (permanently) (temporarily) excused. As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down (and) (return to the waiting room) (go about your duties) (be available by telephone to return within \_\_ minutes).**

TC: The government rests.

**NOTE: This is the time that the Defense may make motions for a finding of not guilty. The MJ's standard for ruling on the motion is at RCM 917. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.**

**2-3-2. TRIAL RESUMES WITH THE DEFENSE CASE, IF ANY**

**MJ: Defense Counsel, you may proceed.**

DC: (Responds.)

**NOTE: If the DC reserved opening statement, the MJ should ask if the DC wishes now to make an opening statement.**

DC: The defense rests.

**2-3-3. REBUTTAL AND SURREBUTTAL, IF ANY**

**MJ: Trial Counsel, any rebuttal?**

TC: (Responds / presents rebuttal.)

**MJ: Defense Counsel, any surrebuttal?**

DC: (Responds / presents surrebuttal.)

**NOTE: If the accused did not testify, the MJ must ask the following question:**

**MJ: \_\_\_\_\_, you did not testify. Was it your personal decision not to testify?**

ACC: (Responds.)

**MJ: Trial Counsel, you may present argument.**

TC: (Argument.)

**MJ: Defense, you may present argument.**

DC: (Argument.)

**MJ: Trial Counsel, rebuttal argument?**

TC: (Responds.)

**MJ: The court is closed.**

#### ***2-3-4. ANNOUNCEMENT OF FINDINGS***

**MJ: \_\_\_\_\_, this court finds you: \_\_\_\_\_.**

**NOTE: If accused is found guilty of any offense, go to Section IV. If completely acquitted, adjourn the court.**

**Section IV**  
**Judge Alone (Sentencing)**

**MJ:** \_\_\_\_\_, we now enter the sentencing phase of the trial where you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself, which you want me to consider in deciding your sentence. In addition to testimony of witnesses and the offering of documentary evidence, you may testify under oath as to these matters, or you may remain silent, in which case I will not draw any adverse inference from your silence. On the other hand, if you desire, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross-examined on it; however, the government may offer evidence to rebut any statement of fact contained in an unsworn statement. An unsworn statement may be made orally, in writing, or both. It may be made by you, by your counsel on your behalf, or by both. Do you understand these rights?

ACC: (Responds.)

**MJ:** Counsel, is the personal data on the front page of the charge sheet correct?

TC/DC: (Respond.)

**MJ:** Defense Counsel, has the accused been punished in any way that would constitute illegal pretrial punishment under Article 13?

DC: (Responds.)

**MJ:** \_\_\_\_\_, is that correct?

ACC: (Responds.)

**MJ:** Counsel, based on the information on the charge sheet, the accused is to be credited with \_\_\_ days of pretrial confinement credit. Is that the correct amount?

TC/DC: (Respond.)

(If appropriate:) **MJ:** Any crime victim who is present at this presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. A crime victim may exercise this right following the government's opportunity to present evidence.

**MJ: Trial Counsel, do you have other evidence to present at this time?**

TC: (Responds and presents case on sentencing, if any.)

TC: The government rests.

**NOTE: If a crime victim exercises the right to be reasonably heard, the MJ must ensure that the crime victim is afforded the opportunity to present a sworn or unsworn statement, following the government case on sentencing and prior to the defense case on sentencing. See RCM 1001(a)(1)(B), RCM 1001(a)(3)(A), and RCM 1001(c); US v. Barker, 77 MJ 377 (CAAF 2018).**

(If appropriate:) **MJ: Is there a crime victim present who desires to be heard?**

VIC: (Responds.)

**MJ: Defense Counsel, do you have any evidence to present at this time?**

**NOTE: MRE 412 evidence offered in sentencing. MRE 412 applies in sentencing, as it does on findings. US v. Fox, 24 MJ 110 (CMA 1987); US v. Whitaker, 34 MJ 822 (AFCCA 1992); US v. Gaddis, 70 MJ 248 (CAAF 2011).**

DC: (Responds and presents case on sentencing, if any.)

DC: The defense rests.

**NOTE: If the accused did not testify or provide an unsworn statement, the MJ must ask the following question:**

**MJ: \_\_\_\_\_, you did not testify or provide an unsworn statement during the sentencing phase of the trial. Was it your personal decision not to testify or provide an unsworn statement?**

ACC: (Responds.)

**MJ: Trial Counsel, do you have rebuttal evidence to offer?**

TC: (Responds.)

**MJ: Defense counsel, any surrebuttal?**

DC: (Responds.)

**NOTE: Credit for Article 15 Punishment. If evidence of an Article 15 was admitted at trial that reflects that the accused received**

**nonjudicial punishment for the same offense for which the accused was also convicted at the court-martial, See paragraph 2-7-21, CREDIT FOR ARTICLE 15 PUNISHMENT.**

**MJ: Trial Counsel, you may present argument.**

TC: (Argument.)

**MJ: Defense Counsel, you may present argument.**

DC: (Argument.)

**NOTE: If the DC concedes that a punitive discharge is appropriate or argues for a discharge, the MJ should conduct an inquiry with the accused to ascertain if the accused knowingly and intelligently agrees with DC's actions. See paragraph 2-7-27, ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE.**

#### ***2-4-1. POST-TRIAL AND APPELLATE RIGHTS ADVICE***

**MJ: Defense Counsel, have you advised the accused orally and in writing of (his) (her) post-trial and appellate rights including the rights contained in Rule for Court-Martial 1010?**

DC: (Responds.)

**MJ: Does the accused have a copy in front of (him) (her)?**

DC: (Responds.)

**MJ: \_\_\_\_\_, I have Appellate Exhibit \_\_, an appellate rights advice form. Is that your signature on this form?**

ACC: (Responds.)

**MJ: Defense Counsel, is that your signature on Appellate Exhibit \_\_?**

DC: (Responds.)

**MJ: \_\_\_\_\_, did your defense counsel explain your post-trial and appellate rights to you?**

ACC: (Responds.)

**MJ: Do you have any questions about your post-trial and appellate rights?**

ACC: (Responds.)

**NOTE: If more than one DC, the MJ should determine which counsel will be responsible for post-trial actions.**

**MJ: Which counsel will be responsible for post-trial actions in this case?**

DC: (Responds.)

**MJ: The court is closed.**

### **2-4-2. ANNOUNCEMENT OF SENTENCE**

**MJ: The court is called to order.**

TC: All parties present when the court closed are again present.

**MJ: Accused and Defense Counsel please rise. \_\_\_\_\_, this court sentences you to: \_\_\_\_\_.**

**(MJ: The accused will be credited with \_\_\_ days of pretrial confinement against the accused's term of confinement.)**

**NOTE: If a pretrial agreement exists, continue below. The MJ must ensure that all parties have the same understanding concerning the operation of the quantum portion on the sentence of the court. Otherwise, the plea may be improvident. If there is no agreement (or there is a plea agreement), skip to the next NOTE.**

**MJ: Please hand me Appellate Exhibit \_\_, the quantum portion of the pretrial agreement. Appellate Exhibit \_\_ states that the convening authority agrees to \_\_\_\_\_. \_\_\_\_\_, have I correctly stated the sentence agreement that you have with the convening authority?**

ACC: (Responds.)

**MJ: Counsel, do you agree?**

TC/DC: (Respond.)

**MJ: My understanding of the effect of the pretrial agreement on the sentence is that the convening authority may approve \_\_\_\_\_. Do counsel agree with my interpretation?**

TC/DC: (Responds.)

**MJ: \_\_\_\_\_, is that also your understanding?**

ACC: (Responds.)

**NOTE: In all cases, continue below.**

**MJ: Are there other matters to take up before this court adjourns?**

TC/DC: (Respond.)

**MJ: This court is adjourned.**



**Section V**  
**Court Members (Contested)**

**2-5. PRELIMINARY INSTRUCTIONS**

**MJ: Bailiff, call the court members.**

**NOTE: Whenever the members enter the courtroom, all persons except the MJ and court reporter shall rise. The members are seated alternately to the right and left of the president according to rank**

**MJ: You may be seated. The court is called to order.**

TC: The court is convened by Court-Martial Convening Order No. \_\_, Headquarters \_\_\_\_\_ dated \_\_\_\_\_ (as amended by \_\_\_\_\_), (a copy) (copies) of which (has) (have) been furnished to each member of the court. The accused and the following persons detailed to this court-martial are present:

\_\_\_\_\_, Military Judge;

\_\_\_\_\_, Trial Counsel;

\_\_\_\_\_, Defense Counsel; and

\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, Court Members.

The following person(s) (is) (are) absent:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**NOTE: Members who have been relieved (viced) by orders need not be mentioned.**

The prosecution is ready to proceed with trial in the case of the United States versus (PVT) ( ) \_\_\_\_\_.

**MJ: The members of the court will now be sworn. All persons in the courtroom, please rise.**

TC: Do you 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 upon a challenge or upon the findings or sentence unless required to do so in the due course of law, so help you God?

MBRS: (Respond.)

**MJ: Please be seated. The court is assembled.**

**Members of the court, it is appropriate that I give you some preliminary instructions. My duty as military judge is to ensure this trial is conducted in a fair, orderly, and impartial manner according to the law. I preside over open sessions, rule upon objections, and instruct you on the law applicable to 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 sessions and periods of recess and adjournment. Any questions you have of me should be asked in open court.**

**As court members, it is your duty to hear the evidence and to determine whether the accused is guilty or not guilty and, if required, to adjudge an appropriate sentence.**

**Under the law, the accused is presumed to be innocent of the offense(s). The government has the burden of proving the accused's guilt by legal and competent evidence beyond a reasonable doubt.**

**NOTE: The services use different definitions of "reasonable doubt." The judge should give the appropriate definition from one of the three options below.**

**(ARMY / COAST GUARD) A "reasonable doubt" is an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest**

misgiving generated by insufficiency of proof of guilt. “Proof beyond a reasonable doubt” means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt.

(AIR FORCE) A "reasonable doubt" is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, 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. 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 offense charged, you must find (him) (her) guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.

(NAVY / USMC) 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.

**NOTE: In all cases, continue below.**

The fact that (a) charge(s) (has) (have) been preferred against this accused and referred to this court for trial does not permit any inference of guilt. You must

determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court and upon the instructions I will give you. Because you cannot properly make that determination until you have heard all the evidence and received the instructions, it is of vital importance that you keep an open mind until all the evidence has been presented and the instructions have been given. I will instruct you fully before you begin your deliberations. In so doing, I may repeat some of the instructions which I will give now or possibly during the trial. Bear in mind that all of these instructions are designed to help you perform your duties as court members.

The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you. You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness's intelligence and ability to observe and accurately remember, in addition to the witness's sincerity and conduct in court, friendships, 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 by a witness or between witnesses, you should consider whether it 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 believability of each witness's testimony should be your guide in evaluating testimony, rather than the number of witnesses called.

Counsel soon will be given an opportunity to ask you questions and exercise challenges. With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, 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.

**Any matter that might affect your impartiality is a ground for challenge. Some of the grounds for challenge would be if you were the accuser in the case, if you have been an investigating or preliminary hearing officer as to any offense charged, or if you have formed or expressed an opinion as to the guilt or innocence of the accused. To determine if any grounds for challenge exist, counsel for both sides are given an opportunity to question you. These questions are not intended to embarrass you. They are not an attack upon your integrity. They are asked merely to determine whether a basis for challenge exists.**

**If, at any time after answering these questions, you realize that any of your answers were incorrect, you recognize a witness whose name you did not previously recognize, or you think of any matter that might affect your impartiality, you have a continuing duty to bring that to the attention of the court. You do that simply by raising your hand and stating only that you have an issue to discuss with the court. I will then follow up with you individually as necessary.**

**It is no adverse reflection upon a court 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.**

**You must keep an open mind throughout the trial. 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 or as to an appropriate sentence if the accused is found guilty of (any) (this) offense. With regard to sentencing, should that become necessary, you may not have a preconceived idea or formula as to either the type or the amount of punishment that should be imposed if the accused were to be convicted.**

**Counsel are given an opportunity to question all witnesses. When counsel have finished, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so (at the close of evidence or prior to any witness**

being permanently excused). There are forms provided for your use if you desire to question any witness. You are required to write your question on the form and sign legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked because your questions, like questions of counsel, are subject to objection. I will conduct any needed examination. There are a couple of things you need to keep in mind concerning questioning.

First, you cannot attempt to help either the government or the defense.

Second, counsel have interviewed the witnesses and know more about the case than we do. Very often they do not ask what may appear to us to be an obvious question because they are aware that this particular witness has no knowledge on the subject.

Rules of evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial, when I sustain an objection, disregard the question and answer. If I overrule an objection, you may consider both the question and answer.

Until you close to deliberate, you may not discuss this court-martial with anyone, even amongst yourselves. You must wait until you are all together in your closed session deliberations so that all panel members have the benefit of your discussion. During the course of the trial, including all periods of recess and adjournment, you must not communicate with anyone about the case, either in person or by email, blog, text message, twitter or any form of social media.

Posting information about the case on a Facebook page, for example, is considered a form of communicating about the case. You must also not listen to or read any accounts of the case or visit the scene of any incident alleged in the specification(s) or mentioned during the trial. Do not consult any source of law or information, written or otherwise, as to any matters involved in this case and do not conduct your own investigation or research. For example, you cannot consult the Manual for Courts-Martial, dictionaries or reference materials, search the internet, 'Google' the witnesses to learn more about them, review a Wikipedia

**entry or consult a map or satellite picture to learn more about the alleged crime scene.**

**During any recess or adjournment, you must also avoid contact with witnesses or potential witnesses in this case, counsel, and the accused. If anyone attempts to discuss the case or communicate with you during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every recess or adjournment, but keep them in mind throughout the trial.**

**We will try to estimate the time needed for recesses or hearings out of your presence. Frequently their duration is extended by consideration of new issues arising in such hearings. Your patience and understanding regarding these matters will contribute greatly to an atmosphere consistent with the fair administration of justice.**

**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. However, 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 court in announcing the results.**

**This general order of events can be expected at this court-martial: Questioning of court members, challenges and excusals, opening statements by counsel, presentation of evidence, substantive instructions on the law to you, closing argument by counsel, procedural instructions on voting, your deliberations, and announcement of the findings. If the accused is convicted of any offense, there will also be sentencing proceedings.**

**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. If it becomes too hot or cold in the courtroom, or if you need a break because of drowsiness or for comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

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 (take your notes with you for safekeeping until the next session) (leave your notes in the (courtroom) (deliberation room)).

One other administrative matter: If during the course of the trial it is necessary that you make any statement, if you would preface the statement by stating your name, that will make it clear on the record which member is speaking.

**Are there any questions?**

MBRS: (Respond.)

**MJ: (Apparently not.) Please take a moment to read the charge(s) on the flyer provided to you and to ensure that your name is correctly reflected on (one of) the convening order(s). If it is not, please let me know.**

**MJ: Trial Counsel, you may announce the general nature of the charge(s).**

TC: The general nature of the charge(s) in this case is \_\_\_\_\_. The charge(s) (was) (were) preferred by \_\_\_\_\_, and forwarded with recommendations as to disposition by \_\_\_\_\_. (A preliminary hearing was conducted by \_\_\_\_\_.)

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

If any member of the court is aware of any matter which he (or she) believes may be a ground for challenge by either side, such matter should now be stated.

MEMBER(S): (Respond.) or

TC: (Negative response from the court members.)



### **2-5-1. VOIR DIRE**

**MJ: Before counsel ask you any questions, I will ask some preliminary questions. If any member has an affirmative response to any question, please raise your hand.**

- 1. Does anyone know the accused? (Negative response.) (Positive response from \_\_\_\_\_.)**
- 2. (If appropriate) Does anyone know any person named in (any of the) (The) Specification(s)?**
- 3. (The trial counsel is) (I am) going to read a list of the potential witnesses in this case. Afterwards, I will ask you if anyone knows any of the potential witnesses in this case. [Read list of witnesses] Does anyone know any of the potential witnesses in this case?**
- 4. Having seen the accused and having read the charge(s) and specification(s), does anyone believe that you cannot give the accused a fair trial for any reason?**
- 5. Does anyone have any prior knowledge of the facts or events in this case?**
- 6. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?**
- 7. (If appropriate) Has anyone, or any member of your family, or anyone close to you personally ever been the victim of an offense similar to any of those charged in this case?**
- 8. If so, will that experience influence the performance of your duties as a court member in this case in any way?**

**NOTE: If Question 8 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the hearing of the other members.**

- 9. How many of you are serving as court members for the first time in a trial by court-martial?**

**10. (As to the remainder) Can each of you who has previously served as a court member put aside anything you may have heard in any previous proceeding and decide this case solely on the basis of the evidence and the instructions as to the applicable law?**

**11. The accused has pled not guilty to (all charges and specifications) (\_\_\_\_\_) and is presumed to be innocent until (his) (her) guilt is established by legal and competent evidence beyond a reasonable doubt. Does anyone disagree with this rule of law?**

**12. Can each of you apply this rule of law and vote for a finding of not guilty unless you are convinced beyond a reasonable doubt that the accused is guilty?**

**13. You are all basically familiar with the military justice system, and you know that the accused has been charged, (his) (her) charge(s) (has)(have) been forwarded to the convening authority and referred to trial. None of this warrants any inference of guilt. Can each of you follow this instruction and not infer that the accused is guilty of anything merely because the charge(s) (has)(have) been referred to trial?**

**14. On the other hand, can each of you vote for a finding of guilty if you are convinced that under the law, the accused's guilt has been proved by legal and competent evidence beyond a reasonable doubt?**

**15. Does each member understand that the burden of proof to establish the accused's guilt rests solely upon the prosecution and the burden never shifts to the defense to establish the accused's innocence?**

**16. Does each member understand, therefore, that the defense has no obligation to present any evidence or to disprove the elements of the offense(s)?**

**17. Has anyone had any legal training or experience other than that generally received by service members of your rank or position?**

**18. Has anyone had any specialized law enforcement training or experience, to include duties as a military police officer, off-duty security guard, civilian police**

**officer, or comparable duties other than the general law enforcement duties common to military personnel of your rank and position?**

**19. I have previously advised you that it is your duty as court members to weigh the evidence and to resolve controverted questions of fact. In so doing, if the evidence is in conflict, you will necessarily be required to give more weight to some evidence than to other evidence. The weight, if any, to be given all of the evidence in this case is solely within your discretion, so it is neither required nor expected that you will give equal weight to all of the evidence. However, it is expected that you will use the same standards in weighing and evaluating all of the evidence and the testimony of each witness and that you will not give more or less weight to the testimony of a particular witness merely because of that witness's status, position, or station in life. Will each of you use the same standards in weighing and evaluating the testimony of each witness and not give more or less weight to the testimony of a particular witness solely because of that witness's position or status?**

**20. Is any member of the court in the rating chain, supervisory chain, or chain of command of any other member?**

**NOTE: If Question 20 is answered in the affirmative, the military judge may want to ask questions 21 and 22 out of the hearing of the other members.**

**21. (To junior) Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, because another member holds a position of authority over you?**

**22. (To senior) Will you be embarrassed or restrained in any way in performing your duties as a court member if a member over whom you hold a position of authority should disagree with you?**

**23. Has anyone had any dealings with any of the parties to the trial, to include me and counsel, which might affect your performance of duty as a court member in any way?**

**24. Does anyone know of anything of either a personal or professional nature that would cause you to be unable to give your full attention to these proceedings throughout the trial?**

**25. It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime or crimes for which the accused is to be sentenced if found guilty. Does any member, having read the charge(s) and specification(s), believe that you would be compelled to vote for any particular punishment, if the accused is found guilty, solely because of the nature of the charge(s)?**

**26. If sentencing proceedings are required, you will be instructed in detail before you begin your deliberations. I will instruct you on the full range of punishments, from (no punishment) (the minimum lawful punishment) to the maximum punishment. You should consider all forms of punishment within that range. "Consider" doesn't necessarily mean that you would vote for that particular punishment. "Consider" means that you think about and make a choice in your mind, one way or the other, as to whether that's an appropriate punishment. Each member must keep an open mind and neither make a choice nor foreclose from consideration any possible sentence until the closed session for deliberations and voting on the sentence. Can each of you follow this instruction?**

**27. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence if called upon to do so in this case?**

**28. Can each of you reach a decision on sentence if required to do so on an individual basis in this particular case and not solely upon the nature of the offense (or offenses) of which the accused may be convicted?**

**29. Is any member aware of any matter that might raise a substantial question concerning your participation in this trial as a court member?**

**MJ: Do counsel for either side desire to question the court members?**

**NOTE: TC and DC will conduct voir dire if desired and individual voir dire will be conducted, if required.**

### **2-5-2. INDIVIDUAL VOIR DIRE**

**MJ: Members of the Court, there are some matters that we must now consider outside of your presence. Please return to the deliberation room. Some of you may be recalled for individual questioning.**

MBRS: (Comply.)

**MJ: All the members are absent. All other parties are present. Trial Counsel, do you request individual voir dire, and if so, state the member and your reason(s).**

TC: (Responds.)

**MJ: Defense Counsel, do you request individual voir dire, and if so, state the member and your reason(s).**

DC: (Responds.)

**NOTE: Individual members may be recalled for questioning until all individual questioning is complete. Advise any member who is questioned individually not to discuss his/her individual questions and answers with any other member when he/she returns to the deliberation room to avoid inadvertently biasing or disqualifying any other member.**

### **2-5-3. CHALLENGES**

**NOTE: Challenges are to be made outside the presence of the court members in an Article 39(a) session. RCM 912 encompasses challenges based upon both actual bias and implied bias. United States v. Clay, 64 MJ 274, 276 (CAAF 2007). Military Judges should analyze all challenges for cause under both actual and implied bias theories, even if the counsel do not specifically use these terms. The test for actual bias is whether the member's bias will not yield to the evidence presented and the judge's instructions. The existence of actual bias is a question of fact; accordingly, the military judge is afforded significant latitude in determining whether it is present in a prospective member. The military judge's physical presence during voir dire and ability to watch the challenged member's demeanor make the military judge specially situated in making this determination. United States v. Terry, 64 MJ 295 (CAAF 2007). Implied bias exists when, despite a disclaimer, most people in the same position as the court member would be prejudiced. United States v. Napolitano, 53 MJ 162 (CAAF 2000). In determining whether implied bias is**

present, military judges look to the totality of the circumstances. United States v. Strand, 59 MJ 455, 459 (CAAF 2004). Implied bias is viewed objectively, through the eyes of the public. Implied bias exists if an objective observer would have substantial doubt about the fairness of the accused’s court-martial panel. Because of the objective nature of the inquiry, appellate courts accord less deference to implied bias determinations of a military judge. United States v. Armstrong, 54 MJ 51, 54 (CAAF 2000). In close cases, military judges are enjoined to liberally grant defense challenges for cause. United States v. Clay, 64 MJ 274 (CAAF 2007). This “liberal grant mandate” does not apply to government challenges for cause. United States v. James, 61 MJ 132 (CAAF 2005). Where a military judge does not indicate on the record that he/she has considered the liberal grant mandate during the evaluation for implied bias of a defense challenge for cause, the appellate courts will accord that decision less deference during review of the ruling. Therefore, when ruling on a defense challenge for cause, the military judge should (1) state that s/he has considered the challenge under both actual and implied bias theories and is aware of the duty to liberally grant defense challenges; and (2) place the reasoning on the record. United States v. Townsend, 65 MJ 460, 464 (CAAF 2008). The following is a suggested procedure for an Article 39(a) session.

**MJ: All the members are absent. All other parties are present. Trial Counsel, do you have any challenges for cause?**

TC: (Responds.)

(IF A CHALLENGE IS MADE) **MJ: Defense Counsel, do you object?**

DC: (Responds.)

(IF DENYING THE CHALLENGE) **MJ: The challenge is denied.**

(IF GRANTING THE CHALLENGE WITHOUT A DEFENSE OBJECTION) **MJ: The challenge is granted.**

(IF GRANTING THE CHALLENGE OVER A DEFENSE OBJECTION) **MJ: The challenge is granted because \_\_\_\_\_.**

**MJ: Defense Counsel, do you have any challenges for cause?**

DC: (Responds.)

(IF A CHALLENGE IS MADE) **MJ: Trial Counsel, do you object?**

TC: (Responds.)

(IF GRANTING THE CHALLENGE) **MJ: The challenge is granted.**

(IF DENYING THE CHALLENGE) MJ: I have considered the challenge for cause on the basis of both actual and implied bias and the mandate to liberally grant defense challenges. The challenge is denied because (\_\_\_\_\_).

**NOTE: If charges were referred prior to 1 January 2019, go to the next NOTE and have counsel exercise peremptory challenges, if any.**

**If charges were referred on or after 1 January 2019, following the exercise of challenges for cause, if any, and prior to the exercise of peremptory challenges, the military judge, or a designee thereof, shall randomly assign numbers to the remaining members for purposes of impaneling members in accordance with RCM 912A. See RCM 912(f)(5). The military judge should proceed as stated below (or as directed by military judge's service Trial Judiciary).**

MJ: In a moment, we will recess to allow the court reporter to randomly assign numbers to the remaining members. The court reporter will do so using the panel member random number generator on the Army JAG Corps' website. Each party may be present and observe the court reporter perform this task, if desired.

MJ: Counsel, do you want to observe the court reporter randomly assign these numbers?

TC/DC: (Respond.)

MJ: Court reporter, please print a copy of the results, once you have them, and mark them as the next appellate exhibit in order. (Please also allow the (trial counsel) (defense counsel) to observe you when you randomly assign the numbers.)

(Recess.)

MJ: This Article 39(a) session is called to order. All parties are present, except the members. Appellate exhibit \_\_\_ is the result of the random assignment of numbers to the remaining members. Does any party have an objection to the manner in which numbers were assigned to the members?

TC/DC: (Respond.)

**NOTE: Continue below with the exercise of peremptory challenges, if any.**

MJ: Trial Counsel, do you have a peremptory challenge?

TC: (Responds.)

MJ: Defense Counsel, do you have a peremptory challenge?

DC: (Responds.)

**NOTE: After excusing the members who were successfully challenged for cause or peremptorily, the MJ will verify that a quorum remains. The MJ will also verify that enlisted members comprise at least one-third of the members, if so requested by the accused.**

**If charges were referred prior to 1 January 2019, proceed to paragraph 2-5-4, ANNOUNCEMENT OF PLEA.**

**If charges were referred on or after 1 January 2019, and excess members remain, the military judge must impanel the members (and any alternate members, if authorized) in accordance with the procedures in RCM 912A. Once the members are impaneled, and any excess members have been excused, the judge must announce that the members have been impaneled, as stated below.**

**MJ: The members are impaneled.**

**NOTE: If alternate members were authorized and impaneled, the MJ should provide the following instruction to the alternate members.**



MJ: \_\_\_\_\_, you have been designated as (an) alternate member(s) of this court-martial. As (an) alternate member(s), you have the same duties as the other members. You will observe the same trial, pay attention to all of my instructions, and may ask questions, if necessary. Sometimes during a trial, a member must be excused due to illness or some other reason. If that occurs, you may be designated as a member of this court-martial. Unless you are later designated as a member, you will not participate in the deliberations or vote on findings or, if necessary, sentence.

#### **2-5-4. ANNOUNCEMENT OF PLEA**

**NOTE: If the accused has pled not guilty to all charges and specifications, or if the accused has pled guilty to only some specifications and has specifically requested members be advised of those guilty pleas, announce the following:**

MJ: Court Members, at an earlier session, the accused pled (not guilty to all charges and specifications) (not guilty to Charge \_\_, Specification \_\_, but guilty to Charge \_\_, Specification \_\_).

**NOTE: If the accused has pled guilty to lesser included offenses and the prosecution is going forward on the greater offense, continue below; if not, go to paragraph 2-5-5, TRIAL ON MERITS.**

MJ: The accused has pled guilty to the lesser included offense of (\_\_\_\_\_), which constitutes a judicial admission to some of the elements of the offense charged in (\_\_\_\_\_) . These elements have therefore been established by the accused's plea without the necessity of further proof. However, the plea of guilty to this lesser offense provides no basis for a conviction of the offense alleged as there remains in issue the element(s) of: \_\_\_\_\_.

The court is instructed that no inference of guilt of such remaining element(s) arises from any admission involved in the accused's plea, and to permit a conviction of the alleged offense, the prosecution must successfully meet its burden of establishing such element(s) beyond a reasonable doubt by legal and competent evidence. Consequently, when you close to deliberate, unless you are satisfied beyond a reasonable doubt that the prosecution has satisfied this burden of proof, you must find the accused not guilty of (\_\_\_\_\_), but the plea of guilty to the lesser included offense of (\_\_\_\_\_) will require a finding of guilty of that lesser offense without further proof.

**NOTE: If mixed pleas were entered and the accused requests that the members be informed of the accused's guilty pleas, the MJ should continue below; if not, go to paragraph 2-5-5, TRIAL ON MERITS.**

**MJ: The court is advised that findings by the court members will not be required regarding the charge(s) and specification(s) of which the accused has already been found guilty pursuant to (his) (her) plea. I inquired into the providence of the plea(s) of guilty, found (it) (them) to be provident, accepted (it) (them), and entered findings of guilty. Findings will be required, however, as to the charge(s) and specifications(s) to which the accused has pled not guilty.**

#### ***2-5-5. TRIAL ON MERITS***

**MJ: I advise you that opening statements are not evidence; rather they are what counsel expect the evidence will show in the case. Does the government have an opening statement?**

TC: (Responds.)

**MJ: Does the defense have an opening statement or do you wish to reserve?**

DC: (Responds.)

**MJ: Trial Counsel, you may proceed.**

**NOTE: The TC administers the oath/affirmation to all witnesses. After a witness testifies, the MJ should instruct the witness along the following lines:**

**MJ: \_\_\_\_\_, you are excused (temporarily) (permanently). As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within \_\_ minutes).**

TC: The government rests.

**NOTE: This is the time that the Defense may make motions for a finding of not guilty. The motions should be made outside the presence of the members. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. See RCM 917 and the instruction at paragraph 2-7-13, MOTION FOR FINDING OF NOT GUILTY.**

#### ***2-5-6. TRIAL RESUMES WITH DEFENSE CASE, IF ANY***

**MJ: Defense Counsel, you may proceed.**

**NOTE: If the defense reserved opening statement, the MJ shall ask if the DC wishes to make an opening statement at this time.**

DC: The defense rests.

***2-5-7. REBUTTAL AND SURREBUTTAL, IF ANY***

**MJ: Trial Counsel, any rebuttal?**

TC: (Responds / presents case.)

**MJ: Defense Counsel, any surrebuttal?**

DC: (Responds / presents case.)

**NOTE: If members have not previously been allowed to ask questions, the MJ should ask:**

**MJ: Does any court member have questions of any witness?**

MBRS: (Respond.)

**NOTE: If the members have questions, the Bailiff will collect the written questions, hand them to the TC and the DC (for an opportunity to write objections), have them marked as appellate exhibits, and present them to the MJ so that the MJ may ask the witness the questions.**

**MJ: Court Members, you have now heard all the evidence. At this time, we need to have a hearing outside of your presence to discuss the instructions. You are excused until approximately \_\_\_\_\_.**

MBRS: (Comply.)

***2-5-8. DISCUSSION OF FINDINGS INSTRUCTIONS***

**MJ: All parties are present with the exception of the court members.**

**NOTE: If the accused did not testify, the MJ must ask the following question, outside the presence of the members:**

**MJ: \_\_\_\_\_, you did not testify. Was it your personal decision not to testify?**

ACC: (Responds.)

**MJ: Counsel, which exhibits go to the court members?**

TC/DC: (Respond.)

**MJ: Counsel, do you see any lesser included offenses that are in issue?**

TC/DC: (Respond.)

**MJ: (IF THE ACCUSED ELECTED NOT TO TESTIFY.) Defense, do you wish for me to instruct on the fact the accused did not testify?**

DC: (Responds.)

**MJ: I intend to give the following instructions: \_\_\_\_\_. Does either side have any objection to those instructions?**

TC/DC: (Respond.)

**MJ: What other instructions do the parties request?**

TC/DC: (Respond.)

**MJ: Trial Counsel, please mark the Findings Worksheet as Appellate Exhibit \_\_, show it to the defense and present it to me.**

TC: (Complies.)

**MJ: Defense Counsel, do you have any objections to the Findings Worksheet?**

DC: (Responds.)

**MJ: Is there anything else that needs to be taken up before the members are called?**

TC/DC: (Respond.)

**MJ: Call the court members.**

### ***2-5-9. PREFATORY INSTRUCTIONS ON FINDINGS***

**MJ: The court is called to order. All parties are again present to include the court members.**

**NOTE: RCM 920(b) provides that instructions on findings shall be given before or after arguments by counsel or at both times. What follows is the giving of preliminary instructions prior to argument with procedural instructions given after argument.**

**MJ: Members of the Court, 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 upon the instructions that I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to**

the facts, and determine the guilt or innocence of the accused. The law presumes the accused to be innocent of the charge(s) against (him) (her).

During the trial, some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for the record of trial.

I will advise you of the elements of each offense alleged.

In (The) Specification (\_\_\_) of (The) (Additional) Charge (\_\_\_), the accused is charged with the offense of (specify the offense). To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

**NOTE: List the elements of the offense(s) using Chapter 3 of the Benchbook.**

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**NOTE: If lesser included offenses are in issue, use paragraph 2-5-10, LESSER INCLUDED OFFENSE(S); if no lesser included offenses are in issue, go to paragraph 2-5-11, OTHER APPROPRIATE INSTRUCTIONS.**

**2-5-10. LESSER INCLUDED OFFENSE(S)**

**NOTE: After instructions on the elements of an offense alleged, the members of the court must be advised of all lesser included offenses raised by the evidence and within the scope of the pleadings. The members should be advised in order of diminishing severity of the elements of each lesser included offense and its differences from the principal offense and other lesser offenses, if any. The members will not be instructed on lesser offenses that are barred by the statute of limitations unless the accused waives the bar. These instructions may be stated substantially as follows:**

**2-5-10a. LIO Introduction**

**MJ: The offense(s) of \_\_\_\_\_ (is) (are) (a) lesser included offense(s) of the offense set forth in (The) Specification (\_\_\_) (of) (The) (Additional) Charge \_\_\_. When you vote, if you find the accused not guilty of the offense charged, that is, \_\_\_\_\_, then you should next consider the lesser included offense of \_\_\_\_\_, in violation of Article \_\_\_. To find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:**

**NOTE: List the elements of the LIO using Chapter 3 of the Benchbook.**

2-5-10b. LIO Differences

**MJ:** The offense charged, \_\_\_\_\_, and the lesser included offense of \_\_\_\_\_ differ (in that the offense charged requires as (an) element(s) that you be convinced beyond a reasonable doubt that (state the element(s) applicable only to the greater offense), whereas the lesser offense of \_\_\_\_\_ does not include such (an) element(s).

(When an LIO involves lesser specific intent) **MJ:** However, the lesser offense of \_\_\_\_\_ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done (recklessly) (negligently) (with the specific intent to \_\_\_\_\_).

(When attempt is an LIO) **MJ:** However, the lesser offense of attempted \_\_\_\_\_ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done with the specific intent to commit the offense of \_\_\_\_\_, that the act(s) amounted to more than mere preparation and that the act(s) apparently tended to bring about the commission of the offense of \_\_\_\_\_.

2-5-10c. Other LIO's Within the Same Specification

**MJ:** This lesser included offense differs from the lesser included offense I just discussed with you previously in that the previous lesser included offense of \_\_\_\_\_ requires as (an) essential element(s) that you be convinced beyond a reasonable doubt that (state the element(s) applicable only to the previous lesser offense) whereas this lesser offense of \_\_\_\_\_ does not include such (an) element(s).

(When an LIO involves lesser specific intent) **MJ:** However, the lesser offense of \_\_\_\_\_ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done (recklessly) (negligently) (with the specific intent to \_\_\_\_\_).

(When attempt is a subsequent LIO) **MJ:** However, the lesser offense of attempted \_\_\_\_\_ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done with the specific intent to commit the offense of \_\_\_\_\_, that

the act(s) amounted to more than mere preparation and that the act(s) apparently tended to bring about the commission of the offense of \_\_\_\_\_.

**NOTE: Repeat the above as necessary to cover all LIO's and then continue.**

#### **2-5-11. OTHER APPROPRIATE INSTRUCTIONS**

**NOTE: For other instructions which may be appropriate in a particular case, see Chapter 4, CONFESSIONS INSTRUCTIONS; Chapter 5, SPECIAL AND OTHER DEFENSES; Chapter 6, MENTAL RESPONSIBILITY; Chapter 7, EVIDENTIARY INSTRUCTIONS. Generally, instructions on credibility of witnesses (see Instruction 7-7-1) and circumstantial evidence (see Instruction 7-3) are typical in most cases and should be given prior to proceeding to the following instructions.**

#### **2-5-12. CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS**

**MJ: You are further advised:**

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

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

**(Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in favor of the lower degree of guilt as to which there is no reasonable doubt; and)**

**Lastly, 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.**

**NOTE: The services use different definitions of "reasonable doubt." The judge should give the appropriate definition from one of the three options below.**

**(ARMY / COAST GUARD) A "reasonable doubt" is not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. "Proof beyond a reasonable doubt" means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the**

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

(AIR FORCE) A "reasonable doubt" is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, 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. 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 offense charged, you must find (him) (her) guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.

(NAVY / USMC) 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 shall 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 of an offense, then you should find the accused guilty of that offense.



**NOTE: In all cases, continue below.**

Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence, you are expected to use 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 conflicts 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.

You must disregard any comment or statement or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty since you alone have the responsibility to make that determination. Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience.

### ***2–5–13. FINDINGS ARGUMENT***

**MJ:** At this time you will hear argument by counsel, which is 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 to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you. As the government has the burden of proof, Trial Counsel may open and close.

**Trial Counsel,** you may proceed.

**TC:** (Argument.)

**MJ:** **Defense Counsel,** you may present findings argument.

**DC:** (Argument.)

**MJ:** **Trial Counsel,** rebuttal argument?

**TC:** (Responds.)

(MJ: Counsel have referred to instructions that I gave you. If there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct.)

**NOTE: If there is an objection that counsel is misstating the evidence during argument, advise the panel as follows:**

(MJ: Argument by counsel is not evidence. Counsel are not witnesses. If the facts as you remember them differ from the way counsel state the facts, it is your memory of the facts that controls.)

### ***2-5-14. PROCEDURAL INSTRUCTIONS ON FINDINGS***

**MJ: The following procedural rules will apply to your deliberations 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 deliberation should 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 (primary) members of the court are required to vote. (Alternate members will not, at this time, participate in deliberations or voting.)**

**(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.) You vote on the specification(s) under the charge before you vote on the charge.**

**If you find the accused guilty of any specification under a charge, the finding as to that charge must be guilty. The junior member will collect and count the votes. The count will then be checked by the president, who will immediately announce the result of the ballot to the members.**

**(IF CHARGES WERE REFERRED PRIOR TO 1 JANUARY 2019, PROVIDE THIS INSTRUCTION ON THE REQUIRED NUMBER OF VOTES TO CONVICT:) 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 \_\_\_ members must concur in any finding of guilty.**

#### **Table 2-1**

#### **Votes Needed for a Finding of Guilty**

<u>No. of Members</u>	<u>Two-Thirds</u>
<u>3</u>	<u>2</u>
<u>4</u>	<u>3</u>
<u>5</u>	<u>4</u>
<u>6</u>	<u>4</u>
<u>7</u>	<u>5</u>
<u>8</u>	<u>6</u>
<u>9</u>	<u>6</u>
<u>10</u>	<u>7</u>
<u>11</u>	<u>8</u>
<u>12</u>	<u>8</u>

(IF CHARGES WERE REFERRED ON OR AFTER 1 JANUARY 2019, PROVIDE THIS INSTRUCTION ON THE REQUIRED NUMBER OF VOTES TO CONVICT:) **The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have \_\_ members, that means \_\_ members must concur in any finding of guilty.**

**Table 2-2**

**Votes Needed for a Finding of Guilty**

<u>No. of Members</u>	<u>Three-Fourths</u>
<u>4</u>	<u>3</u>
<u>6</u>	<u>5</u>
<u>7</u>	<u>6</u>
<u>8</u>	<u>6</u>

**If you have at least \_\_ votes of guilty of any 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 (bearing in mind the instructions I just gave you about voting on the lesser included offense(s)).

**MJ:** 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 the president should 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.

I will then give you specific instructions on the procedure for reconsideration.

**NOTE: See paragraph 2-7-14, RECONSIDERATION INSTRUCTION (FINDINGS).**

**MJ:** 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. As an aid in putting your findings in proper form and making a proper announcement of the findings, you may use Appellate Exhibit \_\_, the Findings Worksheet, which the Bailiff may now hand to the president).

BAILIFF: (Complies.)

**NOTE: The MJ may explain how the Findings Worksheet should be used. A suggested approach follows:**

**MJ:** (COL) (\_\_\_) \_\_\_\_\_, as indicated on Appellate Exhibit \_\_, the first portion will be used if the accused is completely acquitted or completely convicted of (the) (all) charge(s) and specifications(s). (The second part 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, please line out or cross out everything that is not applicable so that when I check your findings I can ensure that they are in proper form. (The next page of Appellate Exhibit \_\_ would be used if you find the accused guilty of the lesser included offense of \_\_\_\_\_ by exceptions (and substitutions). This was (one of) (the) lesser included offense(s) I instructed you on.)

**MJ:** 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) (This) modification(s) of the worksheet in no way indicate(s) (an) opinion(s) by me or counsel concerning any degree of

guilt of this accused. (They are) (This is) merely included to aid you in understanding what findings might be made in the case and for no other purpose. The worksheet is provided only as an aid in finalizing and announcing your decision.

**MJ: Are there any questions about the Findings Worksheet?**

MBRS: (Respond.)

**MJ: If during your deliberations, you have any questions, open the court and I will assist you. The Uniform Code of Military Justice prohibits me and everyone else from entering your closed session deliberations. As I mentioned at the beginning of trial, you must all remain together in the deliberations room during deliberations. During your deliberations, you must not communicate with or provide any information to anyone outside the deliberation room by any means. You also may not conduct any research about this case. Unless authorized by the court, you may not use any electronic device or media, such as a telephone, smart phone, or computer during deliberations. If you need a recess, if you have a question, or when you have reached your findings, you may notify the bailiff, who will then notify me that you desire to return to open court to make your desires or findings known.**

**MJ: Do counsel object to the instructions given or request additional instructions?**

TC/DC: (Respond.)

**MJ: Does any member of the court have any questions concerning these instructions?**

MBR: (Respond.)

**MJ: If it is necessary (and I mention this because there is no latrine immediately adjacent to your deliberation room), your deliberations may be interrupted by a recess. However, before you may leave your closed-session deliberations, you must notify us, we must come into the courtroom, formally convene, and then recess the court; and after the recess, we must reconvene the court and formally close again for your deliberations. So with that in mind, (COL) (\_\_\_) \_\_\_\_\_, do you desire to take a brief recess before you begin your deliberations, or would you like to begin immediately?**

PRES: (Responds.)

**MJ: (Trial Counsel) (Bailiff) please hand to the president of the court (Prosecution Exhibits(s) \_\_) (Defense Exhibit(s) \_\_) (and) (the Findings Instructions) for use during deliberations.**

TC/BAILIFF: (Complies.)

**MJ: (COL) (\_\_\_\_) \_\_\_\_\_, please do not mark on any of the exhibits, except the Findings Worksheet (and please bring all the exhibits with you when you return to announce your findings).**

**NOTE: Prior to closing the court for deliberations, the MJ must instruct the alternate members, if any, that they will not be participating in deliberations, unless later needed, and that they must not discuss the case with anyone. The MJ may allow the alternate members to return to their duties or homes, subject to recall if needed. Requiring alternate members to leave the courthouse may be the prudent course of action in order to avoid contact with the parties and witnesses during deliberations. The alternate members should be told that they may be required to return for presentencing proceedings.**

**MJ: The court is closed.**

### ***2-5-15. PRESENTENCING SESSION***

**NOTE: When the members close to deliberate, the MJ may convene an Article 39(a) session to cover presentencing matters or may wait until after findings.**

**MJ: This Article 39(a) session is called to order. All parties are present, except the court members.**

**MJ: (\_\_\_\_\_), when the members return from their deliberations, if you are acquitted of all charges and specifications, that will terminate the trial. On the other hand, if you are convicted of any offense, then the court will determine your sentence. During that part of the trial, you (will) have the opportunity to present evidence in extenuation and mitigation of the offenses of which you have been found guilty, that is, matters about the offense(s) or yourself which you want the court to consider in deciding your sentence. In addition to the testimony of witnesses and the offering of documentary evidence, you may, testify under oath as to these matters or you may remain silent, in which case the court will not draw any adverse inference from your silence. On the other hand, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross-examined on it. However, the government may offer evidence to rebut any statement of fact contained in an unsworn statement. The unsworn statement may be made orally, in writing, or both. It may**

**be made by you, or by your counsel on your behalf, or by both. Do you understand these rights that you have?**

ACC: (Responds.)

**MJ: Counsel, is the personal data on the first page of the charge sheet correct?**

TC/DC: (Respond.)

**MJ: Defense Counsel, has the accused been punished in any way that would constitute illegal pretrial punishment under Article 13?**

DC: (Responds.)

**MJ: \_\_\_\_\_, is that correct?**

ACC: (Responds.)

**MJ: Counsel, based on the information on the charge sheet, the accused is to be credited with \_\_\_days of pretrial confinement credit. Is that the correct amount?**

TC/DC: (Respond.)

**MJ: Counsel, do you have any documentary evidence on sentencing that could be marked and offered at this time?**

TC/DC: (Comply.)

**MJ: Is there anything else by either side?**

TC/DC: (Respond.)

**MJ: This Article 39(a) session is terminated as we await the members' findings.**

### ***2-5-16. FINDINGS***

**MJ: The court is called to order. All parties are again present as before to include the court members. (COL) (\_\_\_) \_\_\_\_\_, has the court reached findings?**

PRES: (Responds.)

**MJ: Are the findings reflected on the Findings Worksheet?**

PRES: (Responds.)

**MJ: Please fold the worksheet and give it to the Bailiff so that I may examine it.**

BAILIFF: (Complies.)

**NOTE: If a possible error exists on the Findings Worksheet, the MJ must take corrective action. All advice or suggestions to the court from the MJ must occur in open session. In a complex matter, it may be helpful to hold an Article 39(a) session to secure suggestions and agreement on the advice to be given to the court.**

**Occasionally, corrective action by the court involves reconsideration of a finding, and in that situation, instructions on the reconsideration procedure are required (See paragraph 2-7-14, RECONSIDERATION INSTRUCTION (FINDINGS)).**

**If the words “divers occasions” or another specified number of occasions have been excepted IAW United States v. Walters, 58 MJ 391 (CAAF 2003), the MJ must ensure there remains no ambiguity in the findings. Normally, that is accomplished by the panel substituting (a) relevant date(s), or other facts. See paragraph 7-25 for a suggested instruction on clarifying an ambiguous verdict.**

**MJ: I have reviewed the Findings Worksheet and (the findings appear to be in proper form) (\_\_\_\_\_). Bailiff, please return the findings worksheet to the President.**

BAILIFF: (Complies.)

**MJ: Accused and Defense Counsel, please rise. (COL) (\_\_\_) \_\_\_\_\_, please announce the findings of the court.**

ACC/DC: (Comply.)

PRES: (Complies.)

**MJ: Please be seated. (Trial Counsel) (Bailiff), please retrieve all exhibits from the president.**

**NOTE: If the accused is acquitted of all charges, skip to the next NOTE. If there are findings of guilty, the military judge must determine whether the accused has the option of electing sentencing forum:**

**-If all referred specifications allege offenses committed prior to 1 January 2019, the members will determine the sentence.**

**-If all referred specifications allege offenses committed on or after 1 January 2019, the military judge will determine the sentence. However, the accused may elect, instead, to be sentenced by members following the announcement of findings.**



**-If the referred specifications allege some offenses committed prior to 1 January 2019 and some offenses committed on or after 1 January 2019, the members will determine the sentence. However, if the accused, prior to arraignment, elected to be sentenced under the “new” sentencing rules which became effective on 1 January 2019, the accused may elect, instead, to be sentenced by the military judge following the announcement of findings.**

**When an accused has the option of electing the sentencing forum, the military judge must hold an Article 39(a) session, provide the following advice, and obtain the accused’s forum election for sentencing.**

**((If appropriate:) MJ: Members, we need to have a hearing outside of your presence. Please return to the deliberation room.**

**MJ: This Article 39(a) session is called to order. All parties are present, except the court members.**

**MJ: \_\_\_\_\_, you have the right to elect sentencing by members or sentencing by the military judge. If you choose to be sentenced by members, three-fourths of the members must agree in voting on a sentence. If you choose to be sentenced by the military judge, the military judge alone will determine your sentence.**

**MJ: Have you discussed this right with your defense counsel?**

**ACC: (Responds.)**

**MJ: Did your defense counsel explain the difference between sentencing by members and sentencing by the military judge?**

**ACC: (Responds.)**

**MJ: Do you understand the difference between sentencing by members and sentencing by the military judge?**

**ACC: (Responds.)**

**MJ: Do you have any questions about the difference between sentencing by members and sentencing by the military judge?**

**ACC: (Responds.)**

**MJ: How do you choose to be sentenced, by members or by the military judge?**

**ACC: (Responds.))**

**NOTE: If the accused is acquitted of all charges and specifications OR if the accused elects to be sentenced by the military judge, provide the following advice to the members.**

(If necessary:) **MJ: Call the members.**

**MJ: (Members, the accused has elected to be sentenced by the military judge. Therefore, I am about to excuse you from further participation in this trial.) Before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may discuss your personal observations in the courtroom and the process of how a court-martial functions but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused.**

**NOTE: If the accused is acquitted of all charges and specifications, adjourn the court. Otherwise, continue with either member sentencing (Paragraph 2-5-17) or judge alone sentencing (Section IV), as appropriate.**

(If appropriate:) **MJ: This court-martial is adjourned.**

### ***2-5-17. SENTENCING PROCEEDINGS***

**NOTE: If the MJ has not previously advised the accused of his allocution rights (paragraph 2-5-15), the MJ must do so at this time outside the presence of the court members. If there were findings of guilty of which the members had not previously been informed, they should be advised of such now. An amended flyer containing the other offenses is appropriate.**

**MJ: Members of the Court, at this time we will begin the sentencing phase of the trial. (Before doing so, would the members like to take a recess?)**

**MBRS: (Respond.)**

**MJ: Trial Counsel, you may read the personal data concerning the accused as shown on the charge sheet.**

**TC: The first page of the charge sheet shows the following personal data concerning the accused:**

\_\_\_\_\_.

**MJ: Members of the Court, I have previously admitted into evidence (Prosecution Exhibit(s) \_\_, which (is) (are) \_\_\_\_\_) (and) (Defense Exhibit(s) \_\_, which (is) (are) \_\_\_\_\_). You will have (this) (these) exhibit(s) available to you during your deliberations.**

**MJ: Any crime victim who is present at this presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. A crime victim may exercise this right following the government’s opportunity to present evidence.**

**MJ: Trial Counsel, do you have anything else to present at this time?**

TC: (Responds and presents case on sentencing.)

TC: The government rests.

**NOTE: If a crime victim exercises the right to be reasonably heard, the MJ must ensure that the crime victim is afforded the opportunity to present a sworn or unsworn statement, following the government case on sentencing and prior to the defense case on sentencing. See RCM 1001(a)(1)(B), RCM 1001(a)(3)(A), and RCM 1001(c); US v. Barker, 77 MJ 377 (CAAF 2018).**

(If appropriate:) **MJ: Is there a crime victim present who desires to be heard?**

VIC: (Responds.)

**MJ: Defense Counsel, you may proceed.**

**NOTE: MRE 412 evidence offered in sentencing. MRE 412 applies in sentencing, as it does on findings. US v. Fox, 24 MJ 110 (CMA 1987); US v. Whitaker, 34 MJ 822 (AFCCA 1992); US v. Gaddis, 70 MJ 248 (CAAF 2011).**

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

### **2–5–18. REBUTTAL AND SURREBUTTAL, IF ANY**

**MJ: Trial Counsel, any rebuttal?**

TC: (Responds / presents case.)

**MJ: Defense Counsel, any surrebuttal?**

DC: (Responds / presents case.)

**MJ: Members of the Court, you have now heard all the evidence in this case. At this time, we need to have a hearing outside of your presence to go over the instructions that I will give you. I expect that you will be required to be present again at \_\_\_\_\_.**

### **2–5–19. DISCUSSION OF SENTENCING INSTRUCTIONS**

**MJ: All parties are present except the members, who are absent.**

**NOTE: If the accused did not testify or provide an unsworn statement, the MJ must ask the following question outside the presence of the members:**

**MJ: \_\_\_\_\_, you did not testify or provide an unsworn statement during the sentencing phase of the trial. Was it your personal decision not to testify or provide an unsworn statement?**

ACC: (Responds.)

**MJ: Counsel, what do you calculate to be the maximum sentence authorized (and the minimum punishment required) based upon the findings of the court?**

TC/DC: (Respond.)

**NOTE: Plea Agreement. If a plea agreement exists, the members must be instructed on the permissible sentence in accordance with the sentence limitations agreed to by the parties. See RCM 705(d) and RCM 1006(d)(6). The existence of a plea agreement, however, will not be disclosed to the members, except upon request of the accused or when the MJ finds that disclosure of the existence of the plea agreement is manifestly necessary in the interest of justice because of circumstances arising during the proceeding. See RCM 705(f).**

**MJ: Do counsel agree that an instruction on a fine is (not) appropriate in this case?**

TC/DC: (Respond.)

**MJ: Trial Counsel, please mark the Sentence Worksheet as Appellate Exhibit \_\_\_, show it to the Defense, and present it to me.**

TC: (Complies.)

**NOTE: Listing of punishments. Only those punishments on which an instruction will be given should ordinarily be listed on the Sentence Worksheet. If all have agreed that a fine is not appropriate, then it ordinarily should not be listed on the worksheet. Any mandatory minimum punishment should be listed on the worksheet in order to aid the president in announcing the sentence of the court. Also, if a plea agreement exists, the Sentence Worksheet should reflect only those punishments that are within the sentence limitations agreed to by the parties. See RCM 705(d).**

**MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?**

DC: (Responds.)

**MJ: Counsel, I intend to give the standard sentencing instructions. Do counsel have any requests for any special instructions?**

TC/DC: (Respond.)

**NOTE: Credit for Article 15 Punishment. If evidence of an Article 15 was admitted at trial which reflects that the accused received nonjudicial punishment for the same offense which the accused was also convicted at the court-martial, See paragraph 2-7-21, CREDIT FOR ARTICLE 15 PUNISHMENT.**

**MJ: (IF THE ACCUSED ELECTED NOT TO TESTIFY.) Does the defense wish the instruction regarding the fact the accused did not testify?**

**NOTE: Unsworn statement instruction within discretion of MJ. See United States v. Breese, 11 MJ 17 (CMA 1981).**

**MJ: Call the members.**

### ***2-5-20. SENTENCING ARGUMENTS***

**MJ: The court is called to order.**

TC: All parties to include the members are present.

**MJ: Trial Counsel, you may present argument.**

TC: (Argument.)

**MJ: Defense Counsel, you may present argument.**

DC: (Argument.)

**NOTE: If the DC concedes that a punitive discharge is appropriate, the MJ shall conduct an out-of-court hearing to ascertain if the accused knowingly and intelligently agrees with counsel's actions with respect to a discharge. See paragraph 2-7-26 for procedural instructions on ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE.**

### ***2-5-21. SENTENCING INSTRUCTIONS***

**MJ: Members, 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 to those in**

aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he) (she) has been found guilty.

(IF OFFENSES ARE ONE FOR SENTENCING PURPOSES:) MJ: The offenses charged in \_\_\_\_\_ and \_\_\_\_\_ are one offense for sentencing purposes. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense.

MJ: 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 for all offenses of which the accused has been found guilty.) (A separate sentence must be adjudged for each accused.)

**NOTE: Maximum and Minimum Punishment. The MJ must instruct the members on the maximum authorized punishment that may be adjudged and the mandatory minimum punishment, if any. See RCM 1005(e)(1). If there is a plea agreement, the MJ must ensure that this instruction is in accordance with the sentence limitation contained in the plea agreement. See RCM 705(d) and RCM 1006(d)(6). The existence of a plea agreement, however, will not be disclosed to the members, except upon request of the accused or when the MJ finds that disclosure of the existence of the plea agreement is manifestly necessary in the interest of justice because of circumstances arising during the proceeding. See RCM 705(f).**

MJ: The maximum punishment that may be adjudged in this case is:

Reduction to the grade of \_\_\_\_\_;

Forfeiture of ((2/3ds) (\_\_\_\_\_) pay per month for (12) (\_\_) months) (all pay and allowances);

Confinement for \_\_\_\_\_; (and)

(A dishonorable discharge) (A bad-conduct discharge) (dismissal from the service.)

MJ: The minimum punishment that must be adjudged in this case is:

(\_\_\_\_\_).

MJ: The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence (, so long as your sentence includes at least the minimum punishment I just stated).

**NOTE: The instruction on sentencing considerations following this NOTE should be given only if: (1) all referred specifications allege offenses committed before 1 January 2019, or (2) the referred specifications allege some offenses committed before 1 January 2019 and some offenses committed on or after 1 January 2019 AND the accused did not elect to be sentenced under the “new” sentencing rules which became effective on 1 January 2019. Otherwise, proceed to the next NOTE.**

**MJ: There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principle reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.**

**NOTE: The instruction on sentencing considerations following this NOTE should be given only if: (1) all referred specifications allege offenses committed on or after 1 January 2019, or (2) the referred specifications allege some offenses committed before 1 January 2019 and some offenses committed on or after 1 January 2019 AND the accused elected to be sentenced under the “new” sentencing rules which became effective on 1 January 2019. Otherwise, the instruction in the preceding NOTE should be given. RCMs 1005(e), 1002(f).**

**MJ: In sentencing the accused, you must impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces. In doing so, you must take into consideration the following factors:**

- (1) The nature and circumstances of the offense(s) and the history and characteristics of the accused;**
- (2) The impact of the offense(s) on the financial, social, psychological, or medical well-being of any victim of the offense(s); and the mission, discipline, or efficiency of the command of the accused and any victim of the offense(s);**
- (3) The need for the sentence to reflect the seriousness of the offense(s); promote respect for the law; provide just punishment for the offense(s); promote adequate deterrence of misconduct; protect others from further crimes by the accused; rehabilitate the accused; and provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and**

(4) The sentences available under these rules as I have instructed you.

In applying these factors, you may consider any evidence admitted during both the findings proceeding and the presentencing proceeding of this court-martial.

### **2-5-22. TYPES OF PUNISHMENT**

**MJ:** In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe ((IF NO MANDATORY MINIMUM SENTENCE, OR NO MINIMUM SENTENCE LIMITATION IN A PLEA AGREEMENT:) or you may adjudge no punishment).

**NOTE:** If there is a plea agreement, the MJ must tailor the punishments listed below in accordance with any limitations contained in the plea agreement. See RCM 705(d) and RCM 1006(d)(6).

(REPRIMAND:) **MJ:** This court may adjudge a reprimand, being in the nature of a censure. The court shall not specify the terms or wording of any adjudged reprimand.

(REDUCTION:) **MJ:** This court may adjudge reduction to the lowest (or any intermediate) enlisted grade. 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, for example, E-\_\_\_. (An accused may not be reduced laterally, that is, from corporal to specialist.)

**NOTE:** In Army and Navy/USMC courts-martial, the appropriate instruction (from the two below) on automatic reduction in enlisted grade should be given. Automatic reductions do not apply in the Air Force and Coast Guard.

(EFFECT OF ARTICLE 58a—ARMY:) **MJ:** I also advise you that any sentence of an enlisted service member in a pay grade above E-1 that includes either of the following two punishments will automatically reduce that service member to the lowest enlisted pay grade E-1 by operation of law. The two punishments are: One, a punitive discharge, meaning in this case (a bad-conduct discharge) (or) (a dishonorable discharge); or two, confinement in excess of six months, if the sentence is adjudged in months, or 180 days, if the sentence is adjudged in days. (Accordingly, if your sentence includes either a punitive discharge or confinement in excess of six months or 180 days, the accused will automatically be reduced to E-1.) (Because (a dishonorable discharge) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically be reduced to E-1.) However,



notwithstanding these automatic provisions if you wish to sentence the accused to a reduction, you should explicitly state the reduction as a separate element of the sentence.

(EFFECT OF ARTICLE 58a—NAVY / USMC:) MJ: I also advise you that any sentence of an enlisted service member in a pay grade above E-1 that includes either of the following two punishments will automatically reduce that service member to the lowest enlisted pay grade E-1 by operation of law. The two punishments are: One, a punitive discharge, meaning in this case (a bad-conduct discharge) (or) (a dishonorable discharge); or two, confinement in excess of three months, if the sentence is adjudged in months, or 90 days, if the sentence is adjudged in days. (Accordingly, if your sentence includes either a punitive discharge or confinement in excess of three months or 90 days, the accused will automatically be reduced to E-1.) (Because (a dishonorable discharge) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically be reduced to E-1.) However, notwithstanding these automatic provisions if you wish to sentence the accused to a reduction, you should explicitly state the reduction as a separate element of the sentence.

(RESTRICTION:) MJ: This court may adjudge restriction to limits for a maximum period not exceeding two 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 will not exempt an accused from any assigned military duty.

(HARD LABOR WITHOUT CONFINEMENT:) MJ: This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three 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.

**NOTE: If the maximum authorized confinement is one month, the maximum hard labor without confinement that can be adjudged is 45 days.**

(CONFINEMENT:) MJ: As I have already indicated, this court may sentence the accused to confinement for (life) (a maximum of \_\_ (years) (months)). (Unless confinement for life is adjudged,) A sentence to confinement should be adjudged in either full days (or) full months (or full years); fractions (such as one-half or one-third) should not be employed. (So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.)

**NOTE: If confinement for life is an available punishment, instruct further as follows:**

A sentence to confinement for life may be either with eligibility for parole or without eligibility for parole. You are advised that a sentence to “confinement for life without eligibility for parole” means that the accused will not be eligible for parole by any official, but it does not preclude clemency action which might convert the sentence to one which allows parole. A sentence to “confinement for life” or any lesser confinement term, by comparison, means that the accused will have the possibility of earning parole from confinement under such circumstances as are or may be provided by law or regulations. “Parole” is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled on specific conditions and under the possibility of return to incarceration to complete (his) (her) sentence to confinement if the conditions of parole are violated. In determining whether to adjudge “confinement for life without eligibility for parole” or “confinement for life,” if either, you should bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole action by the convening authority or any other authority.

**NOTE: If a mandatory minimum sentence to confinement for life is required for an offense for which the accused is to be sentenced, use the following instructions (instead of the preceding instructions on confinement):**

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

A sentence to “confinement for life without eligibility for parole” means that the accused will be confined for the remainder of (his) (her) life and will not be eligible for parole by any official, but it does not preclude clemency action that might convert the sentence to one that allows parole. A sentence to “confinement for life,” by comparison, means the accused will be confined for the rest of (his) (her) life, but (he) (she) will have the possibility of earning parole from such confinement, under such circumstances as are or may be provided by law or regulations. “Parole” is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility of return to incarceration to complete (his)

(her) sentence of confinement if the conditions of parole are violated. In determining whether to adjudge “confinement for life without eligibility for parole” or “confinement for life” bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating or clemency action by the convening authority or any higher authority, nor in the case of “confinement for life” in reliance upon future decisions on parole that might be made by appropriate officials.

(PRETRIAL CONFINEMENT CREDIT, IF APPLICABLE:) MJ: In determining an appropriate sentence in this case, you should consider that the accused has spent \_\_\_ days in pretrial confinement. 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 authorities at the correctional facility where the accused is sent to serve (his) (her) confinement, and will be given on a day for day basis.

(FORFEITURES—ALL PAY AND ALLOWANCES:) MJ: This court may sentence the accused to forfeit all pay and allowances. 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 (and (his) (her) family) 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. The accused is in pay grade E-\_\_\_ with over \_\_\_ years of service, the total basic pay being \$\_\_\_\_\_ per month.

**NOTE: As an option, the MJ may, instead of giving the oral instructions that follow, present the court members with a pay chart to use during their deliberations.**

MJ: If reduced to the grade of E-\_\_\_, the accused’s total basic pay would be \$\_\_\_\_\_.

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MJ: In the case of an accused who is not confined, forfeitures of pay may not exceed two-thirds of pay per month.

(EFFECT OF ARTICLE 58b IN GCM:) **MJ: Any sentence that includes (either (1) confinement for more than six months or (2)) any confinement and a (punitive discharge) (Dismissal) will require the accused, by operation of law, to forfeit all pay and allowances during the period of confinement. (Because (a dishonorable discharge) (a Dismissal) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically forfeit all pay and allowances during any period of confinement you adjudge.) However, if the court wishes to adjudge any forfeitures of pay, or pay and allowances, the court should explicitly state the forfeiture as a separate element of the sentence.**

(EFFECT OF ARTICLE 58b IN SPCM WHEN BCD AUTHORIZED:) **MJ: Any sentence which includes (either (1) confinement for more than six months or (2)) any confinement and a bad-conduct discharge will require the accused, by operation of law, to forfeit two-thirds of (his) (her) pay during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay, the court should explicitly state the forfeiture as a separate element of the sentence.**

(EFFECT OF ARTICLE 58b IN SPCM—BCD NOT AUTHORIZED:) **MJ: Any sentence which includes confinement for more than six months will require the accused, by operation of law, to forfeit two-thirds of (his) (her) pay during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay, the court should explicitly state the forfeiture as a separate element of the sentence.**

**NOTE: Automatic forfeitures under Article 58b are not authorized for special courts-martial consisting of a military judge alone referred pursuant to Article 16(c)(2)(A).**

**NOTE: The following instruction may be given in the discretion of the military judge:**

**(MJ: (The) (trial) (and) (defense) counsel (has) (have) made reference to the availability (or lack thereof) of monetary support for the accused's family member(s). Again, by operation of law, if you adjudge:**

**(FOR GCM:) (either (1) confinement for more than six months, or (2)) any confinement and a (punitive discharge) (Dismissal), then the accused will forfeit all pay and allowances due (him) (her) during any period of confinement.**

**(FOR SPCM WHEN BCD AUTHORIZED:) (either (1) confinement for more than six months, or (2) any confinement and a bad-conduct discharge, then the accused will forfeit two-thirds of all pay due (him) (her) during any period of confinement.**

**(FOR SPCM—BCD NOT AUTHORIZED:) confinement for more than six months, then the accused will forfeit two-thirds of all pay due (him) (her) during any period of confinement.**

**However, when the accused has dependents, the convening authority may direct that any or all of the forfeiture of pay which the accused otherwise by law would be required to forfeit be paid to the accused's dependents for a period not to exceed six months. This action by the convening authority is purely discretionary. You should not rely upon the convening authority taking this action when considering an appropriate sentence in this case.**

**(FORFEITURES—2/3DS ONLY:) MJ: This court may sentence the accused to forfeit up to two-thirds pay per month for a period of (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 (and (his) (her) family) of such a loss of income. 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.**

**The accused is in pay grade E-\_\_ with over \_\_ years of service, the total basic pay being \$\_\_\_\_\_ per month. If retained in that grade, the maximum forfeiture would be \$\_\_\_\_\_ pay per month for (12) (\_\_) months.**

**If reduced to the grade of E-\_\_, the maximum forfeiture would be \$\_\_\_\_\_ pay per month for (12) (\_\_) months.**

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If reduced to the grade of E-\_\_\_, the maximum forfeiture would be \$\_\_\_\_\_ pay per month for (12) (\_\_) months.

(FINE—GENERAL COURT-MARTIAL:) MJ: This court may adjudge a fine either in lieu of or in addition to forfeitures. A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence.

(In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offense(s) in this case.)

(FINE—SPECIAL COURT-MARTIAL:) MJ: This court may adjudge a fine, either in lieu of or in addition to forfeitures. If you should adjudge a fine, the amount of the fine along with any forfeitures that you adjudge may not exceed the total amount of forfeitures which may be adjudged, that is, forfeiture of two-thirds pay per month for (six) (\_\_) months(s). A fine when ordered executed makes the accused immediately liable to the United States for the entire amount of the fine.

(In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed \_\_ (month(s)) (year).)

**NOTE: Punitive discharges. A DD can be adjudged against noncommissioned warrant officers and enlisted persons only. A BCD may be adjudged only against enlisted persons. A dismissal may be adjudged only against commissioned officers, commissioned warrant officers, and cadets.**

(PUNITIVE DISCHARGE:) MJ: The stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that (he) (she) has served honorably. A punitive discharge will affect an accused's future with regard to (his) (her) legal rights, economic opportunities, and social acceptability.

**NOTE: Effect of punitive discharge on retirement benefits.** The following instruction must be given if requested and the evidence shows any of the following circumstances exist: (1) The accused has sufficient time in service to retire and thus receive retirement benefits; (2) In the case of an enlisted accused, the accused has sufficient time left on his current term of enlistment to retire without having to reenlist; (3) In the case of an accused who is a commissioned or warrant officer, it is reasonable that the accused would be permitted to retire but for a punitive discharge. In other cases, and especially if the members inquire, the military judge should consider the views of counsel in deciding whether the following instruction, appropriately tailored, should be given or whether the instruction would suggest an improper speculation upon the effect of administrative or collateral consequences of the sentence. A request for an instruction regarding the effect of a punitive discharge on retirement benefits should be liberally granted and denied only in cases where there is no evidentiary predicate for the instruction or the possibility of retirement is so remote as to make it irrelevant to determining an appropriate sentence. The military judge should have counsel present evidence at an Article 39(a) session to determine the probability of whether the accused will reach retirement or eligibility for early retirement. Any instruction should be appropriately tailored to the facts of the case with the assistance of counsel and should include the below instruction. Even if the instruction is not required, the military judge nonetheless should consider giving the instruction and allowing the members to consider the matter. United States v. Boyd, 55 MJ 217 (CAAF 2001); United States v. Luster, 55 MJ 67 (CAAF 2001); United States v. Greaves, 46 MJ 133 (CAAF 1997); United States v. Sumrall, 45 MJ 207 (CAAF 1996). When the below instruction is appropriate, evidence of the future value of retirement pay the accused may lose if punitively discharged is generally admissible. United States v. Becker, 46 MJ 141 (CAAF 1997).

(In addition, a punitive discharge terminates the accused's status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits.)

**NOTE: Legal and factual obstacles to retirement.** If the above instruction is appropriate, evidence of the legal and factual obstacles to retirement faced by the particular accused is admissible. If such evidence is presented, the below instruction should be given. United States v. Boyd, 55 MJ 217 (CAAF 2001).

(On the issue of the possibility of becoming a military retiree and receiving retired pay and benefits, you should consider the evidence submitted on the legal and factual obstacles to retirement faced by the accused.)

(DISHONORABLE DISCHARGE ALLOWED:) **MJ:** (This court may adjudge either a dishonorable discharge or a bad-conduct discharge.) (The law imposes a mandatory minimum sentence of a dishonorable discharge for the offense(s) of \_\_\_\_\_.) Such a discharge may deprive one of substantially all benefits administered by the Department of

**Veterans Affairs and the military establishment. A dishonorable discharge should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of 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 a military or civil nature).**

**(ONLY BAD-CONDUCT DISCHARGE ALLOWED:) MJ: This court may adjudge a bad-conduct discharge. Such a discharge may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. A bad-conduct discharge is a severe punishment 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 a military or civil nature.)**

**(DISMISSAL:) MJ: (This court may adjudge a dismissal.) (The law imposes a mandatory minimum sentence of a dismissal for the offense(s) of \_\_\_\_\_.) You are advised that a sentence to a dismissal of a (commissioned officer) (cadet) is, in general, the equivalent of a dishonorable discharge of a noncommissioned officer, a warrant officer who is not commissioned, or an enlisted service member. A dismissal may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. It should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. Dismissal, however, is the only type of discharge the court is authorized to adjudge in this case.**

**(If authorized:) (NO PUNISHMENT:) MJ: Finally, if you wish, this court may sentence the accused to no punishment.**

### ***2-5-23. OTHER INSTRUCTIONS***

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

**MJ: You should consider evidence admitted as to the nature of the offense(s) of which the accused stands convicted, plus:**



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 experienced by the accused.
7. The financial difficulties experienced by the accused.
8. The accused's (mental condition) (mental impairment) (behavior disorder) (personality 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) (NCOER's) (\_\_\_\_\_) indicate: \_\_\_\_\_.
15. That the accused is entitled to wear the following medals and awards: \_\_\_\_\_.
16. Lack of previous convictions or Article 15 punishment.
17. Past performance and conduct in the Army as reflected by \_\_\_\_\_.
18. Character evidence—testimony of \_\_\_\_\_.
19. (Accused's testimony \_\_\_\_\_.)
20. (The accused's expression of his desire to remain in the service.)
21. (That the accused has indicated that (he/she) does not desire a (BCD) (DD) (Dismissal).
22. (Testimony of \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.)

**23. (Pretrial punishment experienced by the accused.)**

**(MJ: Further, you should consider:**

**(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.)**

**(Period of hospitalization and convalescence required for victim.))**

**(ACCUSED NOT TESTIFYING:) MJ: The court will not draw any adverse inference from the fact that the accused did not elect to testify.**

**(ACCUSED AND/OR VICTIM NOT TESTIFYING UNDER OATH:) MJ: (The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. 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.)**

**(An unsworn statement is (also) an authorized means for a crime victim to bring relevant information to the attention of the court.)**

**A person making an unsworn statement cannot be cross-examined by the prosecution or defense, or interrogated by court members or me. However, evidence may be offered to rebut statements of fact contained in unsworn statements. 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, 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 use your common sense and your knowledge of human nature and the ways of the world.**

**NOTE: SCOPE OF ACCUSED'S UNSWORN STATEMENT. The scope of an accused's unsworn statement is broad. United States v. Grill, 48 MJ 131 (CAAF 1998); United States v. Jeffrey, 48 MJ 229 (CAAF 1998); United States v. Britt,**

**48 MJ 233 (CAAF 1998). If the accused addresses collateral consequences (the treatment or sentence of others, command options, sex offender registration, or other matters) that would be inadmissible but for their being presented in an unsworn statement, the military judge can use the instruction below to “put the information in proper context by effectively advising the members to ignore it.” US v. Talkington, 73 MJ 212 (CAAF 2014) (sex offender registration), citing US v. Barrier, 61 MJ 482 (CAAF 2005). In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused’s unsworn statement.**

**MJ: The accused’s unsworn statement included the accused’s personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (\_\_\_\_\_). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted. (Under DOD Instructions, when convicted of certain offenses, including the offense(s) here, the accused must register as a sex offender with the appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration is required in all 50 states; though requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable.)**

**It is not your duty (to determine relative blameworthiness of (and whether appropriate disciplinary action has been taken against) others who might have committed an offense, whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused’s chain of command or other authorities) (or) (to attempt to predict sex offender registration requirements, or the consequences thereof) (\_\_\_\_\_).**

**While the accused is permitted to address these matters in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based upon the offense(s) for which (he) (she) has been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends upon (actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases)) (or) (possible requirements of sex offender registration, and the consequences thereof, at certain locations in the future).**

**(PLEA OF GUILTY:) MJ: 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 (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.

(MENDACITY:) MJ: The evidence presented (and the sentencing argument of trial counsel) raised the question of whether the accused testified falsely before this court 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 instructed that you may consider this issue only within certain constraints.

First, this factor should play no role 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, meaning important, before they can be considered in your deliberations.

Finally, you may consider this factor 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.

**NOTE: When evidence of rehabilitative potential, defense retention evidence, or government rebuttal to defense retention evidence is introduced, the military judge should consider the following instructions, tailored to the specific evidence. See United States v. Eslinger, 70 MJ 193 (CAAF 2011); United States v. Griggs, 61 MJ 402 (CAAF 2005).**

(IF REHABILITATIVE POTENTIAL EVIDENCE IS PRESENTED:) MJ: You have heard testimony from (name witness(es)) indicating an opinion regarding the accused's rehabilitative potential. "Rehabilitative potential" refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society. You may consider this evidence in determining an appropriate sentence for the accused.

(IF DEFENSE RETENTION EVIDENCE IS PRESENTED:) MJ: You have (also) heard testimony from (name witness(es)) indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (\_\_\_\_\_). The testimony of a witness indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (\_\_\_\_\_) is a matter in mitigation that you should consider in determining an appropriate sentence in this case.

(IF THERE IS REBUTTAL TO DEFENSE RETENTION EVIDENCE:) **MJ:** In response to this evidence offered by the defense, you have heard testimony from (name witness(es)) indicating that the witness does not (desire to continue to serve with the accused) (desire to deploy with the accused) (\_\_\_\_\_). This evidence can only be considered for its tendency, if any, to rebut the defense evidence on this issue.

(CONCLUDING INSTRUCTIONS FOR ALL REHABILITATIVE POTENTIAL/ RETENTION EVIDENCE:) **MJ:** You may not consider testimony about (an accused's rehabilitative potential) (and) (whether a witness does (or does not) (desire to continue to serve with the accused) (desire to deploy with the accused) (\_\_\_\_\_)) as a recommendation regarding the appropriateness of a punitive discharge or any other specific sentence in this case, because no witness may suggest a specific punishment or sentence. (This rule does not apply to (statements) (testimony) by the accused regarding personal requests he/she may make in relation to specific punishments.). Whether the accused should receive a punitive discharge or any other authorized legal punishment is a matter for you alone to decide in the exercise of your independent discretion based on your consideration of all the evidence.

**NOTE: Pretrial punishment evidence introduced for purposes of mitigation.**  
**An accused may introduce evidence of pretrial punishment in mitigation, even though the judge has already awarded specific credit for the Article 13 violation as a matter of law. See United States v. Carter, 74 MJ 204 (CAAF 2015). If so, the following instruction is appropriate.**

(PRETRIAL PUNISHMENT EVIDENCE OFFERED IN MITIGATION:) **MJ:** In determining an appropriate sentence, you should consider evidence presented that the accused was illegally punished for (this) (these) offense(s) prior to trial in violation of Article 13, UCMJ. You should also consider that I have awarded the accused \_\_\_ days of credit for this illegal punishment (in addition to the \_\_\_ days of credit for pretrial confinement previously referred to), which will be applied against any sentence to confinement you may adjudge. You should consider evidence of this pretrial punishment, as well as the credit I have awarded for it, in deciding an appropriate sentence in this case.

(ARGUMENT FOR A SPECIFIC SENTENCE:) **MJ:** During argument, trial counsel recommended that you consider a specific sentence in this case. You are advised that the arguments of the trial counsel and (her) (his) recommendations are only (her) (his) individual suggestions and may not be considered as the recommendation or opinion of

anyone other than such counsel. In contrast, you are advised that the defense counsel is speaking on behalf of the accused.

### **2-5-24. CONCLUDING SENTENCING INSTRUCTIONS**

**MJ: When you close to deliberate and vote, only the members will be present. (Alternate members will not, at this time, participate in deliberation or voting.) I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your deliberations 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. You do that by writing out on a slip of paper a complete sentence. (IF MANDATORY MINIMUM SENTENCE, OR A MINIMUM SENTENCE LIMITATION IN A PLEA AGREEMENT: Once again, I advise you that any proposed sentence must include at least (a Dishonorable Discharge) (a Dismissal) (confinement for life) (\_\_\_\_\_).)**

**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.**

**(If charges were referred prior to 1 January 2019:) 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 for life without eligibility for parole, or confinement for life, or) confinement in excess of ten years requires the concurrence of three-fourths or \_\_\_ members.)**

(If charges were referred on or after 1 January 2019:) **Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is three-fourths or \_\_\_ members.**

**Table 2-3**

**Votes Needed for Sentencing**

<u>No. of Members</u>	<u>Two-thirds</u>	<u>Three-fourths</u>
<u>3</u>	<u>2</u>	<u>*</u>
<u>4</u>	<u>3</u>	<u>3</u>
<u>5</u>	<u>4</u>	<u>4</u>
<u>6</u>	<u>4</u>	<u>5</u>
<u>7</u>	<u>5</u>	<u>6</u>
<u>8</u>	<u>6</u>	<u>6</u>
<u>9</u>	<u>6</u>	<u>7</u>
<u>10</u>	<u>7</u>	<u>8</u>
<u>11</u>	<u>8</u>	<u>9</u>
<u>12</u>	<u>8</u>	<u>9</u>

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 may then repeat the process of discussion, proposal of sentences, and voting. 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. If after you determine your sentence, any member suggests you reconsider the sentence, open the court and the president should announce that reconsideration has been proposed without reference to whether the proposed rebalot concerns increasing or decreasing the sentence. I will then give you specific instructions on the procedure for reconsideration.

**NOTE: See paragraph 2-7-19, RECONSIDERATION INSTRUCTION (SENTENCE).**

**MJ: As an aid in putting the sentence in proper form, the court may use the Sentence Worksheet marked Appellate Exhibit \_\_\_\_, which the Bailiff may now hand to the president.**

BAILIFF: (Complies.)

**MJ: Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial or any other publication or writing not properly admitted or received during this trial. These instructions must not be interpreted as indicating an opinion as to the sentence that should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. The only permissible punishments are those listed on the Sentence Worksheet. When the court returns, I will examine the Sentence Worksheet.**

**MJ: Do counsel object to the instructions as given or request other instructions?**

TC/DC: (Respond.)

**MJ: Does any member of the court have any questions?**

MBR: (Responds.)

**MJ: (COL) (\_\_) \_\_\_\_\_, if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?**

PRES: (Responds.)

**MJ: (Trial Counsel) (Bailiff), please give the president (Prosecution Exhibit(s) \_\_\_\_) (Defense Exhibit(s) \_\_\_\_) (and) (the Sentencing Instructions).**

TC/BAILIFF: (Complies.)



**MJ: (COL) (\_\_\_) \_\_\_\_\_, please do not mark on any of the exhibits, except the Sentence Worksheet and please bring all the exhibits with you when you return to announce the sentence.**

TC: (Complies.)

**NOTE: Prior to closing the court for deliberations, the MJ must instruct the alternate members, if any, that they will not be participating in deliberations, unless later needed, and that they must not discuss the case with anyone. The MJ may allow the alternate members to return to their duties or homes, subject to recall if needed. Requiring alternate members to leave the courthouse may be the prudent course of action in order to avoid contact with the parties and witnesses during deliberations.**

**MJ: The court is closed.**

### ***2-5-25. POST-TRIAL AND APPELLATE RIGHTS ADVICE***

**MJ: This Article 39(a) session is called to order.**

TC: All parties are present except the court members.

**MJ: Defense Counsel, have you advised the accused orally and in writing of (his) (her) post-trial and appellate rights including the rights contained in Rule for Court-Martial 1010?**

DC: (Responds.)

**MJ: Does the accused have a copy in front of (him) (her)?**

DC: (Responds.)

**MJ: \_\_\_\_\_, I have before me Appellate Exhibit \_\_, an appellate rights advice form. Is that your signature on this form?**

ACC: (Responds.)

**MJ: Defense Counsel, is that your signature on Appellate Exhibit \_\_?**

DC: (Responds.)

**MJ: \_\_\_\_\_, did your defense counsel explain your post-trial and appellate rights to you?**

ACC: (Responds.)

**MJ: \_\_\_\_\_, do you have any questions about your post-trial and appellate rights?**

ACC: (Responds.)

**NOTE: If more than one DC, the MJ should determine which counsel will be responsible for post-trial actions.**

**MJ: Which counsel will be responsible for post-trial actions in this case?**

DC: (Responds.)

**MJ: This court is in recess.**

**2-5-26. ANNOUNCEMENT OF SENTENCE**

**MJ: The court is called to order.**

TC: All parties to include the court members are present as before.

**MJ: \_\_\_\_\_, have you reached a sentence?**

PRES: (Responds.)

**NOTE: If the president indicates that the members are unable to agree on a sentence, the MJ should give paragraph 2-7-18, the “Hung Jury” instruction.**

**MJ: \_\_\_\_\_, is the sentence reflected on the Sentence Worksheet?**

PRES: (Responds.)

**MJ: \_\_\_\_\_, please fold the Sentence Worksheet and give it to the Bailiff so that I can examine it.**

TC/BAILIFF: (Complies.)

**NOTE: If charges were referred prior to 1 January 2019, proceed as stated below. The president will announce the sentence. If charges were referred on or after 1 January 2019, skip to the next NOTE.**

**MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (\_\_\_\_\_). Bailiff, you may return it to the president.**

BAILIFF: (Complies.)

**MJ: Accused and Defense Counsel, please rise.**

**MJ: (\_\_\_\_\_), please announce the sentence.**

PRES: (Complies.)

**MJ: Please be seated. (Trial Counsel) (Bailiff), please retrieve the exhibit(s) from the president.**

TC/BAILIFF: (Complies.)

**NOTE: If charges were referred on or after 1 January 2019, proceed as stated below. The MJ will announce the sentence adjudged by the members.**

**MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (\_\_\_\_\_).**

**MJ: Accused and Defense Counsel, please rise. \_\_\_\_\_, this court sentences you to: \_\_\_\_\_.**

**MJ: Please be seated. (Trial Counsel) (Bailiff), please retrieve the exhibit(s) from the president.**

**TC/BAILIFF: (Complies.)**

**NOTE: In all cases, continue below.**

**MJ: Members of the Court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused. Counsel and the accused will remain.**

**MJ: The members have withdrawn from the courtroom. All other parties are present.**

**(PRETRIAL CONFINEMENT CREDIT:) MJ: The accused will be credited with \_\_\_ days of pretrial confinement against the accused's term of confinement.**

**NOTE: If a pretrial agreement exists, continue below. The military judge must ensure that all parties have the same understanding concerning the operation of the quantum portion on the sentence of the court. Otherwise, the plea may be improvident. If no pretrial agreement exists (or a plea agreement exists), skip to the next NOTE below.**

**MJ: \_\_\_\_\_, we are now going to discuss the operation of your pretrial agreement on the sentence of the court.**

**MJ: It is my understanding that the effect of the pretrial agreement on the sentence is that the convening authority may approve \_\_\_\_\_. Do you agree with that interpretation?**

**ACC: (Respond.)**

**MJ: Do counsel also agree with that interpretation?**

TC/DC: (Respond.)

**NOTE: In all cases, continue below.**

**MJ: Are there other matters to take up before this court adjourns?**

TC/DC: (Respond.)

**MJ: This court is adjourned.**

***Section VI  
Court Members (Sentencing Only)***

**MJ: \_\_\_\_\_, we now enter into the sentencing phase of the trial where 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 to consider in deciding your sentence. In addition to the testimony of witnesses and the offering of documentary evidence, you may, testify under oath as to these matters, or you may remain silent, in which case the court members may not draw any adverse inference from your silence. On the other hand, if you desire, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross-examined on it; however, the government may offer evidence to rebut any statement of fact contained in any unsworn statement. An unsworn statement may be made orally, in writing, or both. It may be made by you, by your counsel on your behalf, or by both. Do you understand these rights?**

ACC: (Responds.)

**MJ: Counsel, is the personal data on the first page of the charge sheet correct?**

TC/DC: (Respond.)

**MJ: Defense Counsel, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13?**

DC: (Responds.)

**MJ: \_\_\_\_\_, is that correct?**

ACC: (Responds.)

**MJ: Counsel, based on the information on the charge sheet, the accused is to be credited with \_\_\_\_\_ days of pretrial confinement credit. Is that the correct amount?**

TC/DC: (Respond.)

**MJ: Counsel, do you have any documentary evidence on sentencing which could be marked and offered at this time?**

TC/DC: (Respond.)

**MJ: Is there anything else by either side before we call the members?**

TC/DC: (Respond.)

**MJ: Bailiff, call the court members.**

**NOTE: Whenever the members enter the courtroom, all persons except the MJ and reporter shall rise. The members are seated alternately to the right and left of the president according to rank.**

**MJ: You may be seated. The court is called to order.**

TC: The court is convened by Court-Martial Convening Order No. \_\_\_\_, Headquarters \_\_\_\_\_ dated \_\_\_\_\_ (as amended by \_\_\_\_\_), (a copy) (copies) of which (has) (have) been furnished to each member of the court. The accused and the following persons detailed to this court-martial are present: \_\_\_\_\_, Military Judge; \_\_\_\_\_, Trial Counsel; \_\_\_\_\_, Defense Counsel; and \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, & \_\_\_\_\_, Court Members. The following persons are absent: \_\_\_\_\_.

**NOTE: Members who have been relieved (viced) by orders need not be mentioned.**

TC: The prosecution is ready to proceed with trial in the case of the United States versus (PVT) ( ).

**MJ: The members of the court will now be sworn. All persons in the courtroom, please rise.**

TC: Do you 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 upon a challenge or upon the sentence unless required to do so in the due course of law, so help you God?

MBRS: (Comply.)

**MJ: Please be seated. The court is assembled.**

## **2-6-1. PRELIMINARY INSTRUCTIONS**

**MJ: Members of the Court, it is appropriate that I give you some preliminary instructions. My duty as military judge is to ensure this trial is conducted in a fair, orderly, and impartial manner in accordance with the law. I preside over open sessions, rule upon objections, and instruct you on the law applicable to 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 sessions and periods of recess and adjournment. Any questions you have of me should be asked in open court.**

**At a session held earlier, the accused pled guilty to the charge(s) and specification(s) which you have before you. I accepted that plea 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) plea. Your duty is to determine an appropriate sentence. That duty is a grave responsibility requiring the exercise of wise discretion. Your determination must be based upon all 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.**

**Counsel soon will be given an opportunity to ask you questions and exercise challenges. With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, 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.**

**Any matter that may affect your impartiality regarding an appropriate sentence for the accused is a ground for challenge. Some of the grounds for challenge would be if you were the accuser in the case, if you have been an investigating or preliminary hearing officer as to any offense charged, or if you have formed a fixed opinion as to what an appropriate punishment would be for this accused. To determine if any grounds for challenge exist, counsel for both sides are given an opportunity to question you. These questions are not intended to embarrass you. They are not an attack upon your integrity. They are asked merely to determine whether a basis for challenge exists.**

If, at any time after answering these questions, you realize that any of your answers were incorrect, you recognize a witness whose name you did not previously recognize, or you think of any matter that might affect your impartiality, you have a continuing duty to bring that to the attention of the court. You do that simply by raising your hand and stating only that you have an issue to discuss with the court. I will then follow up with you individually as necessary.

It is no adverse reflection upon a court 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. You must keep an open mind throughout the trial. 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 an appropriate sentence, after considering all the alternative punishments of which I will later advise you. You may not have a preconceived idea or formula as to either the type or the amount of punishment which should be imposed, if any.

Counsel are given an opportunity to question all witnesses. When counsel have finished, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so. There are forms provided for your use if you desire to question any witness. You are required to write your question on the form and sign legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked since your questions, like questions of counsel, are subject to objection. I will conduct any needed examination. There are a couple of things you need to keep in mind with regard to questioning.

First, you cannot attempt to help either the government or the defense.

Second, counsel have interviewed the witnesses and know more about the case than we do. Very often they do not ask what may appear to us to be an obvious question because they are aware this particular witness has no knowledge on the subject.

Rules of evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial, when I sustain an objection, disregard the question and answer. If I overrule an objection, you may consider both the question and answer.

**Until you close to deliberate, you may not discuss this court-martial with anyone, even amongst yourselves. You must wait until you are all together in your closed session deliberations so that all panel members have the benefit of your discussion. During the course of the trial, including all periods of recess and adjournment, you must not communicate with anyone about the case, either in person or by email, blog, text message, twitter or other form of social media. Posting information about the case on a Facebook page, for example, is considered a form of communicating about the case. You must also not listen to or read any accounts of the case or visit the scene of any incident alleged in the specification(s) or mentioned during the trial. Do not consult any source of law or information, written or otherwise, as to any matters involved in this case and do not conduct your own investigation or research. For example, you cannot consult the Manual for Courts-Martial, dictionaries or reference materials, search the internet, 'Google' the witnesses to learn more about them, review a Wikipedia entry or consult a map or satellite picture to learn more about any alleged crime scene.**

**During any recess or adjournment, you must also avoid contact with witnesses or potential witnesses in this case, counsel, and the accused. If anyone attempts to discuss the case or communicate with you during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every recess or adjournment, but keep them in mind throughout the trial.**

**We will try to estimate the time needed for recesses or hearings out of your presence. Frequently their duration is extended by consideration of new issues arising in such hearings. Your patience and understanding regarding these matters will contribute greatly to an atmosphere consistent with the fair administration of justice.**

**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. However, in addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations. This general order of events can be expected at this court-martial: Questioning of court members, challenges and excusals, presentation of evidence, closing argument by counsel, instructions on the law, your deliberations, and announcement of the sentence.**



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. If it becomes too hot or cold in the courtroom, or if you need a break because of drowsiness or for comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

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 should (take your notes with you for safekeeping until the next session) (leave your notes in the courtroom).

One other administrative matter: if during the course of the trial it is necessary that you make any statement, if you would preface the statement by stating your name, that will make it clear on the record which member is speaking.

**MJ: Are there any questions?**

MBRS: (Respond.)

**MJ: (Apparently not.) Please take a moment to read the charge(s) on the flyer provided to you and to ensure that your name is correctly reflected on (one of) the convening order(s). If it is not, please let me know.**

MBRS: (Comply.)

**MJ: Trial Counsel, you may announce the general nature of the charge(s).**

TC: The general nature of the charge(s) in this case is: \_\_\_\_\_. The charge(s) (was) (were) preferred by \_\_\_\_\_, and forwarded with recommendations as to disposition by \_\_\_\_\_. (A preliminary hearing was conducted by \_\_\_\_\_.)

TC: The records of this case disclose (no grounds for challenge) (grounds for challenge of \_\_\_\_\_ for the following reasons).

TC: If any member of the court is aware of any matter which he (or she) believes may be a ground for challenge by either side, such matter should now be stated.

MBRS: (Respond.) or

TC: (Negative response from the court members.)

## **2-6-2. VOIR DIRE**

**MJ: Before counsel ask you any questions, I will ask a few preliminary questions. If any member has an affirmative response to any question, please raise your hand.**

**1. Does anyone know the accused? (Negative response.) (Positive response from \_\_\_\_\_.)**

**2. Does anyone know any person named in any of the specifications?**

**3. (The trial counsel is) (I am) going to read a list of the potential witnesses in this case. Afterwards, I will ask you if anyone knows any of the potential witnesses in this case. [Read list of witnesses] Does anyone know any of the potential witnesses in this case?**

**4. Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?**

**5. Does anyone have any prior knowledge of the facts or events in this case?**

**6. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?**

**7. Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?**

**8. If so, will that experience influence your performance of duty as a court member in this case in any way?**

**NOTE: If Question 8 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the hearing of the other members.**

**9. How many of you are serving as court members for the first time?**

**10. (As to the remainder) Can each of you who has previously served as a court member put aside anything you may have heard in any previous proceeding and decide this case solely on the basis of the evidence and my instructions as to the applicable law?**

**11. Has anyone had any specialized law enforcement training or experience, to include duties as a military police officer, off-duty security guard, civilian police officer or comparable duties other than the general law enforcement duties common to military personnel of your rank and position?**

12. Is any member of the court in the rating chain, supervisory chain, or chain of command, of any other member?

**NOTE: If question 12 is answered in the affirmative, the military judge may want to ask questions 13 and 14 out of the hearing of the other members.**

13. (To junior) Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, because another member holds a position of authority over you?

14. (To senior) Will you be embarrassed or restrained in any way in the performance of your duties as a court member if a member over whom you hold a position of authority should disagree with you?

15. Has anyone had any dealings with any of the parties to the trial, to include me and counsel, which might affect your performance of duty as a court member in any way?

16. Does anyone know of anything of either a personal or professional nature that would cause you to be unable to give your full attention to these proceedings throughout the trial?

17. It is a ground for challenge that you have an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime(s) for which the accused is to be sentenced. Does any member, having read the charge(s) and specification(s), believe that you would be compelled to vote for any particular punishment solely because of the nature of the charge(s)?

18. You will be instructed in detail before you begin your deliberations. I will instruct you on the full range of punishments (from no punishment) up to the maximum punishment. You should consider all forms of punishment within that range. Consider doesn't necessarily mean that you would vote for that particular punishment. Consider means that you think about and make a choice in your mind, one way or the other, as to whether that's an appropriate punishment. Each member must keep an open mind and not make a choice, nor foreclose from consideration any possible sentence, until the closed session for deliberations and voting on the sentence. Can each of you follow this instruction?

19. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence in this case?

20. Can each of you reach a decision on a sentence on an individual basis in this particular case and not solely upon the nature of the offense (or offenses) of which the accused has been convicted?

21. Is any member aware of any matter that might raise a substantial question concerning your participation in this trial as a court member?

MJ: Do counsel for either side desire to question the court members?

**NOTE: Trial Counsel and Defense Counsel will conduct voir dire if desired, and individual voir dire will be conducted, if required.**

### ***2-6-3. INDIVIDUAL VOIR DIRE***

MJ: Members of the Court, there are some matters that we must now consider outside of your presence. Please return to the deliberation room. Some of you may be recalled for individual questioning.

MBRS: (Comply.)

MJ: All the members are absent. All other parties are present. Trial Counsel, do you request individual voir dire and if so, state the member and your reason(s).

TC: (Responds.)

MJ: Defense Counsel, do you request individual voir dire and if so, state the member and your reason(s).

DC: (Responds.)

**NOTE: Individual members are recalled for questioning until all individual questioning is complete. Advise any member who is questioned individually not to discuss what he/she just said in the courtroom with any other member when he/she returns to the deliberation room, in order to avoid inadvertently biasing or disqualifying any other member.**

### ***2-6-4. CHALLENGES***

**NOTE: Challenges are to be made outside the presence of the court members in an Article 39(a) session. RCM 912 encompasses challenges based upon both actual bias and implied bias. United States v. Clay, 64 MJ 274, 276 (CAAF 2007). Military Judges should analyze all challenges for cause under both actual and implied bias theories, even if the counsel do not specifically use these terms. The test for actual bias is whether the member's bias will not yield to the evidence presented and the judge's instructions. The existence of actual bias is a question of fact; accordingly, the military judge is afforded**

significant latitude in determining whether it is present in a prospective member. The military judge's physical presence during voir dire and ability to watch the challenged member's demeanor make the military judge specially situated in making this determination. United States v. Terry, 64 MJ 295 (CAAF 2007). Implied bias exists when, despite a disclaimer, most people in the same position as the court member would be prejudiced. United States v. Napolitano, 53 MJ 162 (CAAF 2000). In determining whether implied bias is present, military judges look to the totality of the circumstances. United States v. Strand, 59 MJ 455, 459 (CAAF CA2004). Implied bias is viewed objectively, through the eyes of the public. Implied bias exists if an objective observer would have substantial doubt about the fairness of the accused's court-martial panel. Because of the objective nature of the inquiry, appellate courts accord less deference to implied bias determinations of a military judge. United States v. Armstrong, 54 MJ 51, 54 (CAAF 2000). In close cases, military judges are enjoined to liberally grant defense challenges for cause. United States v. Clay, 64 MJ 274 (CAAF 2007). This "liberal grant mandate" does not apply to government challenges for cause. United States v. James, 61 MJ 132 (CAAF 2005). Where a military judge does not indicate on the record that s/he has considered the liberal grant mandate during the evaluation for implied bias of a defense challenge for cause, the appellate courts will accord that decision less deference during review of the ruling. Therefore, when ruling on a defense challenge for cause, the military judge should (1) state that he/she has considered the challenge under both actual and implied bias theories, and is aware of the duty to liberally grant defense challenges; and (2) place the reasoning on the record. United States v. Townsend, 65 MJ 460, 464 (CAAF 2008). The following is a suggested procedure for an Article 39(a) session.

**MJ: All the members are absent. All other parties are present. Trial Counsel, do you have any challenges for cause?**

TC: (Responds.)

(IF A CHALLENGE IS MADE) **MJ: Defense Counsel, do you object?**

DC: (Responds.)

(IF DENYING THE CHALLENGE) **MJ: The challenge is denied.**

(IF GRANTING THE CHALLENGE WITHOUT A DEFENSE OBJECTION) **MJ: The challenge is granted.**

(IF GRANTING THE CHALLENGE OVER A DEFENSE OBJECTION) **MJ: The challenge is granted because \_\_\_\_\_.**

**MJ: Defense Counsel, do you have any challenges for cause?**

DC: (Responds.)

(IF A CHALLENGE IS MADE) **MJ: Trial Counsel, do you object?**

TC: (Responds.)

(IF GRANTING THE CHALLENGE) **MJ: The challenge is granted.**

(IF DENYING THE CHALLENGE) **MJ: I have considered the challenge for cause on the basis of both actual and implied bias and the mandate to liberally grant defense challenges. The challenge is denied because (\_\_\_\_\_).**

**NOTE: If charges were referred prior to 1 January 2019, go to the next NOTE and have counsel exercise peremptory challenges, if any.**

**If charges were referred on or after 1 January 2019, following the exercise of challenges for cause, if any, and prior to the exercise of peremptory challenges, the military judge, or a designee thereof, shall randomly assign numbers to the remaining members for purposes of impaneling members in accordance with RCM 912A. See RCM 912(f)(5). The military judge should proceed, as stated below (or as directed by military judge's service Trial Judiciary).**

**MJ: At this time, we will take a recess to allow the court reporter to randomly assign numbers to the remaining members. (She) (He) will do so using the panel member random number generator on the Army JAG Corps' site. Each party may be present and observe the court reporter perform this task, if desired.**

**MJ: Counsel, do you want to observe the court reporter randomly assign these numbers?**

TC/DC: (Respond.)

**MJ: Court reporter, please print a copy of the results, once you have them, and mark them as the next appellate exhibit in order. (Please also allow the (trial counsel) (defense counsel) to observe you when you randomly assign the numbers.)**

(Recess.)

**MJ: Appellate exhibit \_\_ is the result of the random assignment of numbers to the remaining members. Does any party have an objection to appellate exhibit \_\_?**

TC/DC: (Respond.)

**NOTE: Continue below with the exercise of peremptory challenges, if any.**

**MJ: Trial Counsel, do you have a peremptory challenge?**

TC: (Responds.)

**MJ: Defense Counsel, do you have a peremptory challenge?**

DC: (Responds.)

**NOTE: After excusing the members who were successfully challenged for cause or peremptorily, the MJ will verify that a quorum remains. The MJ will also verify that enlisted members comprise at least one-third of the members, if so requested by the accused.**

**If charges were referred prior to 1 January 2019, proceed to paragraph 2-6-5, SENTENCING PROCEEDINGS.**

**If charges were referred on or after 1 January 2019, and excess members remain, the military judge must impanel the members (and any alternate members, if authorized) in accordance with the procedures in RCM 912A. Once the members are impaneled, and any excess members have been excused, the judge must announce that the members have been impaneled, as stated below.**

**MJ: The members are impaneled.**

**NOTE: If alternate members were authorized and impaneled, the MJ should provide the following instruction to the alternate members.**

**MJ: \_\_\_\_\_, you have been designated as (an) alternate member(s) of this court-martial. As (an) alternate member(s), you have the same duties as the other members. You will observe the same trial, pay attention to all of my instructions, and may ask questions, if necessary. Sometimes during a trial, a member must be excused due to illness or some other reason. If that occurs, you may be designated as a member of this court-martial. Unless you are later designated as a member, you will not participate in the deliberations or vote on a sentence.**

### **2-6-5. SENTENCING PROCEEDINGS**

**MJ: Court Members, at this time we will begin the sentencing phase of this court-martial. Trial Counsel, you may read the personal data concerning the accused as shown on the first page of the charge sheet.**

**TC: The first page of the charge sheet shows the following personal data concerning the accused: \_\_\_\_\_.**

**MJ: Members of the Court, I have previously admitted into evidence (Prosecution Exhibit(s) \_\_\_\_, which (is) (are) \_\_\_\_\_) (and) (Defense Exhibit(s) \_\_\_\_, which (is) (are) \_\_\_\_\_). You will have (this) (these) exhibit(s) available to you during your deliberations. (Trial Counsel, you may read the stipulation of fact into evidence.)**

**(If appropriate:) (MJ: Any crime victim who is present at this presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. A crime victim may exercise this right following the government's opportunity to present evidence.)**

**MJ: Trial Counsel, do you have anything else to present at this time?**

**TC: (Responds and presents case on sentencing.)**

**NOTE: The TC administers the oath/affirmation for all witnesses.**

**MJ: Does any court member have questions of this witness?**

**MBRS: (Respond.)**



**NOTE: If the members have questions, the Bailiff will collect the written questions, hand them to the TC and DC (for an opportunity to write objections), have them marked as appellate exhibits, and present them to the MJ so that the MJ May ask the witness the questions.**

**MJ: \_\_\_\_\_, you are excused. You may step down and (return to your duties) (go about your business).**

TC: The government rests.

**NOTE: If a crime victim exercises the right to be reasonably heard, the MJ must ensure that the crime victim is afforded the opportunity to present a sworn or unsworn statement, following the government case on sentencing and prior to the defense case on sentencing. See RCM 1001(a)(1)(B), RCM 1001(a)(3)(A), and RCM 1001(c); US v. Barker, 77 MJ 377 (CAAF 2018).**

(If appropriate:) **MJ: Is there a crime victim present who desires to be heard?**

VIC: (Responds.)

**MJ: Defense Counsel, you may proceed.**

**NOTE: MRE 412 evidence offered in sentencing. MRE 412 applies in sentencing. United States v. Fox, 24 MJ 110 (CMA 1987); United States v. Whitaker, 34 MJ 822 (AFCCA 1992).**

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

### ***2-6-6. REBUTTAL AND SURREBUTTAL, IF ANY***

**MJ: Trial Counsel, any rebuttal?**

TC: (Responds / presents case.)

**MJ: Defense Counsel, any surrebuttal?**

DC: (Responds / presents case.)

**MJ: Members of the Court, you have now heard all the evidence. At this time, we need to have a hearing outside of your presence to go over the instructions that I**

will give you. I expect that you will be required to be present again in about \_\_\_\_\_.

MBRS: (Comply.)

### ***2–6–7. DISCUSSION OF SENTENCING INSTRUCTIONS***

**MJ: All parties are present as before, except the court members who are absent.**

**NOTE: If the accused did not testify or provide an unsworn statement, the MJ must ask the following question outside the presence of the members:**

**MJ: \_\_\_\_\_, you did not testify or provide an unsworn statement during the sentencing phase of the trial. Was it your personal decision not to testify or provide an unsworn statement?**

ACC: (Responds.)

**MJ: Counsel, what do you calculate to be the maximum sentence authorized (and the minimum punishment required)?**

TC/DC: (Respond.)

**NOTE: Plea Agreement. If a plea agreement exists, the members must be instructed on the permissible sentence in accordance with the sentence limitations agreed to by the parties. See RCM 705(d) and RCM 1006(d)(6). The existence of a plea agreement, however, will not be disclosed to the members, except upon request of the accused or when the MJ finds that disclosure of the existence of the plea agreement is manifestly necessary in the interest of justice because of circumstances arising during the proceeding. See RCM 705(f).**

**MJ: Do counsel agree that an instruction on a fine is (not) appropriate in this case?**

TC/DC: (Respond.)

**MJ: Trial Counsel, please mark the Sentence Worksheet as Appellate Exhibit \_\_\_\_, show it to the Defense, and present it to me.**

TC: (Complies.)

**NOTE: Listing of punishments. Only those punishments on which an instruction will be given should ordinarily be listed on the Sentence Worksheet. If all have agreed that a fine is not appropriate, then it ordinarily should not be listed on the worksheet. Any mandatory minimum punishment should be listed on the worksheet in order to aid the president in announcing the sentence of the court. Also, if a plea agreement exists, the Sentence Worksheet should reflect only those punishments that are within the sentence limitations agreed to by the parties. See RCM 705(d).**

**MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?**

DC: (Responds.)

**MJ: Counsel, I intend to give the standard sentencing instructions. Do counsel have any requests for any special instructions?**

TC/DC: (Respond.)

**NOTE: Credit for Article 15 Punishment. If evidence of an Article 15 was admitted at trial which reflects that the accused received nonjudicial punishment for the same offense which the accused was also convicted at the court-martial, See paragraph 2-7-21, CREDIT FOR ARTICLE 15 PUNISHMENT.**

**MJ: (IF THE ACCUSED ELECTED NOT TO TESTIFY.) Does the defense wish the instruction regarding the fact the accused did not testify?**

**NOTE: Unsworn statement instruction within discretion of MJ. See United States v. Breese, 11 MJ 17 (CMA 1981).**

**MJ: Call the members.**

## **2-6-8. SENTENCING ARGUMENTS**

**MJ: The court is called to order.**

TC: All parties, to include the members, are present.

**MJ: Trial Counsel, you may present argument.**

TC: (Argument.)

**MJ: Defense Counsel, you may present argument.**

DC: (Argument.)

**NOTE: If the DC concedes that a punitive discharge is appropriate, the MJ shall conduct an out-of-court hearing to ascertain if the accused knowingly and intelligently agrees with counsel's actions with respect to a discharge. See paragraph 2-7-26 for the procedural instructions on ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE.**

### **2-6-9. SENTENCING INSTRUCTIONS**

**MJ: Members of the Court, 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 to those in aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he) (she) has been found guilty.**

**(IF OFFENSES ARE ONE FOR SENTENCING PURPOSES:) MJ: The offenses charged in \_\_\_\_\_ and \_\_\_\_\_ are one offense for sentencing purposes. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense.**

**MJ: 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 for all offenses of which the accused has been found guilty.) (A separate sentence must be adjudged for each accused.)**

**NOTE: Maximum and Minimum Punishment. The MJ must instruct the members on the maximum authorized punishment that may be adjudged and the mandatory minimum punishment, if any. See RCM 1005(e)(1). If there is a plea agreement, the MJ must ensure that this instruction is in accordance with the sentence limitation contained in the plea agreement. See RCM 705(d) and RCM 1006(d)(6). The existence of a plea agreement, however, will not be disclosed to the members, except upon request of the accused or when the MJ finds that disclosure of the existence of the plea agreement is manifestly**

**necessary in the interest of justice because of circumstances arising during the proceeding. See RCM 705(f).**

**MJ: The maximum punishment that may be adjudged in this case is:**

Reduction to the grade of \_\_\_\_\_;

Forfeiture of ((2/3ds) (\_\_\_\_\_) pay per month for (12) (\_\_) months) (all pay and allowances);

Confinement for \_\_\_\_\_; (and)

(A dishonorable discharge) (A bad-conduct discharge) (dismissal from the service.)

**MJ: The minimum punishment that must be adjudged in this case is:**

(\_\_\_\_\_).

**MJ: The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence (, so long as your sentence includes at least the minimum punishment I just stated).**

**NOTE: The instruction on sentencing considerations following this NOTE should be given only if: (1) all referred specifications allege offenses committed before 1 January 2019, or (2) the referred specifications allege some offenses committed before 1 January 2019 and some offenses committed on or after 1 January 2019 AND the accused did not elect to be sentenced under the “new” sentencing rules which became effective on 1 January 2019. Otherwise, proceed to the next NOTE.**

**MJ: There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principle reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.**

**NOTE: The instruction on sentencing considerations following this NOTE should be given only if: (1) all referred specifications allege offenses committed on or after 1 January 2019, or (2) the referred specifications allege some offenses committed before 1 January 2019 and some offenses committed on or after 1 January 2019 AND the accused elected to be sentenced under the “new” sentencing rules which became effective on 1 January 2019. Otherwise, the instruction in the preceding NOTE should be given.**

**MJ: In sentencing the accused, you must impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces. In doing so, you must take into consideration the following factors:**

- (1) The nature and circumstances of the offense(s) and the history and characteristics of the accused;**
- (2) The impact of the offense(s) on the financial, social, psychological, or medical well-being of any victim of the offense(s); and the mission, discipline, or efficiency of the command of the accused and any victim of the offense(s);**
- (3) The need for the sentence to reflect the seriousness of the offense(s); promote respect for the law; provide just punishment for the offense(s); promote adequate deterrence of misconduct; protect others from further crimes by the accused; rehabilitate the accused; and provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and**
- (4) The sentences available under these rules as I have instructed you.**

**In applying these factors, you may consider any evidence admitted during both the findings proceeding and the presentencing proceeding of this court-martial.**

#### ***2–6–10. TYPES OF PUNISHMENT***

**MJ: In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe ((IF NO MANDATORY MINIMUM SENTENCE, OR NO MINIMUM**

SENTENCE LIMITATION IN A PLEA AGREEMENT:) or you may adjudge no punishment).

**NOTE: If there is a plea agreement, the MJ must tailor the punishment listed below in accordance with any limitations contained in the plea agreement. See RCM 705(d) and RCM 1006(d)(6).**

(REPRIMAND:) MJ: This court may adjudge a reprimand, being in the nature of a censure. The court shall not specify the terms or wording of any adjudged reprimand.

(REDUCTION:) MJ: This court may adjudge reduction to the lowest (or any intermediate) enlisted 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, for example, E-\_\_\_. (An accused may not be reduced laterally, that is, from corporal to specialist).

**NOTE: In Army and Navy/USMC courts-martial, the appropriate instruction (from the two below) on automatic reduction in enlisted grade should be given. Automatic reductions do not apply in the Air Force and Coast Guard.**

(EFFECT OF ARTICLE 58a—ARMY:) MJ: I also advise you that any sentence of an enlisted service member in a pay grade above E-1 that includes either of the following two punishments will automatically reduce that service member to the lowest enlisted pay grade E-1 by operation of law. The two punishments are: One, a punitive discharge, meaning in this case (a bad-conduct discharge) (or) (a dishonorable discharge); or two, confinement in excess of six months, if the sentence is adjudged in months, or 180 days, if the sentence is adjudged in days. (Accordingly, if your sentence includes either a punitive discharge or confinement in excess of six months or 180 days, the accused will automatically be reduced to E-1.) (Because (a dishonorable discharge) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically be

reduced to E-1.) However, notwithstanding these automatic provisions if you wish to sentence the accused to a reduction, you should explicitly state the reduction as a separate element of the sentence.

(EFFECT OF ARTICLE 58a—NAVY / USMC:) **MJ:** I also advise you that any sentence of an enlisted service member in a pay grade above E-1 that includes either of the following two punishments will automatically reduce that service member to the lowest enlisted pay grade E-1 by operation of law. The two punishments are: One, a punitive discharge, meaning in this case (a bad-conduct discharge) (or) (a dishonorable discharge); or two, confinement in excess of three months, if the sentence is adjudged in months, or 90 days, if the sentence is adjudged in days. (Accordingly, if your sentence includes either a punitive discharge or confinement in excess of three months or 90 days, the accused will automatically be reduced to E-1.) (Because (a dishonorable discharge) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically be reduced to E-1.) However, notwithstanding these automatic provisions if you wish to sentence the accused to a reduction, you should explicitly state the reduction as a separate element of the sentence.

(RESTRICTION:) **MJ:** This court may adjudge restriction to limits for a maximum period not exceeding two 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 will not exempt an accused from any assigned military duty.

(HARD LABOR WITHOUT CONFINEMENT:) **MJ:** This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three 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.

**NOTE: If the maximum authorized confinement is one month, the maximum hard labor without confinement that can be adjudged is 45 days.**



(CONFINEMENT:) MJ: As I have already indicated, this court may sentence the accused to confinement for (life) (a maximum of \_\_\_\_\_(years) (months)). (Unless confinement for life is adjudged,) A sentence to confinement should be adjudged in either full days (or) full months (or full years); fractions (such as one-half or one-third) should not be employed. (So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.)

**NOTE: If confinement for life is an available punishment, instruct further as follows:**

A sentence to confinement for life may be either with eligibility for parole or without eligibility for parole. You are advised that a sentence to “confinement for life without eligibility for parole” means that the accused will not be eligible for parole by any official, but it does not preclude clemency action which might convert the sentence to one which allows parole. A sentence to “confinement for life” or any lesser confinement term, by comparison, means that the accused will have the possibility of earning parole from confinement under such circumstances as are or may be provided by law or regulations. “Parole” is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled on specific conditions and under the possibility of return to incarceration to complete (his) (her) sentence to confinement if the conditions of parole are violated. In determining whether to adjudge “confinement for life without eligibility for parole” or “confinement for life,” if either, you should bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole action by the convening authority or any other authority.

**NOTE: If a mandatory minimum sentence to confinement for life is required for an offense for which the accused is to be sentenced, use the following instructions (instead of the preceding instructions on confinement):**

(CONFINEMENT:) MJ: You are advised that the law imposes a mandatory minimum sentence of confinement for life for the offense(s) of which the accused

has been convicted. Accordingly, the sentence you adjudge must include a term of confinement for life. You have the discretion to determine whether that confinement will be “with eligibility for parole” or “without eligibility for parole.”

A sentence to “confinement for life without eligibility for parole” means that the accused will be confined for the remainder of (his) (her) life, and will not be eligible for parole by any official, but it does not preclude clemency action that might convert the sentence to one that allows parole. A sentence to “confinement for life,” by comparison, means the accused will be confined for the rest of (his) (her) life, but (he) (she) will have the possibility of earning parole from such confinement, under such circumstances as are or may be provided by law or regulations. “Parole” is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility of return to incarceration to complete (his) (her) sentence of confinement if the conditions of parole are violated. In determining whether to adjudge “confinement for life without eligibility for parole” or “confinement for life,” bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating or clemency action by the convening authority or any higher authority nor, in the case of “confinement for life,” in reliance upon future decisions on parole that might be made by appropriate officials.

(PRETRIAL CONFINEMENT CREDIT, IF APPLICABLE:) MJ: In determining an appropriate sentence in this case, you should consider that the accused has spent \_\_\_ days in pretrial confinement. 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 authorities at the correctional facility where the accused is sent to serve (his) (her) confinement, and will be given on a day for day basis.

(FORFEITURES ALL PAY AND ALLOWANCES:) MJ: This court may sentence the accused to forfeit all pay and allowances. 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 (and (his) (her) family) 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. The accused is in pay grade E-\_\_\_ with over \_\_\_ years of service, the total basic pay being \$ \_\_\_\_\_ per month.

**NOTE: As an option, the MJ may, instead of giving the oral instructions that follow, present the court members with a pay chart to use during their deliberations.**

**MJ: If reduced to the grade of E-\_\_\_, the accused's total basic pay would be \$ \_\_\_\_\_.**

**If reduced to the grade of E-\_\_\_, the accused's total basic pay would be \$ \_\_\_\_\_.**

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**If reduced to the grade of E-\_\_\_, the accused's total basic pay would be \$ \_\_\_\_\_.**

**MJ: In the case of an accused who is not confined, forfeitures of pay may not exceed two-thirds of pay per month.**

**(EFFECT OF ARTICLE 58b IN GCM:) MJ: Any sentence which includes (either (1) confinement for more than six months or (2)) any confinement and a (punitive discharge) (Dismissal) will require the accused, by operation of law, to forfeit all pay and allowances during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay and/or pay and allowances, the court should explicitly state the forfeiture as a separate element of the sentence.**

**(EFFECT OF ARTICLE 58b IN SPCM WHEN BCD AUTHORIZED:) MJ: Any sentence which includes (either (1) confinement for more than six months or (2)) any confinement and a bad-conduct discharge will require the accused, by operation of law, to forfeit two-thirds of (his) (her) pay during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay, the court should explicitly state the forfeiture as a separate element of the sentence.**

(EFFECT OF ARTICLE 58b IN SPCM—BCD NOT AUTHORIZED:) **MJ: Any sentence which includes confinement for more than six months will require the accused, by operation of law, to forfeit two-thirds of (his) (her) pay during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay, the court should explicitly state the forfeiture as a separate element of the sentence.**

**NOTE: Automatic forfeitures under Article 58b are not authorized for special courts-martial consisting of a military judge alone referred pursuant to Article 16(c)(2)(A).**

**NOTE: The following instruction may be given in the discretion of the trial judge:**

**(MJ: (The) (trial) (and) (defense) counsel (has) (have) made reference to the availability (or lack thereof) of monetary support for the accused's family member(s). Again, by operation of law, if you adjudge:**

**(FOR GCM:) (either (1) confinement for more than six months, or (2)) any confinement and a (punitive discharge) (Dismissal), then the accused will forfeit all pay and allowances due (him) (her) during any period of confinement.**

**(FOR SPCM WHEN BCD AUTHORIZED:) (either (1) confinement for more than six months, or (2)) any confinement and a bad-conduct discharge, then the accused will forfeit two-thirds of all pay due (him) (her) during any period of confinement.**

**(FOR SPCM—BCD NOT AUTHORIZED:) confinement for more than six months, then the accused will forfeit all pay due (him) (her) during any period of confinement. However, when the accused has dependents, the convening authority may direct that any or all of the forfeiture of pay which the accused otherwise by law would be required to forfeit be paid to the accused's dependents for a period not to exceed six months. This action by the convening authority is purely discretionary. You should not rely upon the convening authority taking this action when considering an appropriate sentence in this case.)**

**(FORFEITURES 2/3DS ONLY:) MJ: This court may sentence the accused to forfeit up to two-thirds pay per month for a period of (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 (and (his) (her) family) of such a loss of income. 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.

The accused is in pay grade E-\_\_\_ with over \_\_\_ years of service, the total basic pay being \$ \_\_\_\_\_ per month. If retained in that grade, the maximum forfeiture would be \$ \_\_\_\_\_ pay per month for (12) (\_\_\_) months.

If reduced to the grade of E-\_\_\_, the maximum forfeiture would be \$\_\_\_\_\_ pay per month for (12) (\_\_\_) months.

If reduced to the grade of E-\_\_\_, the maximum forfeiture would be \$\_\_\_\_\_ pay per month for (12) (\_\_\_) months.

If reduced to the grade of E-\_\_\_, the maximum forfeiture would be \$\_\_\_\_\_ pay per month for (12) (\_\_\_) months.

If reduced to the grade of E-\_\_\_, the maximum forfeiture would be \$\_\_\_\_\_ pay per month for (12) (\_\_\_) months.

If reduced to the grade of E-\_\_\_, the maximum forfeiture would be \$\_\_\_\_\_ pay per month for (12) (\_\_\_) months.

(FINE—GENERAL COURT-MARTIAL:) **MJ:** This court may adjudge a fine either in lieu of, or in addition to, forfeitures. A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. (In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offense(s) in this case.)

(FINE—SPECIAL COURT-MARTIAL:) **MJ:** This court may adjudge a fine, either in lieu of, or in addition to, forfeitures. If you should adjudge a fine, the amount of the fine, along with any forfeitures that you adjudge, may not exceed the total amount of forfeitures which may be adjudged, that is, forfeiture of two-thirds pay per month for (six) (\_\_\_) months(s). A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of the fine. (In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed \_\_\_\_\_ (month(s)) (year).)

**NOTE: Punitive discharges. A DD can be adjudged against noncommissioned warrant officers and enlisted persons only. A BCD may be adjudged only against enlisted persons. A Dismissal may be adjudged only against commissioned officers, commissioned warrant officers, and cadets.**

(PUNITIVE DISCHARGE:) **MJ:** You are advised that the stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that (he) (she) has served honorably. A punitive discharge will affect an accused's future with regard to (his) (her) legal rights, economic opportunities, and social acceptability.

**NOTE: Effect of punitive discharge on retirement benefits. The following instruction must be given, if requested and the evidence shows any of the following circumstances exist: (1) The accused has sufficient time in service to retire and thus receive retirement benefits; (2) In the case of an enlisted accused, the accused has sufficient time left on his current term of enlistment to retire without having to reenlist; (3) In the case of an accused who is a commissioned or warrant officer, it is reasonable that the accused would be permitted to retire but for a punitive discharge. In other cases, and especially if the members inquire, the military judge should consider the views of counsel in deciding whether the following instruction, appropriately tailored, should be given or whether the instruction would suggest an improper speculation upon the effect of administrative or collateral consequences of the**

**sentence. A request for an instruction regarding the effect of a punitive discharge on retirement benefits should be liberally granted and denied only in cases where there is no evidentiary predicate for the instruction or the possibility of retirement is so remote as to make it irrelevant to determining an appropriate sentence. The military judge should have counsel present evidence at an Article 39(a) session or otherwise to determine the probability of whether the accused will reach retirement or eligibility for early retirement. Any instruction should be appropriately tailored to the facts of the case with the assistance of counsel, and should include the below instruction. Even if the instruction is not required, the military judge nonetheless should consider giving the instruction and allowing the members to consider the matter. United States v. Boyd, 55 MJ 217 (CAAF 2001); United States v. Luster, 55 MJ 67 (CAAF 2001); United States v. Greaves, 46 MJ 133 (CAAF 1997); United States v. Sumrall, 45 MJ 207 (CAAF 1996). When the below instruction is appropriate, evidence of the future value of retirement pay the accused may lose if punitively discharged is generally admissible. United States v. Becker, 46 MJ 141 (CAAF 1997).**

**(In addition, a punitive discharge terminates the accused's status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits.)**

**NOTE: Legal and factual obstacles to retirement. If the above instruction is appropriate, evidence of the legal and factual obstacles to retirement faced by the particular accused is admissible. If such evidence is presented, the below instruction should be given. United States v. Boyd, 55 MJ 217 (CAAF 2001).**

**(On the issue of the possibility of becoming a military retiree and receiving retired pay and benefits, you should consider the evidence submitted on the legal and factual obstacles to retirement faced by the accused.)**

**(DISHONORABLE DISCHARGE ALLOWED:) MJ: (This court may adjudge either a dishonorable discharge or a bad-conduct discharge.) (The law imposes a mandatory minimum sentence of a dishonorable discharge for the offense(s) of \_\_\_\_\_.) Such a discharge may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. A dishonorable discharge should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of 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 a military or civil nature.)**

**(ONLY BAD-CONDUCT DISCHARGE ALLOWED:) MJ: This court may adjudge a bad-conduct discharge. Such a discharge may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. A bad-conduct discharge is a severe punishment 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 a military or civil nature.)**

**(DISMISSAL:) MJ: (This court may adjudge a dismissal.) (The law imposes a mandatory minimum sentence of a dismissal for the offense(s) of \_\_\_\_\_.) You are advised that a sentence to a dismissal of a (commissioned officer) (cadet) is, in general, the equivalent of a dishonorable discharge of a noncommissioned officer, a warrant officer who is not commissioned, or an enlisted service member. A dismissal may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. It should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. Dismissal, however, is the only type of discharge the court is authorized to adjudge in this case.**

**(IF AUTHORIZED) (NO PUNISHMENT:) MJ: Finally, if you wish, this court may sentence the accused to no punishment.**

### ***2-6-11. OTHER INSTRUCTIONS***

**MJ: In selecting a sentence, you should consider all matters in extenuation, mitigation, and aggravation (, whether introduced before or after findings). (Thus,**



**all the evidence you have heard in this case is relevant on the subject of sentencing).**

**MJ: You should consider evidence admitted as to the nature of the offense(s) of which the accused stands convicted, plus:**

- 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 experienced by the accused.**
- 7. The financial difficulties experienced by the accused.**
- 8. The accused's (mental condition) (mental impairment) (behavior disorder) (personality 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) (NCOER's) (\_\_\_\_\_) indicate: \_\_\_\_\_.**
- 15. That the accused is entitled to wear the following medals and awards:  
\_\_\_\_\_.**
- 16. Lack of previous convictions or Article 15 punishment.**
- 17. Past performance and conduct in the Army as reflected by \_\_\_\_\_.**

18. Character evidence—testimony of \_\_\_\_\_.
19. (Accused's testimony \_\_\_\_\_.)
20. (The accused's expression of his desire to remain in the service.)
21. (That the accused has indicated that (he/she) does not desire a (BCD) (DD) (Dismissal).)
22. (Testimony of \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.)
23. Pretrial punishment experienced by the accused.)

**MJ: Further you should consider:**

(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.)

(Period of hospitalization and convalescence required for victim.)

**(ACCUSED NOT TESTIFYING:) MJ: The court will not draw any adverse inference from the fact that the accused did not elect to testify.**

**(ACCUSED AND/OR VICTIM NOT TESTIFYING UNDER OATH:) MJ: (The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. 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.)**

**(An unsworn statement is (also) an authorized means for a crime victim to bring relevant information to the attention of the court.)**

A person making an unsworn statement cannot be cross-examined by the prosecution or defense, or interrogated by court members or me. However, evidence may be offered to rebut statements of fact contained in unsworn statements. 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, 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 use your common sense and your knowledge of human nature and the ways of the world.

**NOTE: SCOPE OF ACCUSED'S UNSWORN STATEMENT. The scope of an accused's unsworn statement is broad. US v. Grill, 48 MJ 131 (CAAF 1998); US v. Jeffrey, 48 MJ 229 (CAAF 1998); US v. Britt, 48 MJ 233 (CAAF 1998). If the accused addresses collateral consequences (the treatment or sentence of others, command options, sex offender registration, or other matters) that would be inadmissible but for their being presented in an unsworn statement, the military judge can use the instruction below to "put the information in proper context by effectively advising the members to ignore it." US v. Talkington, 73 MJ 212 (CAAF 2014) (sex offender registration), citing US v. Barrier, 61 MJ 482 (CAAF 2005). In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused's unsworn statement.**

**MJ: The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (\_\_\_\_\_).** An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted. (Under DOD Instructions, when convicted of certain offenses, including the offense(s) here, the accused must register as a sex offender with the appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration is required in all 50 states; though requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable.)

**It is not your duty (to determine relative blameworthiness of (and whether appropriate disciplinary action has been taken against) others who might have committed an offense, whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused's chain of command or other authorities) (or) (to attempt to predict sex offender registration requirements, or the consequences thereof) (\_\_\_\_\_)).**

**While the accused is permitted to address these matters in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based upon the offense(s) for which (he) (she) has been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends upon (actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases)) (or) (possible requirements of sex offender registration, and the consequences thereof, at certain locations in the future).**

**(PLEA OF GUILTY:) MJ: 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 (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.**

**(MENDACITY:) MJ: The evidence presented (and the sentencing argument of trial counsel) raised the question of whether the accused testified falsely before this court 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 instructed that you may consider this issue only within certain constraints. First, this factor should play no role 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, meaning important, before they can be considered in your deliberations.**

Finally, you may consider this factor 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.

**NOTE: When evidence of rehabilitative potential, defense retention evidence, or government rebuttal to defense retention evidence is introduced, the military judge should consider the following instructions, tailored to the specific evidence. US v. Eslinger, 70 MJ 193 (CAAF 2011); US v. Griggs, 61 MJ 402 (CAAF 2005).**

(IF REHABILITATIVE POTENTIAL EVIDENCE IS PRESENTED:) **MJ: You have heard testimony from (name witness(es)) indicating an opinion regarding the accused’s rehabilitative potential. “Rehabilitative potential” refers to the accused’s potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society. You may consider this evidence in determining an appropriate sentence for the accused.**

(IF DEFENSE RETENTION EVIDENCE IS PRESENTED:) **MJ: You have (also) heard testimony from (name witness(es)) indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (\_\_\_\_\_). The testimony of a witness indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (\_\_\_\_\_) is a matter in mitigation that you should consider in determining an appropriate sentence in this case.**

(IF THERE IS REBUTTAL TO DEFENSE RETENTION EVIDENCE:) **MJ: In response to this evidence offered by the defense, you have heard testimony from (name witness(es)) indicating that the witness does not (desire to continue to serve with the accused) (desire to deploy with the accused) (\_\_\_\_\_). This evidence can only be considered for its tendency, if any, to rebut the defense evidence on this issue.**

(CONCLUDING INSTRUCTIONS FOR ALL REHABILITATIVE POTENTIAL/RETENTION EVIDENCE:) **MJ: You may not consider testimony about (an accused’s rehabilitative potential) (and) (whether a witness does (or does not)**

(desire to continue to serve with the accused) (desire to deploy with the accused) (\_\_\_\_)) as a recommendation regarding the appropriateness of a punitive discharge or any other specific sentence in this case, because no witness may suggest a specific punishment or sentence. (This rule does not apply to (statements) (testimony) by the accused regarding personal requests he/she may make in relation to specific punishments.). Whether the accused should receive a punitive discharge or any other authorized legal punishment is a matter for you alone to decide in the exercise of your independent discretion based on your consideration of all the evidence.

**NOTE: Pretrial punishment evidence introduced for purposes of mitigation. An accused may introduce evidence of pretrial punishment in mitigation, even though the judge has already awarded specific credit for the Article 13 violation as a matter of law. US v. Carter, 74 MJ 204 (CAAF 2015). If so, the following instruction is appropriate.**

(PRETRIAL PUNISHMENT EVIDENCE OFFERED IN MITIGATION:) **MJ:** In determining an appropriate sentence, you should consider evidence presented that the accused was illegally punished for (this) (these) offense(s) prior to trial in violation of Article 13, UCMJ. You should also consider that I have awarded the accused \_\_\_ days of credit for this illegal punishment (in addition to the \_\_\_ days of credit for pretrial confinement previously referred to), which will be applied against any sentence to confinement you may adjudge. You should consider evidence of this pretrial punishment, as well as the credit I have awarded for it, in deciding an appropriate sentence in this case.

(ARGUMENT FOR A SPECIFIC SENTENCE:) **MJ:** During argument, trial counsel recommended that you consider a specific sentence in this case. You are advised that the arguments of the trial counsel and (her) (his) recommendations are only (her) (his) individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel. In contrast, you are advised that the defense counsel is speaking on behalf of the accused.

## ***2-6-12. CONCLUDING SENTENCING INSTRUCTIONS***

**MJ: When you close to deliberate and vote, only the members will be present. (Alternate members will not participate in deliberation or voting.) I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your deliberations 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. You do that by writing out on a slip of paper a complete sentence. (IF MANDATORY MINIMUM SENTENCE, OR A MINIMUM SENTENCE LIMITATION IN A PLEA AGREEMENT: Once again, I advise you that any proposed sentence must include at least (a Dishonorable Discharge) (a Dismissal) (confinement for life) (\_\_\_\_\_).)**

**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.**

**(If charges were referred prior to 1 January 2019:) 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 for life without eligibility for parole, or confinement for life, or) confinement in excess of ten years requires the concurrence of three-fourths or \_\_\_ members.)**

(If charges were referred on or after 1 January 2019:) **Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is three-fourths or \_\_\_ members.**

**Table 2-4**

**Votes Needed for Sentencing**

<b><u>No. of Members</u></b>	<b><u>Two-thirds</u></b>	<b><u>Three-fourths</u></b>
<b><u>3</u></b>	<b><u>2</u></b>	<b><u>*</u></b>
<b><u>4</u></b>	<b><u>3</u></b>	<b><u>3</u></b>
<b><u>5</u></b>	<b><u>4</u></b>	<b><u>4</u></b>
<b><u>6</u></b>	<b><u>4</u></b>	<b><u>5</u></b>
<b><u>7</u></b>	<b><u>5</u></b>	<b><u>6</u></b>
<b><u>8</u></b>	<b><u>6</u></b>	<b><u>6</u></b>
<b><u>9</u></b>	<b><u>6</u></b>	<b><u>7</u></b>
<b><u>10</u></b>	<b><u>7</u></b>	<b><u>8</u></b>
<b><u>11</u></b>	<b><u>8</u></b>	<b><u>9</u></b>
<b><u>12</u></b>	<b><u>8</u></b>	<b><u>9</u></b>

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 may then repeat the process of discussion, proposal of sentences, and voting. 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. If after you determine your sentence, any member suggests you reconsider the sentence, open the court and the president should announce that



reconsideration has been proposed without reference to whether the proposed rebalot concerns increasing or decreasing the sentence. I will then give you specific instructions on the procedure for reconsideration.

**NOTE: See paragraph 2-7-19, RECONSIDERATION INSTRUCTION (SENTENCE).**

**MJ: As an aid in putting the sentence in proper form, the court may use the Sentence Worksheet marked Appellate Exhibit \_\_\_\_ which the (Trial Counsel) (Bailiff) may now hand to the president.**

TC/BAILIFF: (Complies.)

**MJ: Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial or any other publication or writing not properly admitted or received during this trial. These instructions must not be interpreted as indicating an opinion as to the sentence which should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. The only permissible punishments are those listed on the Sentence Worksheet. When the court returns, I will examine the Sentence Worksheet.**

**MJ: Do counsel object to the instructions as given or request other instructions?**

TC/DC: (Respond.)

**MJ: Does any member of the court have any questions?**

MBRS: (Respond.)

**MJ: (COL) (\_\_\_) \_\_\_\_\_, if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?**

PRES: (Responds.)

**MJ: (Trial Counsel) (Bailiff), please give the president Prosecution Exhibit(s) \_\_\_\_ (and Defense Exhibit(s) \_\_\_\_).**

TC/BAILIFF: (Complies.)

**MJ: (COL) (\_\_\_) \_\_\_\_\_, please do not mark on any of the exhibits, except the Sentence Worksheet, and please bring all the exhibits with you when you return to announce the sentence.**

**NOTE: Prior to closing the court for deliberations, the MJ must instruct the alternate members, if any, that they will not be participating in deliberations, unless later needed, and that they must not discuss the case with anyone. The MJ may allow the alternate members to return to their duties or homes, subject to recall if needed. Requiring alternate members to leave the courthouse may be the prudent course of action in order to avoid contact with the parties and witnesses during deliberations.**

**MJ: The court is closed.**

***2-6-13. POST-TRIAL AND APPELLATE RIGHTS ADVICE***

**MJ: This Article 39(a) session is called to order.**

TC: All parties are present except the court members.

**MJ: Defense Counsel, have you advised the accused orally and in writing of (his) (her) post-trial and appellate rights including the rights contained in Rule for Court-Martial 1010?**

DC: (Responds.)

**MJ: Does the accused have a copy in front of (him) (her)?**

DC: (Responds.)

**MJ: \_\_\_\_\_, I have Appellate Exhibit \_\_, an appellate rights advice form. Is that your signature on this form?**

ACC: (Responds.)

**MJ: Defense Counsel, is that your signature on Appellate Exhibit \_\_\_?**

DC: (Responds.)

**MJ: \_\_\_\_\_, did your defense counsel explain your post-trial and appellate rights to you?**

ACC: (Responds.)

**MJ: \_\_\_\_\_, do you have any questions about your post-trial and appellate rights?**

ACC: (Responds.)

**NOTE: If more than one DC, the MJ should determine which counsel will be responsible for post-trial actions.**

**MJ: Which counsel will be responsible for post-trial actions in this case?**

DC: (Responds.)

**MJ: This court is in recess.**

### ***2-6-14. ANNOUNCEMENT OF SENTENCE***

**MJ: The court is called to order.**

TC: All parties to include the court members are present as before.

**MJ: \_\_\_\_\_, have you reached a sentence?**

PRES: (Responds.)

**NOTE: If the president indicates that the members are unable to agree on a sentence, the MJ should give paragraph 2-7-18, the "Hung Jury" instruction.**

**MJ: \_\_\_\_\_, is the sentence reflected on the Sentence Worksheet?**

PRES: (Responds.)

**MJ: \_\_\_\_\_, please fold the Sentence Worksheet and give it to the (Trial Counsel) (Bailiff) so that I can examine it.**

TC/BAILIFF: (Complies.)

**NOTE: If charges were referred prior to 1 January 2019, proceed as stated below. The president will announce the sentence. If charges were referred on or after 1 January 2019, skip to the next NOTE.**

**MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (\_\_\_\_\_). Bailiff, you may return it to the president.**

**BAILIFF: (Complies.)**

**MJ: Accused and Defense Counsel, please rise.**

**MJ: (\_\_\_\_\_), please announce the sentence.**

**PRES: (Complies.)**

**MJ: Please be seated. (Trial Counsel) (Bailiff), please retrieve the exhibit(s) from the president.**

**TC/BAILIFF: (Complies.)**

**NOTE: If charges were referred on or after 1 January 2019, proceed as stated below. The MJ will announce the sentence adjudged by the members.**

**MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (\_\_\_\_\_).**

**MJ: Accused and Defense Counsel, please rise. \_\_\_\_\_, this court sentences you to: \_\_\_\_\_.**

**MJ: Please be seated. (Trial Counsel) (Bailiff), please retrieve the exhibit(s) from the president.**

**TC/BAILIFF: (Complies.)**

**NOTE: In all cases, continue below.**

**MJ: Members of the Court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may, of course, discuss your personal observations in the**

courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused. Counsel and the accused will remain.

**MJ:** The members have withdrawn from the courtroom. All other parties are present.

(PRETRIAL CONFINEMENT CREDIT:) **MJ:** The accused will be credited with \_\_\_\_ days of pretrial confinement against the accused's term of confinement.

**NOTE:** If a pretrial agreement exists continue below. The military judge must ensure that all parties have the same understanding concerning the operation of the quantum portion on the sentence of the court. Otherwise, the plea may be improvident. If no pretrial agreement exists, see next NOTE below.

**MJ:** \_\_\_\_\_, we are now going to discuss the operation of your pretrial agreement on the sentence of the court.

**MJ:** It is my understanding that the effect of the pretrial agreement on the sentence is that the convening authority may approve \_\_\_\_\_. Do you agree with that interpretation?

ACC: (Respond.)

**MJ:** Do counsel also agree with that interpretation?

TC/DC: (Respond.)

**NOTE:** In all cases, continue below.

**MJ:** Are there other matters to take up before this court adjourns?

TC/DC: (Respond.)

**MJ:** This court is adjourned.

**Section VII**  
**Miscellaneous Procedural Guides**

**2-7-1. WAIVER OF STATUTORY WAITING PERIOD**

**MJ:** \_\_\_\_\_, you have a right to a delay of (three) (five) days between the day charges are served on you and the day of trial, not counting the day of service and the day of trial. Unless you consent, you may not be tried on these charges until \_\_\_\_\_. Do you understand this right?

ACC: (Responds.)

**MJ:** Have you discussed this with your defense counsel?

ACC: (Responds.)

**MJ:** Do you consent to the trial proceeding today?

ACC: (Responds.)

**MJ:** Has anyone forced you to consent to proceeding today?

ACC: (Responds.)

**MJ:** Trial Counsel, you may proceed.

## **2-7-2. PRO SE REPRESENTATION**

**MJ: \_\_\_\_\_, you have indicated that you wish to represent yourself at this trial. If I permit you to represent yourself, then you will be expected to conduct your defense just as if you were a qualified lawyer. Do you understand that?**

ACC: (Responds.)

**MJ: Have you ever studied law or had any legal training?**

ACC: (Responds.)

**MJ: What education do you have? (Do you understand English?)**

ACC: (Responds.)

**MJ: Do you suffer from any physical or mental ailments?**

ACC: (Responds.)

**MJ: Are you presently taking any medication?**

ACC: (Responds.)

**MJ: Have you ever represented yourself or someone else in a criminal trial?**

ACC: (Responds.)

**MJ: Do you know with what offenses you are charged?**

ACC: (Responds.)

**MJ: Are you familiar with the MRE?**

ACC: (Responds.)

**MJ: Do you realize that the MRE govern what evidence may be introduced and those rules must be followed even though you are representing yourself?**

ACC: (Responds.)

**MJ: Let me give you an example of what could occur at trial. If the trial counsel offers some evidence that normally would not be admissible, a trained lawyer would object to the evidence and the evidence would be kept out of the trial. If you are acting as your own lawyer and you do not recognize that the evidence is**

**inadmissible and fail to object, then the evidence will come in. Do you understand that?**

ACC: (Responds.)

**MJ: Are you familiar with the Rules for Courts-Martial?**

ACC: (Responds.)

**MJ: Do you realize the Rules for Courts-Martial govern how this case will be tried?**

ACC: (Responds.)

**MJ: Do you understand that you would be better off with a trained lawyer who would know the procedures, the rules of evidence, the Rules for Courts-Martial, and the rules of law?**

ACC: (Responds.)

**MJ: Also, when you represent yourself, you are personally involved in the case and it is very difficult for you to have an objective view of the proceedings. In fact, sometimes, you may become so involved that you harm yourself by what you say and do in court. Whereas, a lawyer whose duty is to represent you can act more objectively, can follow correct procedures, and is less likely to do you harm and is more likely to do you good. Do you understand this?**

ACC: (Responds.)

**MJ: As a general rule, acting as your own lawyer is not a good policy. Even if you are legally trained, it is not a good idea. If you are not legally trained, it is even worse. Do you understand that?**

ACC: (Responds.)

**MJ: Do you realize that representing yourself is not a matter of merely telling your story? And if you testify, you cannot just give a statement. You must ask yourself questions and then give answers, according to the MRE and the Rules for Courts-Martial?**

ACC: (Responds.)



**MJ: Have you discussed the idea of representing yourself with your detailed defense counsel?**

ACC: (Responds.)

**MJ: Do you realize that the maximum punishment in this case if you are convicted of all charges and specifications is \_\_\_\_\_?**

ACC: (Responds.)

**MJ: Have you tried to talk to any other lawyer about your case?**

ACC: (Responds.)

**MJ: Would you like to talk to another lawyer about this?**

ACC: (Responds.)

**MJ: Have you understood everything I have said to you?**

ACC: (Responds.)

**MJ: Let me advise you further that I think it is unwise for you to represent yourself. I strongly urge that you not represent yourself. Knowing all that I have told you, do you still want to act as your own lawyer?**

ACC: (Responds.)

**NOTE: If accused persists, continue.**

**MJ: Is this decision made as a result of any threats or force against you? Is it a decision you make of your own free will?**

ACC: (Responds.)

**MJ: Even though you desire to represent yourself, I recommend that you have counsel sit with you at the counsel table and be available to assist you. Do you want counsel to remain at counsel table?**

ACC: (Responds.)

**NOTE: RCM 506(d) requires that the MJ be satisfied that the accused is mentally competent to make the decision and understand the disadvantages of self-representation. The MJ should make factual findings regarding the accused's ability to appreciate the nature of a**

**criminal trial; its possible consequences; and the ability of the accused to communicate, to express himself or herself, and whether the decision is a voluntary one. Once the MJ is satisfied that the accused may proceed pro se, the MJ should inform the accused that:**

**MJ: I am going to have your detailed counsel stay (either at counsel table, if the accused elected, or in the spectator section) throughout your trial and be available. Counsel may provide you with advice and procedural instructions. Counsel will not do anything without your agreement; however, (she) (he) is available to act as your lawyer or assist you at any time. If at any time during the trial, you feel that you could benefit from advice and you want to take a break to talk to counsel about something, let me know, and I will permit it. Do you understand this?**

**ACC: (Responds.)**

**REFERENCES: [United States v. Mix](#), 35 MJ 283 (CMA 1992).**

**2-7-3. WAIVER OF CONFLICT-FREE COUNSEL (DC REPRESENTING MULTIPLE ACCUSED)**

**MJ: \_\_\_\_\_, do you understand that you have a constitutional right to be represented by counsel who has undivided loyalty to you and your case?**

ACC: (Responds.)

**MJ: 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?**

ACC: (Responds.)

**MJ: For a lawyer to represent more than one client concerning a matter arising out of the same incident, you must consent to that representation. Do you understand that?**

ACC: (Responds.)

**MJ: Have you discussed this matter with your defense counsel?**

ACC: (Responds.)

**MJ: After discussing this matter with (her) (him), did you voluntarily decide for yourself that you would like to have (her) (him) still represent you?**

ACC: (Responds.)

**MJ: 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, that is, for example, the defense counsel may be put in a position of arguing that one client is more at fault than another client?**

ACC: (Responds.)

**MJ: Understanding that even if an actual conflict of interest does not presently exist between your defense counsel representing you and (her) (his) other client(s), but that one could possibly develop, do you still desire to be represented by \_\_\_\_\_ ?**

ACC: (Responds.)

**MJ: Do you understand that you are entitled to be represented by another lawyer where no potential conflict of interest would ever arise?**

ACC: (Responds.)

**MJ: Knowing this, please tell me why you want to give up your right to conflict-free counsel and be represented by \_\_\_\_\_?**

ACC: (Responds.)

**MJ: Do you have any questions about your right to conflict-free counsel?**

ACC: (Responds.)

**MJ: 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.**

**REFERENCES:** [United States v. Smith, 36 MJ 455 \(CMA 1993\)](#); [United States v. Hurtt, 22 MJ 134 \(CMA 1986\)](#); [United States v. Breese, 11 MJ 17 \(CMA 1981\)](#).

**2-7-4. PRETRIAL / PLEA AGREEMENT: DISMISSAL OF CHARGE CLAUSE**

**MJ: Your (pretrial) (plea) agreement indicates that the convening authority has directed the trial counsel to move to dismiss (charge(s) \_\_\_\_ and (its) (their) specification(s) after I accept your plea of guilty. In other words, if I accept your plea of guilty, the government will not prosecute the remaining charge(s) provided your plea of guilty remains in effect until the announcement of sentence, at which time I would grant the motion. Do you understand that?**

ACC: (Responds.)

**MJ: However, if for some reason your plea of guilty at any time becomes unacceptable, the trial counsel would be free to proceed on (all) (The) (Additional) Charge(s) and (its) (their) specification(s). Do you understand that?**

ACC: (Responds.)

**2-7-5. PRETRIAL / PLEA AGREEMENT: TESTIFY IN ANOTHER CASE**

**MJ: In your (pretrial) (plea) agreement, you have offered to testify truthfully as to the facts and circumstances of this case, as you know them, in the trial of United States v. \_\_\_\_\_. If you are called as a witness in that case and either refuse to testify or testify untruthfully, the convening authority will no longer be bound by the sentence limitations contained in Appellate Exhibit \_\_\_\_\_. Do you understand that?**

ACC: (Responds.)

**2-7-6. PRETRIAL / PLEA AGREEMENT: OPERATION OF ARTICLE 58a ON A  
SUSPENDED SENTENCE**

**MJ: Did you realize at the time you made the agreement, and do you understand now that, under the provisions of Article 58a, UCMJ, if a (dishonorable discharge) (bad-conduct discharge) (confinement for 6 months or 180 days) is adjudged, but suspended by the convening authority as provided in your agreement, you will automatically be reduced to the lowest enlisted pay grade, E-1?**

ACC: (Responds.)

***2-7-7. PRETRIAL/PLEA AGREEMENT: SUSPENSION WITHOUT DEFERMENT***

**MJ: Your (pretrial) (plea) agreement provides that the convening authority will suspend for \_\_\_\_ (years) (months) any sentence to confinement which is adjudged. However, the agreement makes no reference to deferment. Did you realize at the time you made the agreement, and do you understand now that the effect of this provision is that you will begin serving any sentence to confinement when adjudged and the convening authority will suspend the (unexecuted) (unserved) portion of any confinement when (she) (he) takes action in your case and you will then be released from confinement?**

**ACC: (Responds.)**



**2-7-8. PRETRIAL / PLEA AGREEMENT: ARTICLE 32 WAIVER**

**Use this version for Article 32 preliminary hearings waived on or after 26 December 2014.**

**MJ: \_\_\_\_\_, your (pretrial) (plea) agreement states that you agreed to waive the Article 32 preliminary hearing. Have you discussed what an Article 32 preliminary hearing is with your defense counsel?**

**ACC: (Responds.)**

**MJ: Do you understand that no charge against you may be tried at a general court-martial without first having an Article 32 preliminary hearing concerning that charge unless you agree otherwise?**

**ACC: (Responds.) MJ: Do you understand that you have the right to be present at the Article 32 preliminary hearing and to be represented by counsel at the preliminary hearing?**

**ACC: (Responds.)**

**MJ: Do you understand that you could cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing, for the preliminary hearing officer to consider in arriving at his or her recommendations?**

**ACC: (Responds.)**

**MJ: Do you understand that you could have provided sworn or unsworn testimony at the Article 32 preliminary hearing?**

**ACC: (Responds.)**

**(IF THE WAIVER OCCURRED BEFORE 1 JANUARY 2019:) MJ: Do you understand that the purpose of the Article 32 preliminary hearing is to consider the form of the charges, to determine whether there is probable cause to believe you committed an offense, to determine whether the convening authority has court-martial jurisdiction over the offense and you, and to recommend the disposition that should be made of the case?**

**(IF THE WAIVER OCCURRED ON OR AFTER 1 JANUARY 2019:) MJ: Do you understand that the purpose of the Article 32 preliminary hearing is to determine whether each specification alleges an offense, whether there is probable cause to believe you committed an offense, whether the convening authority has court-martial jurisdiction over the offense and you, and to recommend the disposition that should be made of the case?**

ACC: (Responds.)

**MJ: Do you understand that, if legally permissible, one possible strategy for you and your counsel at the preliminary hearing could have been an attempt to have the Article 32 preliminary hearing officer recommend disposition of the charge(s) other than trial by general court-martial?**

ACC: (Responds.)

**MJ: Did you know about all these rights that you would have at the Article 32 preliminary hearing at the time you elected to give up the right to have the Article 32 preliminary hearing?**

ACC: (Responds.)

**MJ: Do you freely and willingly agree to proceed to trial by general court-martial without an Article 32 preliminary hearing occurring in your case?**

ACC: (Responds.)

**MJ: Defense Counsel, if the accused's plea of guilty is determined to be improvident will the accused be afforded an Article 32 preliminary hearing or is it permanently waived?**

DC: (Responds.)

**MJ: Trial Counsel, do you agree?**

TC: (Responds.)

**2-7-9. PRETRIAL / PLEA AGREEMENT: WAIVER OF MEMBERS**

**MJ: Your (pretrial) (plea) agreement states that you agree to waive, that is give up, trial by members and to select trial by military judge alone.**

ACC: (Responds.)

**MJ: Do you understand the difference between trial before members and trial before military judge alone, as I explained to you earlier?**

ACC: (Responds.)

**MJ: Did you understand the difference between the various types of trials when you signed your (pretrial) (plea) agreement?**

ACC: (Responds.)

**MJ: Did you understand that you were giving up trial with members when you signed your (pretrial) (plea) agreement?**

ACC: (Responds.)

**MJ: Was that waiver a free and voluntary act on your part?**

ACC: (Responds.)

**2-7-10. PRETRIAL / PLEA AGREEMENT: WAIVER OF MOTIONS**

**NOTE 1: Waiver of motions in a pretrial agreement or plea agreement. RCM 705 prohibits any term in a pretrial agreement or plea agreement that is not voluntary or deprives the accused of the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights. Thus, a term to “waive all motions” is overbroad and cannot be enforced. However, if the agreement includes a term to waive a particular motion not precluded by RCM 705 or a term to “waive all waiveable motions” or words to that effect, proceed along the lines of the instruction below. See paragraph 2-7-11, WAIVER OF MOTION FOR ILLEGAL PRETRIAL PUNISHMENT (ARTICLE 13) SENTENCING CREDIT.**

**MJ: Defense Counsel, what motions are you not making pursuant to this provision of the (pretrial) (plea) agreement?**

DC: (Responds.)

**MJ: (To accused) Your (pretrial) (plea) agreement states that you waive, or give up, the right to make a motion regarding (state the specific motion(s) waived by the agreement). I advise you that certain motions are waived, or given up, if your defense counsel does not make the motion prior to entering your plea. Some motions, however, such as motions to dismiss for a lack of jurisdiction, for example, can never be given up. Do you understand that this term of your (pretrial) (plea) agreement means that you give up the right to make (this) (any) motion which by law is given up when you plead guilty?**

ACC: (Responds.)

**MJ: In particular, do you understand that this term of your agreement may preclude this court or any appellate court from having the opportunity to determine if you are entitled to any relief based upon (this) (these) motion(s)?**

ACC: (Responds.)

**MJ: When you elected to give up the right to litigate (this) (these) motion(s), did your defense counsel explain this term of your agreement and the consequences to you?**

ACC: (Responds.)

**MJ: Did anyone force you to enter into this term of your agreement?**

ACC: (Responds.)

**MJ: Defense Counsel, which side originated the waiver of motion(s) provision?**

DC: (Responds.)

**NOTE 2: Unlawful Command Influence. The government may not require waiver of an unlawful command influence motion to obtain a pretrial agreement or plea agreement. The accused, however, may offer to waive an unlawful command influence motion if the unlawful command influence involves issues occurring only during the accusatory phase of the court-martial (i.e., during preferral, forwarding, and referral of charges), as opposed to the adjudicative process (i.e., which includes interference with witnesses, judges, members, and counsel). See United States v. Weasler, 43 MJ 15 (CAAF 1995). If a waiver of an unlawful command influence motion originated with the prosecution, the judge should declare the term void as a matter of public policy. For other motions not falling within the prohibited terms of RCM 705, regardless of their origination, and for unlawful command influence motions originated by the defense which involve issues only during the accusatory phase, continue as set forth below:**

**MJ: (to accused) (Although the government originated this term of your (pretrial) (plea) agreement,) Did you freely and voluntarily agree to this term of your agreement in order to receive what you believed to be a beneficial agreement?**

ACC: (Responds.)

**MJ: Defense Counsel, what do you believe to be the factual basis of any motions covered by this term of the (pretrial) (plea) agreement?**

DC: (Responds.)

**MJ: (To the accused) Do you understand that if (this) (these) motion(s) were made and granted by me, then a possible ruling could have been that (all charges against you would be dismissed) (the statement you gave to (your command) (law enforcement authorities) (\_\_\_\_\_) could not be used as evidence against you at this court-martial) (\_\_\_\_\_)?**

ACC: (Responds.)

**MJ: (To the accused) Knowing what your defense counsel and I have told you, do you want to give up making (this) (these) motion(s) in order to get the benefit of your (pretrial) (plea) agreement?**

ACC: (Responds.)

**MJ: Do you have any questions about this provision of your (pretrial) (plea) agreement?**

ACC: (Responds.)

***2-7-11. PRETRIAL / PLEA AGREEMENT: WAIVER OF MOTION FOR ILLEGAL PRETRIAL PUNISHMENT (ARTICLE 13) SENTENCING CREDIT***

**MJ: Your (pretrial) (plea) agreement indicates that you agree to waive, or give up, your right to make a motion about whether you have suffered from illegal pretrial punishment. Article 13 of the Uniform Code of Military Justice essentially prohibits anyone from imposing pretrial punishment upon you except for the minimum amount of restraint necessary to ensure your presence for trial. In addition, your chain of command may not publicly humiliate or degrade you as a form of punishment. Do you understand what I have said?**

ACC: (Responds.)

**MJ: What was the nature of the pretrial restraint, if any, that you have undergone pending this trial?**

ACC: (Responds.)

**MJ: (If accused had been in pretrial restraint:) What is it about this pretrial restraint that you believe may have been illegal?**

ACC: (Responds.)

**MJ: Tell me about other illegal pretrial punishment, if any, you may have suffered.**

ACC: (Responds.)

**MJ: (If accused has been in pretrial confinement:) Do you understand that the law requires that I award you day for day credit against the sentence for any lawfully imposed pretrial confinement imposed in this case?**

ACC: (Responds.)

**MJ: Do you also understand that if you convinced me that more likely than not you suffered from illegal pretrial punishment, then you would be entitled to (additional) credit against any sentence which you may receive in this case?**

ACC: (Responds.)

**MJ: Do you understand that, by this term of your (pretrial) (plea) agreement, you are giving up the right for this court, or any court considering an appeal of your case, to determine if you actually suffered from illegal pretrial punishment to include a claim for (additional) credit against your sentence for illegal pretrial punishment?**

ACC: (Responds.)

**MJ: Defense Counsel, have you considered the amount of credit you would have asked for if this issue were to be litigated?**

DC: (Responds.)

**MJ: (To the accused) Do you understand that the amount of credit for illegal pretrial punishment, if any, would be subject to my discretion depending on the seriousness of the illegal pretrial punishment? (If you succeeded on this issue, do you understand that you may have received the credit sought by your defense counsel, or possibly more or less than that amount?)**

ACC: (Responds.)

**MJ: Do you understand that by not litigating this issue, you will never know what credit for illegal pretrial punishment, if any, that you would be entitled to, and that you will receive no credit against your sentence for illegal pretrial punishment?**

ACC: (Responds.)

**MJ: When you elected to give up the right to litigate the illegal pretrial punishment issue, did your defense counsel explain this issue and the consequences to you?**

ACC: (Responds.)

**MJ: Did anyone force you to enter into this term of your agreement?**

ACC: (Responds.)

**MJ: Defense Counsel, which side originated this term of the agreement?**

DC: (Responds.)



**MJ: (Although the government originated this term of your agreement,) Did you freely and voluntarily decide to agree to this term of your agreement in order to receive what you believed to be a beneficial (pretrial) (plea) agreement?**

ACC: (Responds.)

**MJ: Knowing what I have now told you, do you still desire to give up the right to litigate the issue of illegal pretrial punishment as long as your (pretrial) (plea) agreement continues to exist?**

ACC: (Responds.)

**MJ: Do you have any questions about this provision of your agreement?**

ACC: (Responds.)

**MJ: As I have stated, if I accept your waiver of the Article 13 issue, I will not order any credit to be applied against your sentence for illegal pretrial punishment. You may, however, bring to the court's attention (the conditions of your pretrial restraint) (and) (your perceived pretrial punishment) in the sentencing phase of the trial so that the court can consider such matters in deciding upon an appropriate sentence for you. Do you understand that?**

ACC: (Responds.)

**REFERENCES:** [United States v. McFadyen, 51 MJ 289 \(CAAF 1999\).](#)

## **2-7-12. 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. The advice may be substantially as follows:**

**MJ: \_\_\_\_\_, 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 guilt or innocence of an alleged offense, the issue of fact must be decided by the court pursuant to appropriate instructions. RCM 905 and 907.**

## **2-7-13. MOTION FOR FINDING OF NOT GUILTY**

**NOTE:** The DC may make any motion for a finding of not guilty when the government rests or after the defense has rested, or both. Such a motion should be made at an Article 39(a) session outside the presence of the members. Before the motion is ruled upon, the DC may properly be required to indicate specifically wherein the evidence is legally insufficient. Also, the ruling on the motion may be deferred to permit the TC to reopen the case for the prosecution and produce any available evidence. The MJ rules finally on the motion for findings of not guilty. If there is any evidence which, together with all inferences that can properly be drawn therefrom and all applicable presumptions, could reasonably tend to establish every essential element of an offense charged, the motion will not be granted. If, using the same test, there is insufficient evidence to support the offense charged, but there is sufficient evidence to support a lesser included offense, the military judge may grant the motion as to the greater part and, if appropriate, the corresponding charge. See RCM 917. Normally, the motion should not be made before the court members. If the motion is mistakenly made before the members and is denied, the MJ should instruct the members as follows:

**MJ:** You are advised that my ruling(s) on the defense motion for a finding of not guilty must not influence you in any way when you consider whether the accused is guilty or not guilty. The ruling(s) (was) (were) governed by a different standard than that which will guide you in determining whether the accused is guilty or not guilty. A finding of guilty may not be reached unless the government has met its burden of establishing the guilt of the accused beyond a reasonable doubt, and whether this standard of proof has been met is a question which must be determined by you without any references to my prior ruling(s) on the motion(s) for a finding of not guilty.

**NOTE:** If the motion is granted in part, so that the specification is reduced to a lesser offense, the MJ should instruct the members as follows:

**MJ:** You are advised that I have found the accused not guilty of the part of (The) Specification (\_\_\_\_) of (The) (Additional) Charge \_\_\_\_\_ which alleges the offense of \_\_\_\_\_. However, the accused remains charged in this specification with the lesser offense of \_\_\_\_\_. My ruling must not influence you in any way

when you consider whether the accused is guilty or not guilty of the lesser offense. The ruling was governed by a different standard than that which will guide you in determining whether the accused is guilty or not guilty of the lesser offense. A finding of guilty may not be reached unless the government has met its burden of establishing the guilt of the accused beyond a reasonable doubt, and whether this standard of proof has been met is a question which must be determined by you without reference to my prior ruling on the motion for a finding of not guilty.

**NOTE: Depending upon the complexity of the changes resulting from a partial finding of not guilty, the MJ should direct the members to amend their copies of the flyer or direct preparation of a new flyer.**

## 2-7-14. RECONSIDERATION INSTRUCTION (FINDINGS)

**NOTE: If the charges were referred prior to 1 January 2019, an instruction substantially as follows must be given when any court member proposes reconsideration. If charges were referred on or after 1 January 2019, skip to the next NOTE.**

**MJ: Reconsideration is a process wherein you are allowed to re-vote on your finding(s) 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 finding(s) by the required concurrence, any member may propose that (some or all of) the finding(s) be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the finding(s). In order for you to reconsider and re-vote on a finding, the following rules apply:**

**Table 2-5  
Votes Needed Reconsideration of Findings**

No. of Members	Not Guilty	Guilty
4	3	2
5	3	2
6	4	3
7	4	3
8	5	3

**MJ: 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 \_\_\_ members 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 finding, which means in this case, a guilty finding for the offense(s) of \_\_\_\_\_, then a proposal by any member for reconsideration regarding (that) (those) offense(s)**

requires you to reconsider that 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). (COL) (\_\_\_\_), when the findings are announced, do not indicate whether they are the original findings or the result of reconsideration.

**NOTE: If the charges were referred on or after 1 January 2019, an instruction substantially as follows must be given when any court member proposes reconsideration. If charges were referred prior to 1 January 2019, see the preceding NOTE.**

**MJ:** Reconsideration is a process wherein you are allowed to re-vote on your finding(s) 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 finding(s) by the required concurrence, any member may propose that (some or all of) the finding(s) be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the finding(s). In order for you to reconsider and re-vote on a finding, the following rules apply:

<b>No. of Members</b>	<b>Not Guilty</b>	<b>Guilty</b>
4	3	2
6	4	2
7	4	2
8	5	3

**MJ:** 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-fourth 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 guilty. 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 three-fourths concurrence for a finding of guilty) (the unanimous vote requirement for a finding of guilty for a capital offense). (COL) (\_\_\_\_\_), when the findings are announced, do not indicate whether they are the original findings or the result of reconsideration.

## **2-7-15. RELATIVE SEVERITY OF SENTENCE**

**NOTE: The following matters commonly arise pertaining to sentence or during the members' deliberation on sentence. They should be given when counsel or a member of the court raises a question or makes a request calling for such instructions or when the need for such instructions is otherwise apparent. Before answering any question concerning relative severity of sentences, the views of counsel for both sides and the accused should be ascertained. An Article 39(a) session may be required. The following instruction, as modified to meet the circumstances of the particular case, may be given:**

**MJ: The question as to whether a sentence of \_\_\_\_\_ is less severe than a sentence of \_\_\_\_\_ is a question which cannot be resolved with mathematical certainty. However, I remind you of my advice as to the effect of punitive discharges. Both types of punitive discharge and their 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 permanent 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.**



## **2-7-16. CLEMENCY (RECOMMENDATION FOR SUSPENSION)**

**MJ: You have no authority to suspend either a part of or the entire sentence that you adjudge; however, you may recommend such suspension. Such a recommendation is not binding on the convening or higher authority. Thus, in arriving at a sentence, you must be satisfied that it 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 for suspension.**

**If fewer than all members wish to recommend suspension of a part of, or the entire sentence, 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 a part of or the entire sentence is solely in the discretion of the court.**

**Your responsibility is to adjudge a sentence that you regard as fair and just at the time it is imposed, and not a sentence that will become fair and just only if your recommendation is adopted by the convening or higher authority.**

## ***2-7-17. CLEMENCY (ADDITIONAL INSTRUCTIONS)***

**MJ: It is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. However, if any or all of you wish to recommend clemency, it is within your authority to do so after the sentence is announced. Your responsibility is to adjudge a sentence that you regard as fair and just at the time it is imposed and not a sentence that will become fair and just only if the mitigating action recommended in your clemency recommendation is adopted by the convening or higher authority who is in no way obligated to accept your recommendation.**

**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) (the restitution by) the accused after the trial and before the convening authority's action.**

## **2-7-18. "HUNG JURY" INSTRUCTION**

**NOTE: Whenever any question arises concerning whether the required concurrence of members on a sentence or other matter relating to sentence is mandatory, or the MJ, after discussion with counsel for both sides and the accused, determines the jury has been deliberating for an inordinate length of time, the court may be advised substantially as follows:**

**MJ: As the sentence in this case is discretionary with you members, 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 comparing 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.**

**NOTE: In capital cases, only one vote on the death penalty may be taken.**

**NOTE: If the President subsequently announces that the court is unable to agree upon a sentence, a mistrial as to sentence should be declared. The court should then be adjourned.**

**2-7-19. RECONSIDERATION INSTRUCTION (SENTENCE)**

**NOTE: If the charges were referred prior to 1 January 2019, an instruction substantially as follows must be given when any court member proposes reconsideration. If charges were referred on or after 1 January 2019, skip to the next NOTE.**

**MJ: Reconsideration is a process wherein you are allowed to re-vote on a 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 a 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:**

**Table 2-7  
Votes Needed for Reconsideration of Sentence**

<b>No. of Members</b>	<b>Increase Sentence</b>	<b>Decrease Sentence</b>
4	3	2
5	3	2
6	4	3
7	4	3
8	5	3

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 at least \_\_\_\_\_ 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, then \_\_\_ members 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 eligibility for 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 proposing and determining an appropriate sentence to include the two-thirds (or three-fourths) (or unanimous) concurrence required for a sentence. (COL) (\_\_\_\_\_), when the sentence is announced, do not indicate whether it is the original sentence or the result of reconsideration.

**NOTE: If the charges were referred on or after 1 January 2019, an instruction substantially as follows must be given when any court member proposes reconsideration. If charges were referred prior to 1 January 2019, see the preceding NOTE.**

**MJ:** Reconsideration is a process wherein you are allowed to re-vote on a 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 a 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:

**Table 2–8  
Votes Needed for Reconsideration of Sentence**

No. of Members	Increase Sentence	Decrease Sentence
4	3	2
6	4	2
7	4	2
8	5	3

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 at least \_\_\_\_\_ 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-fourth of the members must vote by secret, written ballot in favor of reconsideration. Since we have \_\_\_ members, then \_\_\_ 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 proposing and determining an appropriate sentence to include the three-fourths (or unanimous) concurrence required for a sentence. (COL) (\_\_\_\_\_), when the sentence is announced, do not indicate whether it is the original sentence or the result of reconsideration.

## **2-7-20. COMMENT ON RIGHTS TO SILENCE OR COUNSEL**

**NOTE: Comment on or question about an accused's exercise of a right to remain silent, to counsel, or both. Except in extraordinary cases, a question concerning, evidence of, or argument about, an accused's right to remain silent or to counsel is improper and inadmissible. If such information is presented before the fact finder, even absent objection, the military judge should: determine whether or not this evidence is admissible and, if inadmissible, evaluate any potential prejudice, make any appropriate findings, and fashion an appropriate remedy. In trials with members, this should be done in an Article 39(a) session. Cautions to counsel and witnesses are usually appropriate. If the matter was improperly raised before members, the military judge must ordinarily give a curative instruction like the following, unless the defense affirmatively requests one not be given to avoid highlighting the matter. Other remedies, including mistrial, might be necessary. See United States v. Garrett, 24 MJ 413 (CMA 1987), and United States v. Sidwell, 51 MJ 262 (CAAF 1999).**

**MJ: (You heard) (A question by counsel may have implied) that the accused may have exercised (his) (her) (right to remain silent) (and) (or) (right to request counsel). It is improper for this particular (question) (testimony) (statement) to have been brought before you. Under our military justice system, military personnel have certain constitutional and legal rights that must be honored. When suspected or accused of a criminal offense, a service member has (an absolute right to remain silent) (and) (or) (certain rights to counsel). That the accused may have exercised (his) (her) right(s) in this case must not be held against (him) (her) in any way. You must not draw any inference adverse to the accused because (he) (she) may have exercised such right(s), and the exercise of such right(s) must not enter into your deliberations in any way. You must disregard the (question) (testimony) (statement) that the accused may have invoked his right(s). Will each of you follow this instruction?**



## 2-7-21. CREDIT FOR ARTICLE 15 PUNISHMENT

**NOTE 1: Using this instruction.** When an accused has previously received nonjudicial punishment for the same offense of which the accused stands convicted at the court-martial, the defense has the option to introduce evidence of the prior nonjudicial punishment for the sentencing authority to consider. If the defense introduces the Article 15 in mitigation in a trial with members, the judge must instruct as to the specific credit (See NOTE 2) that will be given for the prior nonjudicial punishment unless the defense requests that the judge merely instruct that the members consider the prior punishment (See NOTE 3) when adjudging the sentence. The judge should obtain the defense's election regarding the desired instruction at the Article 39(a) session on sentencing instructions. The defense also has the right to have the judge determine the proper credit to be given by the convening authority without making the members aware of the prior Article 15 or the specific credit to be given (See NOTE 4). In a judge alone trial, the judge must state on the record the specific credit to be awarded for the prior punishment. See United States v. Gammons, 51 MJ 169 (CAAF 1999).

**NOTE 2: Instruction on specific credit.** When the judge instructs on specific credit to be given for a prior Article 15 punishment, the judge must ensure the accused receives "day-for-day, dollar-for-dollar, stripe-for-stripe" credit for any prior nonjudicial punishment suffered for the same offense(s) on which the accused was convicted at the court-martial. United States v. Pierce, 27 MJ 367 (CMA 1989). The judge should address this issue when discussing proposed sentencing instructions with counsel to arrive at a fair and reasonable credit on which to instruct. Because the types of punishment administered nonjudicially and judicially are not always identical, and because no current guidelines exist for equivalent punishments except those contained in RCM 1003(b) (6) and (7), which provide an equivalency for restriction and hard labor without confinement to that of confinement, the judge is responsible to ensure that the accused receives proper credit for the prior punishment. (Judges may want to look to the 1969 MCM's Table of Equivalent Punishments as a guide. That Table indicated that one day of confinement equals one and one-half days of hard labor without confinement, or two days' restriction, or one day's forfeiture of pay.) Once the judge determines the appropriate credit (See, e.g., United States v. Edwards, 42 MJ 381 (CAAF 1995)), the judge should give an instruction substantially as follows:

**When you decide upon a sentence in this case, you must consider that punishment has already been imposed upon the accused under Article 15, UCMJ,**

for the offense(s) of \_\_\_\_\_ of which (he) (she) has also been convicted at this court-martial. The accused will receive specific credit for the prior nonjudicial punishment which was imposed and approved. After trial and when the case is presented to the convening authority for action, the convening authority must credit the accused with the prior punishment from the Article 15 proceeding against any sentence you may adjudge. The convening authority, therefore, must [state the specific credit to be given by stating words to the effect of: (disapprove any adjudged reprimand) (and) (reduce any adjudged forfeiture of pay by \$ \_\_\_\_\_ pay per month for \_\_\_\_\_ month(s)) (and) (credit the accused with already being reduced in grade to E- \_\_\_\_\_) (and) (reduce any adjudged restriction by \_\_\_\_\_ days, or reduce any adjudged hard labor without confinement by \_\_\_\_\_ days, or reduce any adjudged confinement by \_\_\_\_\_ days)].

**NOTE 3: General consideration of prior Article 15. When the defense desires that the judge only instruct that consideration, without stating any specific credit, be given to the prior Article 15 punishment, then the judge should instruct as follows (with the caveat that, if the defense counsel requests it, the judge must determine and announce the specific credit to be awarded outside the presence of the court members; See NOTE 4.):**

When you decide upon a sentence in this case, you must consider that punishment has already been imposed upon the accused under Article 15, UCMJ, for the offense(s) of \_\_\_\_\_ of which (he) (she) has also been convicted at this court-martial. This prior punishment is a matter in mitigation which you must consider.

**NOTE 4. When evidence of the Article 15 or the amount of specific credit for the Article 15 is not presented to the court members. The defense not only has the election not to make the court members aware of the specific credit to be given for the prior Article 15 for the same offense of which the accused stands convicted (See NOTE 3), but also can elect not to bring any evidence of the prior Article 15 to the attention of the members. In either situation, however, the defense has a right, at an Article 39(a) session, to have the judge determine the credit which the convening authority must give to the accused. In this situation, it is suggested that the judge defer determining the actual credit for the convening authority to give until after the sentence has been announced. This procedure will ensure that the judge awards the proper equivalent credit. The judge may**

**adapt the instruction following NOTE 2 to announce what credit the convening authority must apply. The defense also has the option to not raise the credit issue at trial, and can raise it for the first time before the convening authority after trial.**

**REFERENCES:** [United States v. Gammons, 51 MJ 169 \(CAAF 1999\)](#); [United States v. Pierce, 27 MJ 367 \(CMA 1989\)](#).

**Table 2–9  
Table of Equivalent Punishments**

<b>Confinement at hard labor</b>	<b>Hard labor without confinement</b>	<b>Restriction to limits</b>	<b>Forfeiture</b>
1 day	1 1/2 days	2 days	1 day's pay

**Table 2–10  
Table of Equivalent Nonjudicial Punishments**

<b>Kind of Punishment</b>	<b>Upon commissioned and warrant officers (to be used only by an officer with GCM jurisdiction, or by a flag officer in command or his delegate)</b>	<b>Upon other personnel</b>
Arrest in Quarters	1 day	-----
Restriction	2 days	2 days
Extra Duties	-----	1 1/2 days*
Correctional Custody	-----	1 day
Forfeiture of pay	1 day's pay	1 day's pay

**\*The factor designated by asterisk in the table above is 2 instead of 1 1/2 when the punishment is imposed by a commanding officer below the grade of major or lieutenant commander. The punishment of forfeiture of pay may not be substituted for the other punishments listed in the table, nor may those other punishments be substituted for forfeiture of pay.**

## **2-7-22. VIEWS AND INSPECTIONS**

**NOTE 1: Guidance on views and inspections.** The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object. A view or inspection should be permitted only in extraordinary circumstances (See NOTE 2). A view or inspection shall take place only in the presence of all parties, the members (if any), the military judge, and the reporter. A person familiar with the scene may be designated by the military judge to escort the court-martial. Such person shall perform the duties of escort under oath. The escort shall not testify, but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort, a party, the military judge, or any member shall be made a part of the record. The fact that a view or inspection has been made does not necessarily preclude the introduction in evidence of photographs, diagrams, maps, or sketches of the place or item viewed, if these are otherwise admissible. Before conducting the session described below in the presence of the members, the military judge should hold an Article 39(a) session to determine exactly what place or items will be viewed or inspected and that the below procedures and instructions are properly tailored to the circumstances.

**NOTE 2: Considerations whether to permit a view.**

***a. The party requesting a view or inspection has the burden of proof both as to relevance and extraordinary circumstances. The military judge must be satisfied that a view or inspection is relevant to guilt or innocence as opposed to a collateral issue. The relevance must be more than minimal and, even when relevance is established, the proponent must still establish extraordinary circumstances.***

***b. Extraordinary circumstances exist only when the military judge determines that other alternative evidence (testimony, sketches, diagrams, maps, photographs, videos, etc.) is inadequate to sufficiently describe the premises, place, article, or object. The military judge should also consider the orderliness of the trial, how time consuming a view or inspection would be, the logistics involved, safety concerns, and whether a view or inspection would mislead or confuse members.***

***c. A view is not intended as evidence, but simply to aid the trier of fact in understanding the evidence.***

***d. Counsel and the military judge should be attentive to alterations to, or differences in, the item or location to be viewed or inspected as compared to the time that the place or item is relevant to the proceedings. Differences in time of day, time of the year, lighting,***

***and other factors should also be discussed. The military judge should be prepared, with assistance of counsel, to note these differences to the members.***

**MJ: The court will be permitted to view (the place in which the offense charged in this case is alleged to have been committed) (\_\_\_\_\_) as requested by (trial) (defense) counsel. Does the (trial) (defense) counsel desire that an escort accompany the court?**

(TC) (DC): Yes, I suggest that \_\_\_\_\_ serve as the escort. (He has testified as to the (place) (\_\_\_\_\_) and I believe that it is desirable to have him as escort.)

**MJ: Does (trial) (defense) counsel have any objection to \_\_\_\_\_ as escort?**

(TC) (DC): (No objection) (\_\_\_\_\_).

**MJ: Have \_\_\_\_\_ come into the courtroom. (The proposed escort enters the courtroom.)**

TC: (To escort) State your full name, (grade, organization, station, and armed force) (occupation and city and state of residence).

Escort: \_\_\_\_\_.

**MJ: The court has been authorized to inspect (the place in which the offense charged in this case is alleged to have been committed) (\_\_\_\_\_) and desires you to act in the capacity of escort. Do you have any objections to serving as escort?**

Escort: No, your Honor.

**MJ: Trial Counsel will administer the oath to the escort.**

TC: Please raise your right hand. Do you (swear) (or) (affirm) that you will escort the court and will well and truly point out to them (the place in which the offense charged in this case is alleged to have been committed) (\_\_\_\_); and that you will not speak to the court concerning (the alleged offense) (\_\_\_\_), except to describe (the place aforesaid) (\_\_\_\_\_). So help you God.

Escort: I do.

**MJ: This view is being undertaken to assist the court in understanding and applying the evidence admitted in the trial. The view itself is not evidence; it merely enables the court to consider and apply the evidence before it in the light**

of the knowledge obtained by the inspection. Likewise, nothing said at the inspection is to be considered as evidence. The court will not hear witnesses or take evidence at the view. Counsel and members of the court properly may ask the escort to point out certain features, but they must otherwise refrain from conversation. Counsel, the members, and I will be provided with paper and a writing instrument to write out any questions of the escort and the questions will be marked as an appellate exhibit. The reporter is instructed to record all statements made at the view by counsel, the accused, the escort, the members, or me. Reenactments of the events involved or alleged to have been committed are not authorized. The escort, counsel, the accused, the reporter, and I will be present with the court at all times during the view. The court will now recess and remain in the vicinity of the courtroom to await necessary transportation. When the view has been completed, the court will reassemble and the regular proceedings will be resumed.

**MJ: Are there any questions from the members about the procedure we are to follow?**

MBRS: (Respond.)

**MJ: (Other than at the previous Article 39(a) session held earlier on this matter,) Do counsel have any objections to these instructions or any requests about how the viewing is to be conducted?**

TC/DC: (Respond.)

**NOTE 3: The court should then proceed to the place to be inspected. After the court has assembled at the place to be viewed, the military judge should state in substance as follows:**

**MJ: It is now \_\_\_ hours on the \_\_\_ day of \_\_\_\_\_ 20\_\_; all parties to the trial who were present when the court recessed are present; and that \_\_\_\_\_ is also present.**

**NOTE 4: The military judge should then ask questions of the escort to identify the physical location of the court.**

**MJ: The members of the court are at liberty to look around. If you have questions to ask of the escort, please write them out so that I can ask them in the presence of all the parties to the trial. Remain together. Please bear in mind that everything said during the course of the view must be recorded by the court reporter. The members may not talk or otherwise communicate among themselves.**

**NOTE 5: The court should then be allowed sufficient time to inspect the place or item in question.**

**MJ: Does any member or counsel have any questions to ask the escort? (If so, please write them out on the forms provided.) If not, I we are in recess until \_\_\_\_\_.**

**NOTE 6: Once the view is conducted, the military judge should conduct an Article 39(a) session substantially as follows:**

**MJ: Does any party have any objections to how the view was conducted or to anything that occurred during the view?**

TC/DC: (Respond.)

**NOTE 7: After the court is called to order and all parties to the trial are accounted for, the military judge should make the following announcement:**

**MJ: During the recess, the members of the court, counsel, the accused, the escort, the military judge, and the reporter viewed (the place in which the offense charged in this case is alleged to have been committed) (which was identified by the escort as \_\_\_\_\_) (\_\_\_\_\_). The transcript of the reporter's Notes taken at the view will be inserted at the proper chronological point in the record of trial. The members are instructed to avoid, and not go to, the location we just visited until the trial has ended.**

**REFERENCES:**

(1) Views and inspections generally. RCM 913(c)(3).

(2) Oath for escort. RCM 807(b).

(3) Test for whether a view is warranted. United States v. Marvin, 24 MJ 365 (CMA 1987); United States v. Ayala, 22 MJ 777 (ACMR 1986), *aff'd* 26 MJ 190 (CAAF 1988); and United States v. Huberty, 50 MJ 704 (AFCCA 1999).

(4) View not evidence. United States v. Ayala, 22 MJ 777 (ACMR 1986), *aff'd* 26 MJ 190 (CMA 1988).

(5) Unauthorized view. United States v. Wolfe, 24 CMR 57 (CMA 1955).

(6) Completeness of record of a view. United States v. Martin, 19 CMR 646 (AFBR 1955), *pet. denied*, 19 CMR 413 (CMA 1955).



## **2-7-23. ABSENT ACCUSED INSTRUCTION: PRELIMINARY FINDINGS**

**MJ: 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. You are not permitted to speculate as to why the accused is not present in court today and that you must not draw any inference 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 as respects (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.**

**Will each member follow this instruction?**

**REFERENCES:** See United States v. Minter, 8 MJ 867 (NMCMR 1980); See *also* United States v. Denney, 28 MJ 521 (ACMR 1989) (indicating that accused's absence may be considered for rehabilitative potential); United States v. Chapman, 20 MJ 717 (NMCMR 1985), *aff'd*, 23 MJ 226 (CMA 1986) (*summary affirmance*).

**2-7-24. STIPULATIONS OF FACT AND EXPECTED TESTIMONY (NOT IAW A PRETRIAL / PLEA AGREEMENT)**

**NOTE: Whenever the prosecution or defense offers a stipulation into evidence, the MJ should conduct an inquiry with the accused outside the presence of the court members along the following lines:**

**MJ: \_\_\_\_\_, before signing the stipulation, did you read it thoroughly?**

ACC: (Responds.)

**MJ: Do you understand the contents of the stipulation?**

ACC: (Responds.)

**MJ: Do you agree with the contents of the stipulation?**

ACC: (Responds.)

**MJ: Before signing the stipulation, did your defense counsel explain the stipulation to you?**

ACC: (Responds.)

**MJ: Do you understand that you have an absolute right to refuse to stipulate to the contents of this document?**

ACC: (Responds.)

**MJ: You should enter into this stipulation only if you believe it is in your best interest to do so. Do you understand that?**

ACC: (Responds.)

**MJ: \_\_\_\_\_, I want to ensure that you understand how this stipulation is to be used.**

**(IF STIPULATION OF FACT:) MJ: When counsel for both sides and you 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 along with all the other evidence in the case. Do you understand that?**

ACC: (Responds.)

**(IF STIPULATION OF EXPECTED TESTIMONY:) MJ: When counsel for both sides and you agree to a stipulation of expected testimony, you are agreeing that if \_\_\_\_\_ were present in court and testifying under oath, (she) (he) would testify substantially as set forth in this stipulation. The stipulation does not admit the truth of the person's testimony. The stipulation can be contradicted, attacked, or explained in the same way as if the person was testifying in person. Do you understand that?**

ACC: (Responds.)

**MJ: \_\_\_\_\_, knowing now what I have told you and what your defense counsel earlier told you about this stipulation, do you still desire to enter into the stipulation?**

ACC: (Responds.)

**MJ: Do counsel concur in the contents of the stipulation?**

TC/DC: (Respond.)

**MJ: The stipulation is admitted into evidence as \_\_\_\_\_.**

**NOTE: Stipulations of expected testimony are admitted into evidence, but only read to the court members. They are not to be given to them for use in deliberations.**

**2-7-25. CONFSSIONAL STIPULATION OF FACT INQUIRY**

**NOTE: The following inquiry is required by United States v. Bertelson, 3 MJ 314 (CMA 1977), whenever a stipulation “practically amounts to a confession” as set forth in the discussion following RCM 811(c).**

**MJ: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure the accused has a copy.**

TC: (Complies.)

**MJ: \_\_\_\_\_, I have before me Prosecution Exhibit \_\_\_\_ for Identification, a stipulation of fact. Did you sign this stipulation?**

ACC: (Responds.)

**MJ: Did you read this document thoroughly before you signed it?**

ACC: (Responds.)

**MJ: Do both counsel agree to the stipulation and that your signatures appear on the document?**

TC/DC: (Respond.)

**MJ: \_\_\_\_\_, a stipulation of fact is an agreement among the trial counsel, the defense counsel, and you that the contents of the stipulation are true, and if entered into evidence are the uncontradicted facts in this case. No one can be forced to enter into a stipulation, and no stipulation can be accepted without your consent, so you should enter into it only if you truly want to do so. Do you understand this?**

ACC: (Responds.)

**MJ: Are you voluntarily entering into this stipulation because you believe it is in your own best interest to do so?**

ACC: (Responds.)

**MJ: \_\_\_\_\_, the government has the burden of proving beyond a reasonable doubt every element of the offense(s) with which you are charged. By stipulating**

to the material elements of the offense(s), as you are doing here, you alleviate that burden. That means that based upon the stipulation alone, and without receiving any other evidence, the court can find you guilty of the offense(s) to which the stipulation relates. Do you understand that?

ACC: (Responds.)

**(IF JUDGE ALONE TRIAL:) 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 of the offense(s) to which the stipulation relates. And second, I will use it in determining an appropriate sentence for you.**

**(IF MEMBERS TRIAL:) MJ: If I admit this stipulation into evidence it will be used in two ways.**

**First, members will use it to determine if you are, in fact, guilty of the offense(s) to which the stipulation relates. And second, the trial counsel may read it to the court members and they will have it with them when they decide upon your sentence.**

**MJ: Do you understand and agree to these uses of the stipulation?**

ACC: (Responds.)

**MJ: Do both counsel also agree to these uses?**

TC/DC: (Respond.)

**MJ: \_\_\_\_\_, a stipulation of fact ordinarily cannot be contradicted. You should, therefore, let me know now if there is anything in the stipulation that you disagree with or feel is untrue. Do you understand that?**

ACC: (Responds.)

**MJ: At this time, I want you to read your copy of the stipulation silently to yourself as I read it to myself.**

**NOTE: The MJ should read the stipulation and be alert to resolve inconsistencies between what is stated in the stipulation and what**

**the accused will say during the inquiry establishing the factual basis for the stipulation.**

**MJ: Have you finished reading it?**

ACC: (Responds.)

**MJ: \_\_\_\_\_, is everything in the stipulation the truth?**

ACC: (Responds.)

**MJ: Is there anything in the stipulation that you do not which to admit that is true?**

ACC: (Responds.)

**MJ: \_\_\_\_\_, have you consulted fully with your counsel about the stipulation?**

ACC: (Responds.)

**MJ: After having consulted with your counsel, do you consent to my accepting the stipulation?**

ACC: (Responds.)

**MJ: \_\_\_\_\_, at this time I want you to tell me what the factual basis is for this stipulation. Tell me what happened.**

**NOTE: At this point the military judge must personally question the accused to develop information showing what the accused did or did not do and what he/she intended, where intent is pertinent. The aim is to make clear the factual basis for the recitations in the stipulation. The military judge must be alert to the existence of any inconsistencies between the stipulation and the explanations of the accused. If any arise they must be discussed thoroughly with the accused, and the military judge must resolve them or reject the stipulation.**

**MJ: Does either counsel believe that any further inquiry is required into the factual basis for the stipulation?**

TC/DC: (Respond.)

**MJ: \_\_\_\_\_, has anybody made any promises or agreements with you in connection with this stipulation?**

ACC: (Responds.)

**MJ: Counsel, are there any written or unwritten agreements between the parties in connection with the stipulation?**

**NOTE: Should this inquiry reveal the existence of an agreement not to raise defenses or motions, the stipulation will be rejected as inconsistent with Article 45(a).**

TC/DC: (Respond.)

**MJ: Defense Counsel, do you have any objections to Prosecution Exhibit \_\_\_\_ for Identification?**

DC: (Responds.)

**MJ: Prosecution Exhibit \_\_\_\_ for Identification is admitted into evidence.**

## **2-7-26. ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE**

**NOTE 1: Argument or a request for a punitive discharge. It is improper for defense counsel to argue for a discharge or dismissal against the client's desires. *United States v. Israel*, 75 MJ 559 (ACCA 2015); *United States v. Dresen*, 40 MJ 462 (CMA 1994); *United States v. McMillan*, 42 CMR 601 (ACMR 1970). If the defense or the accused requests, argues for, or concedes the appropriateness of, a punitive discharge or dismissal, the military judge should conduct an inquiry with the accused outside of the presence of the court members. *United States v. McNally*, 16 MJ 32 (CMA 1983). But See *United States v. Lyons*, 36 MJ 425 (CMA 1993). The focus of the inquiry is to ensure that the accused consents to the argument and fully understands the ramifications of a punitive discharge or dismissal. Ordinarily, before argument or the accused's making a request for a discharge or dismissal, the defense counsel should inform the military judge outside the presence of the court members of the planned argument or request. This procedure will ensure that the inquiry is done before the members hear the argument or request. If the argument is made before the inquiry below is conducted, the inquiry should be made before the court closes to deliberate on the sentence. If the accused did not wish the argument to be made, the military judge should instruct the members to disregard that portion of the defense's argument. The following inquiry may be appropriate:**

**MJ: \_\_\_\_\_, do you understand that the only discharge(s) this court can adjudge (is) (are) a bad-conduct discharge (and a dishonorable discharge) (is a dismissal)?**

ACC: (Responds.)

**MJ: Do you understand that a (dishonorable discharge) (bad-conduct discharge) (dismissal) will forever adversely stigmatize the character of your military service and it will limit your future employment and schooling opportunities?**

ACC: (Responds.)

**MJ: Do you understand that a (dishonorable discharge) (bad-conduct discharge) (dismissal) may adversely affect your future with regard to legal rights, economic opportunities, and social acceptability?**

ACC: (Responds.)



**MJ: Do you understand that by (receiving a (dishonorable discharge) (bad-conduct discharge)) (being dismissed), you will lose substantially all benefits from the Department of Veterans Affairs and the military establishment, as well as other benefits normally given by other governmental agencies?**

ACC: (Responds.)

**(IF RETIREMENT ELIGIBLE: MJ: Do you understand that a (dishonorable discharge) (bad-conduct discharge) (dismissal) terminates your military status and will deprive you of any retirement benefits, to include retired pay?**

ACC: (Responds.)

**MJ: Have you thoroughly discussed your desires with your defense counsel?**

ACC: (Responds.)

**MJ: Do you believe you fully understand the ramifications of a (dishonorable discharge) (bad-conduct discharge) (dismissal)?**

ACC: (Responds.)

**MJ: Are you aware that if you do not receive a punitive discharge from this court-martial, then your chain of command may very well try to administratively separate you from the service?**

ACC: (Responds.)

**MJ: Are you also aware that an administrative separation is considered much less severe than a discharge from a court-martial and will not stigmatize you with the devastating and long term effects of a discharge from a court-martial?**

ACC: (Responds.)

**MJ: \_\_\_\_\_, knowing all that I and your defense counsel have explained to you, is it your express desire to be (discharged from the service with a (dishonorable discharge) (bad-conduct discharge)) (dismissed from the service) (if, as you indicate, it will preclude (confinement) (an extended period of confinement) (\_\_\_\_\_))?**

ACC: (Responds.)

**MJ: Do you consent to your defense counsel stating an argument that you desire to be (discharged with a (dishonorable discharge) (bad-conduct discharge)) (dismissed from the service) (if it will preclude (confinement) (an extended period of confinement) (\_\_\_\_\_))?**

ACC: (Responds.)

**NOTE 2: Sentence Appropriateness. The sentencing authority should not adjudge a dishonorable discharge, bad-conduct discharge or a dismissal merely based upon a request for one. The discharge or dismissal must be an appropriate punishment for the accused and the offenses of which the accused stands convicted before it can be adjudged. United States v. Strauss, 47 MJ 739 (NMCCA 1997).**

**NOTE 3: Requesting a Dismissal. Although no case specifically holds that counsel may argue for a dismissal, appellate courts have implicitly recognized such arguments as proper. See United States v. Worrell, 3 MJ 817 (AFCMR 1977) (arguing for a dismissal is not ineffective assistance of counsel); United States v. Nunes, 39 MJ 889 (AFCCA 1994) (argument held not to be a request for dismissal); United States v. Perry, 48 MJ 197 (CAAF 1998) (argument for dismissal implicitly approved; alleged error was failure to instruct on the impact of a dismissal).**

**NOTE 4: Title 10, United States Code, Section 1161(b) (2) authorizes the President to “drop from the rolls of any armed force any commissioned officer...who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court-martial.” Section 1167 provides that “a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member’s armed force at any time after the sentence to confinement has become final...and the member has served in confinement for a period of six months.”**

**2-7-27. GUILTY PLEA - ADVICE TO ACCUSED WHEN RAISED: MENTAL RESPONSIBILITY, EVIDENCE NEGATING MENS REA, OR COMPETENCE**

**NOTE 1:** If the accused has pled guilty and the issue of the accused's mental responsibility, lack of mens rea, or competence to stand trial is raised during trial, the military judge should conduct one or more of the following inquiries, as appropriate. See Article 50a, UCMJ; Ellis v. Jacob, 26 MJ 90 (CMA 1988); United States v. Berri, 33 MJ 337 (CMA 1991); Benchbook Instructions 6-1 through 6-5 (Sanity and Partial Mental Responsibility) and 5-17 (Evidence Negating Mens Rea). During a Care inquiry, to distinguish between the "mere possibility of a defense" (which does not require further inquiry by the military judge) and a "possible defense" (which does), See United States v. Hayes, 70 MJ 454 (CAAF 2012).

**NOTE 2:** Lack of mental responsibility or lack of mens rea due to partial mental responsibility raised. If the issue of the accused's lack of mental responsibility or lack of mens rea due to partial mental responsibility at the time of the offenses charged has been raised during the providence inquiry, conduct the following inquiry. If necessary, the military judge may sua sponte order an inquiry under RCM 706 to occur during or after the trial.

**MJ:** Defense counsel, (during my inquiry into the providence of the accused's guilty plea) (during your sentencing case) (\_\_\_\_), the issue of the accused's (lack of mental responsibility) (partial mental responsibility) at the time of the offense(s) charged (in (the) specification(s) (\_\_\_\_) of (the) (Additional) Charge (\_\_\_\_)) was raised. Specifically, (the accused stated \_\_\_\_\_) ((Doctor)(\_\_\_\_) testified that \_\_\_\_\_) (\_\_\_\_). (Do you believe the accused has a defense based upon lack of mental responsibility) (Do you believe the accused, because of partial lack of mental responsibility, was unable to (entertain the premeditated design to kill) (form the specific intent to \_\_\_\_\_) (know that \_\_\_\_\_) (act willfully) (\_\_\_\_)) with respect to (the) (those) charged offense(s)?

DC: (Responds.)

**MJ:** Have you fully investigated potential mental responsibility defenses by reviewing the facts in this case and speaking with the accused? (Have you spoken with the accused's doctor(s)?) (Have you obtained assistance from mental health professionals in evaluating this issue?)

DC: (Responds.)

**MJ:** Has a mental responsibility inquiry been conducted under RCM 706? (If not, do you believe there is reason to believe the accused lacked mental responsibility for any offense charged?)

DC: (Responds.)

**(MJ: Do you desire a continuance in order to further investigate this issue?**

DC: (Responds.)

**NOTE 3: Defense states no lack of mental responsibility defense. If defense counsel states that no mental responsibility defenses exist, the MJ should conduct the following inquiry of the accused.**

**MJ: \_\_\_\_\_, military law recognizes a defense of lack of mental responsibility. This lack of mental responsibility defense would be a complete defense to the offense(s) charged (in (the) specification(s) (\_\_\_\_) of (the) (Additional) Charge (\_\_\_\_)). The defense of lack of mental responsibility has two parts. First, at the time of (the) (those) charged offense(s), you must have been suffering from a severe mental disease or defect. Second, as a result of that severe mental disease or defect, you must have been unable to appreciate the nature and quality or wrongfulness of your conduct. Do you understand this?**

ACC: (Responds.)

**MJ: \_\_\_\_\_, has your defense counsel explained to you the defense of lack of mental responsibility?**

ACC: (Responds.)

**MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were suffering from a severe mental disease or defect?**

ACC: (Responds.)

**MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were unable to appreciate the nature and quality or wrongfulness of your actions?**

ACC: (Responds.)

**MJ: Did you understand what you were doing at the time of (the) (those) charged offense(s)? Why?**

ACC: (Responds.)

**MJ: Did you understand what you were doing at the time of (the) (those) charged offense(s) was wrong? Why?**

ACC: (Responds.)

**MJ:** \_\_\_\_\_, based on what I have told you and what your defense counsel told you, do you believe the defense of lack of mental responsibility applies in your case?

ACC: (Responds.)

**MJ:** Defense counsel, are you affirmatively disclaiming the defense of lack of mental responsibility?

DC: (Responds.)

**MJ:** \_\_\_\_\_, do you agree?

ACC: (Responds.)

**NOTE 4:** Defense states no partial lack of mental responsibility for specific mens rea offense. If any offense includes a specific mens rea element, ask the following additional questions.

**MJ:** Defense counsel, based on your investigation, do you believe the accused suffered from a mental (disease) (defect) (impairment) (condition) (deficiency) (character or behavior disorder) (\_\_\_\_\_) that prevented him/her from (entertaining the premeditated design to kill) (forming the specific intent to \_\_\_\_\_) (knowing that \_\_\_\_\_) (acting willfully) (\_\_\_\_\_) at the time he/she committed (the) (those) charged offense(s)?

DC: (Responds.)

**MJ:** \_\_\_\_\_, has your defense counsel explained to you that partial lack of mental responsibility can negate certain mental states required for (the) (those) charged offense(s)?

ACC: (Responds.)

**MJ:** (The military judge should describe the offense(s) to which partial lack of mental responsibility might apply, and the affected elements, as follows:) I advised you earlier that one of the elements of the offense(s) charged (in (the) specification(s) (\_\_\_\_) of (the) (Additional) Charge (\_\_\_\_)) is that you (had a premeditated design to kill) (had the specific intent to \_\_\_\_\_) (knew that \_\_\_\_\_) (acted willful) (\_\_\_\_\_). You may have been sane at the time of the charged offense(s), yet, because of some underlying mental disease, defect, impairment, condition, deficiency, or character or behavior disorder, you may have been incapable of (entertaining the premeditated design to kill) (forming the specific intent to \_\_\_\_\_) (having knowledge that \_\_\_\_\_) (acting willfully) (\_\_\_\_\_). Do you understand this?

ACC: (Responds.)

**MJ: What, if any, mental disease, defect, impairment, condition, deficiency, or character or behavior disorder, were you suffering from at the time you committed (the) (those) charged offense(s)? Were you seeing a doctor? What medications were you taking at that time? What effects, if any, did the mental disease, defect, impairment, condition, deficiency, or character or behavior disorder and these medications have on you? At the time you committed (the) (those) charged offense(s), did you continue to perform military duties?**

ACC: (Responds.)

**MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were suffering from a mental disease, defect, impairment, condition, deficiency, or character or behavior disorder that would have prevented you from (entertaining the premeditated design to kill) (forming the specific intent to \_\_\_\_\_) (having knowledge that \_\_\_\_\_) (acting willfully) (\_\_\_\_\_)? Why?**

ACC: (Responds.)

**MJ: Defense counsel, are you affirmatively disclaiming the defense of partial mental responsibility with respect to (the) (those) charged offense(s)?**

DC: (Responds.)

**MJ: \_\_\_\_\_, do you agree?**

ACC: (Responds.)

**NOTE 5: Lack of competence to stand trial raised. To the extent that the accused's competence to stand trial is raised, the military judge should conduct the following inquiry.**

**MJ: Defense counsel, have you fully investigated the issue of whether the accused suffers from a mental disease or defect that prevents him/her from understanding the nature of these proceedings or from cooperating intelligently with you in the preparation of the defense?**

DC: (Responds.)

**MJ: Based on your investigation, do you believe the accused suffers from a mental disease or defect that prevents him/her from understanding the nature of these proceedings or prevented him/her from cooperating intelligently with you in the preparation of the defense?**

DC: (Responds.)

**MJ: Has a mental responsibility inquiry been conducted under RCM 706? (If not, does defense counsel believe there is reason to believe the accused lacks competence to stand trial?)**

DC: (Responds.)

**MJ: Do you desire a continuance in order to further investigate this issue?**

DC: (Responds.)

**MJ: \_\_\_\_\_, are you currently suffering from any mental disease or defect such that you cannot understand these proceedings?**

ACC: (Responds.)

**MJ: Have you been diagnosed with any condition that would affect your ability to understand these proceedings or cooperate with your defense counsel?**

ACC: (Responds.)

**MJ: Have you understood everything we've talked about today?**

ACC: (Responds.)

**MJ: Do you understand the roles of all the participants? Do you understand the trial counsel represents the government and has the responsibility to present evidence tending to establish your guilt of these offenses?**

ACC: (Responds.)

**MJ: Do you understand the defense counsel represents you and has the responsibility to challenge the evidence presented against you, cross-examine witnesses, and make legal arguments on your behalf?**

ACC: (Responds.)

**MJ: Do you understand I am the military judge in your case and I rule on all objections, preside over all open sessions of court, and, if you select trial by judge alone, determine your guilt or innocence and, if found guilty, will impose sentence upon you?**

ACC: (Responds.)

**MJ: Are you taking any medication? What medication are you taking? Are you feeling the effects of any medication? Within the last 24 hours have you taken**

**the medication in the prescribed dosage and at the times ordered by the doctor? Does taking this medication in the prescribed manner make it difficult for you to understand these proceedings or have you understood everything we've talked about today?**

ACC: (Responds.)

**MJ: How long have you been taking (this) (these) medication(s)? Have you continued to perform military duties while you are taking your medication(s)? Do you have a profile limiting your military duties? Have you been assigned to quarters?**

ACC: (Responds.)

**MJ: I note that during my discussion with the accused today for the past \_\_\_\_ hours, the accused (has been engaged and attentive) (has responded appropriately to my questions) (has maintained eye contact with me) (has not slurred his word nor stuttered, stumbled, or otherwise given me any indication that he is anything but fully coherent) and (has demonstrated appropriate affect for these proceedings) (\_\_\_\_\_). It appears to me that from his participation and demeanor throughout the proceedings, the accused is not impaired and that he understands the proceedings that have taken place today and is able to participate in his defense. Have you understood the proceedings that have taken place today?**

ACC: (Responds.)

**MJ: Are you able to assist your defense counsel in preparing your defense?**

ACC: (Responds.)

**MJ: I find that the accused is not presently suffering from a mental disease or defect rendering him/her mentally incompetent to stand trial under RCM 909. The accused is able to understand the nature of these proceedings and able to (conduct) (cooperate intelligently in) the defense of this case.**



**2-7-28. VICTIM'S COUNSEL**

**MJ: \_\_\_\_\_, you indicated you are appearing as the (Special Victim Counsel) (Victim Legal Counsel) (civilian counsel) for (state the alleged victim's name). Please state your qualifications for the record.**

SVC/VLC/Civilian Counsel: I represent \_\_\_\_\_. I am an attorney and licensed to practice law in the state(s) of \_\_\_\_\_. I am a member in good standing of the (\_\_\_\_\_) bar(s). I have not acted in any manner which might tend to disqualify me in this court-martial.