Department of the Army
Pamphlet 27–9

Legal Services

Military Judges' Benchbook

Headquarters
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SUMMARY of CHANGE

DA PAM 27–9
Military Judges' Benchbook

This revised Department of the Army Pamphlet incorporates the substantive criminal law found in the Manual for Courts-Martial, through the 2008 Edition; decisions of military and higher courts; and comments and opinions of individual legal specialists on criminal law. Highlighted below are some of the changes to the 2001 edition of this Benchbook:

- Conforms the Article 111 instruction (Drunken or Reckless Operation of a Vehicle, Aircraft or Vessel) to recent amendments of 10 USC Section 911 regarding the blood / breath alcohol limits.

- Adds a missing portion of an element for Desertion with Intent to Shirk Important Service.

- Amends the Article 134 instruction (Adultery) to conform to 2002 changes to the Manual for Courts-Martial.

- Adds a quick reference list of Evidentiary Instructions to the beginning of Chapter 7.

- To conform to recent case law:

  — Clarifies Vicarious Liability - Principals and Co-conspirators (instruction 7-1) and Principals - Aiding and Abetting (instruction 7-1-1) that the aider and abettor need not agree with, or even know of, the means by which the perpetrator is to carry out the shared criminal intent.

  — Clarifies the Article 93 instruction (Cruelty and Maltreatment) that there is no requirement for actual physical or mental harm or suffering by the victim.

  — Adds an additional reference to the Article 134 instruction (Obstructing Justice).

  — Removes the term "ineradicable" when discussing the stigma associated with punitive discharges.

  — Amends the Article 130 instruction (Housebreaking) instruction to include the *Williams* factors the fact finder may consider when deciding if the accused's entry was unlawful, including the accused's intent upon entry.

  — Amends the Article 126 instructions (Arson — Aggravated — Inhabited Dwelling; Arson — Aggravated — Structure; and Arson — Simple) to clarify that an accused can be guilty of aggravated arson of his own property. Also clarifies that the accused need not specifically intend to burn or char the property burned or charred, so long as the accused willfully and maliciously started the fired that resulted in the burning or charring.

- Corrects minor typographical errors.

RESERVED

FOREWORD

This Benchbook should be regarded as a supplement to the Uniform Code of Military Justice, as amended; the Manual for Courts-Martial, 2008 Edition; opinions of appellate courts; other departmental publications dealing primarily with trial procedure; and similar legal reference material. Statutes, Executive Orders, and appellate decisions are the principal sources for this Benchbook, and such publications, rather than this Benchbook, should be cited as legal authority

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Department of the Army
Washington, DC
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Legal Services
Military Judges' Benchbook

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History. This publication was originally published on 01 April 2001. This electronic edition publishes the 2010 edition.

Summary. This pamphlet sets forth pattern instructions and suggested procedures applicable to trials by general and special court-martial. It has been prepared primarily to meet the needs of military judges. It is also intended as a practical guide for counsel, staff judge advocates, commanders, legal specialists, and others engaged in the administration of military justice.

Applicability. This pamphlet applies to the Active Army, the Army National Guard of the United States, and the U.S. Army Reserve.

Proponent and exception authority. The proponent of this pamphlet is The Judge Advocate General (TJAG). The proponent has the authority to approve exceptions to this publication that are consistent with controlling law and regulation. The proponent may delegate this approval authority, in writing, to a division chief within the proponent agency in the grade of colonel or the civilian equivalent.

Suggested Improvements. Users are invited to send comments and suggested improvements to the Military Judges' Benchbook on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to the Office of the Chief Trial Judge, U.S. Army Legal Services Agency, ATTN: JALS-TJ, 901 N. Stuart St., Arlington, VA 22203.

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Chapter 1
INTRODUCTION

1–1. PURPOSE AND SCOPE.

a. Obligations, duties, and essential characteristics of military judges. Although the primary thrust of this Benchbook is to assist military judges in the preparation of trial instructions, military judges must constantly be mindful of their judicial responsibilities in and out of the courtroom. In this regard, additional guidance may be found in publications of such organizations as the American Bar Association, American Judicature Society, and National Conference of State Trial Judges. Particular attention should be given to the Code of Judicial Conduct and Standards for the Administration of Criminal Justice pertaining to the Special Functions of the Trial Judge as promulgated by the American Bar Association.

(1) General obligations.

(a) A military judge must maintain a thorough knowledge of military law, including all its latest developments, by careful analysis of the decisions of military appellate tribunals, the United States Court of Appeals for the Armed Forces, and pertinent decisions of other federal courts.

(b) A military judge must administer justice fairly and promptly, and in a simple, uniform, and efficient manner. All judges should retain a flexible trial docket to avoid unnecessary delays in the scheduling and conduct of trials. Whenever practicable and consistent with each accused's right to a speedy trial, judges should endeavor to conduct trials consecutively during specified periods and at specified locations.

(c) A military judge has responsibilities beyond deciding cases. The judge should provide statistical records of the activities of the court at regular intervals. In addition, the judge should conduct formal or informal training sessions for counsel to improve the quality of military justice.

(d) A military judge should analyze problems arising in court and, if appropriate, should recommend legislative and other changes that will improve the administration and cause of justice.

(e) Judges should participate in judicial associations and confer with other judges, particularly with those having similar jurisdiction, to increase their competence.

(2) General duties during trials.

(a) A military judge must administer justice and faithfully, impartially, and independently perform all duties to the best of the judge's ability and understanding in accordance with the law, the evidence admitted in court, and the judge's own conscience.

(b) The judge should seek a full understanding of the factual issues and the applicable law. The judge should generally hear the arguments of counsel regarding interlocutory matters and the admissibility of evidence out of the hearing of the court members.

(c) A military judge is not merely an umpire between counsel. As a representative of justice, the judge is sworn to uphold the law and to ensure that justice is done. The judge should maintain the dignity of trial proceedings and preside with independence and impartiality. However, the judge should not unnecessarily interfere with or interrupt counsel.

(d) A military judge should refrain from displays of temper, personal pique, or manifestations of idiosyncrasies. The judge should avoid comment, conduct, or appearance that may unfairly influence court members or affect their judgment on the outcome of the case. The judge must endeavor to show

restraint and understanding and to curb any tendency toward arbitrary or sarcastic remarks, bearing in mind that every word spoken during trial is not merely momentarily audible but is permanently recorded. The judge should therefore insure that all statements are uttered with due regard not only for the immediate impact upon those present, but upon all those who may subsequently examine the record in close detail.

(e) While proceedings must never be unduly protracted by an excessive display of legal acumen, or other unnecessary verbiage, they must also never be unnecessarily abbreviated by a natural reluctance to avoid repetition in similar but different cases. Through maximum use of the Military Judges' Benchbook and other aids, the judge must always skillfully maintain a prudent balance in this regard.

(f) When delivering instructions, the military judge should speak in a conversational voice, using language that is clear, simple, and understandable. The judge should avoid any inflection, act, or demeanor that suggests a personal opinion, or conveys a meaning that is not expressed in the language employed.

(3) Essential characteristics.

(a) Judicial office imposes great moral responsibilities. However, the mantle of responsibility which goes with the judge does not mean the judge must be aloof to human relations. The judge's individual character, warmth, and human qualities should not be adversely affected by judicial status but should be developed fully as necessary ingredients of a proper judicial temperament. A military judge must have a deep sense of justice and an abiding faith in the law. The judge must possess honesty and courage; wisdom and learning; courtesy and patience; thoroughness and decisiveness; understanding and social consciousness; and independence and impartiality.

(b) "The Kind of Judges We Need." One of the best descriptions of the kind of judges we need is contained in a statement by the late Chief Justice Arthur T. Vanderbilt of New Jersey, who devoted nearly all of his life to the promotion of programs to improve the administration of civilian and military justice: "We need judges learned in the law, not merely the law in books but, something far more difficult to acquire, the law as applied in action in the courtroom; judges deeply versed in the mysteries of human nature and adept in the discovery of the truth in the discordant testimony of fallible human beings; judges beholden to no man, independent and honest - equally important - believed by all men to be independent and honest; judges above all, fired with consuming zeal to mete out justice according to law to every man, woman, and child that may come before them and to preserve individual freedom against any aggression of government; judges with the humility born of wisdom, patient and untiring in the search for truth, and keenly conscious of the evils arising in a workaday world from any unnecessary delay. Judges with all of these attributes are not easy to find, but which of these traits dare we eliminate if we are to hope for evenhanded justice? Such ideal judges can after a fashion make even an inadequate system of substantive law achieve justice; on the other hand, judges who lack these qualifications will defeat the best system of substantive and procedural law imaginable."

b. Primary objective. This Benchbook is primarily designed to assist military judges of courts-martial in the drafting of necessary instructions to courts. Since instructional requirements vary in each case, the pattern instructions are intended only as guides from which the actual instructions are to be drafted. In addition, this publication is designed to suggest workable solutions for many specific problems which may arise at a trial and to guide the military judge past certain pitfalls which might otherwise result in error. Specific examples of situations with which the military judge may have to deal are set forth, and in many instances actual language which may be employed in meeting these situations is suggested.

1–2. NECESSITY FOR TAILORING.

No standardized set of instructions can cover every situation arising in a trial by court-martial. Special circumstances will invariably be presented, requiring instructions not dealt with in this Benchbook, or adaptation of one or more of these instructions to the facts of a case. These instructions are not intended to be a substitute for the ingenuity, resourcefulness, and research skill of the military judge. They will be of maximum value when used as a guide to carefully tailor instructions to be given to court members. The tailoring of instructions to the particular facts of a case contemplates the affirmative submission of the respective theories, both of the government and of the accused, to the members of courts, with lucid guideposts, to the end that they may knowledgeably apply the law to the facts as they find them.

1–3. ELEMENTS OF OFFENSES.

a. Each pattern instruction contained in Chapter 3 bears the same number as the corresponding paragraph in Chapter 4 of the Manual for Courts-Martial, United States, 2008 Edition (MCM). For example, regarding larceny, paragraph 46, MCM, the pattern instruction is numbered 3–46–1. The instruction for the lesser included offense of wrongful appropriation, also contained in paragraph 46, is Instruction 3–46–2. For most punitive offenses, if there are two or more methods by which the punitive article can be violated, the instructions are set forth separately, and are numbered with a –2, –3, –4, and so forth. Each instruction includes the maximum punishment; the form specification, which may be slightly different from the MCM form specification; the elements of the offense; definitions of terms; and required or desirable supplementary instructions. If an instruction includes a term having a special legal connotation (term of art), the term should be defined for the benefit of the court, and ordinarily appears in the "DEFINITIONS AND OTHER INSTRUCTIONS" section of each instruction. Each pattern instruction set out in Chapter3 should be prefaced by the language found in Chapters 2 (2–5–9) or 8 (8–3–8), PREFATORY INSTRUCTIONS ON FINDINGS. In the body of the instructions, that is, the elements and definitions sections, language found in parentheses is ordinarily not required in each case, but may be in a particular case, depending on the pleadings, the facts, and the contentions of the parties. Language set forth in brackets denotes elements which are alternative means of committing an offense, or aggravating factors which are not required to be instructed upon in each case, unless pled in the specification. For example, Article 123 may be violated by forging a document or uttering a forged document; thus, the form specification and elements for forgery are found in one set of brackets, and those for uttering are set forth in a second set of brackets.

b. NOTEs are used extensively throughout the instructions in Chapter 3. When an instruction follows a note in the "DEFINITIONS AND OTHER INSTRUCTIONS" section, that instruction should be given only if the subject matter of the note applies to the facts and circumstances of that case. NOTEs in other portions of Chapter 3 are intended to explain the applicability of the instruction generally, or to alert the trial judge to optional elements or unusual applications of the instruction.

1–4. OTHER INSTRUCTIONS.

a. When court members are to determine findings in a case involving a plea of not guilty, the military judge should instruct as to the elements of each offense charged and all lesser included offenses, any special or other defense in issue, and other supplementary matters, bearing in mind the need for tailoring such instructions to the facts of the case. These instructions should conclude with mandatory advice concerning the burden of proof, reasonable doubt, presumption of innocence, and guidance concerning procedures to follow in deliberations and voting in closed session found in Chapter 2. When court members are to determine a sentence, instructions must be tailored to the law and evidence just as in the case of pre-findings advice.

b. Instructions in Chapter 5 cover general and special defenses, and Chapter 7 includes common evidentiary instructions. As in Chapter 3, instructional language which follows a note is to be given only when the note applies to the facts and circumstances of the offense.

1–5. REFERENCES.

Paragraph numbers in Chapter 3 conform to the paragraph numbers in the MCM. Therefore, no MCM citations are listed at paragraph e, "Reference." Absent other citations, paragraph e is omitted.

RESERVED

Chapter 2
TRIAL PROCEDURE AND INSTRUCTIONS

This procedural guide modifies the Guide for General and Special Courts-Martial in Appendix 8, Manual for Courts-Martial, 2008. This guide is intended for use in any case to which a military judge (MJ) has been detailed. In addition to serving as a procedural guide for contested and uncontested trials, this chapter provides the majority of standard, nonevidentiary instructions on findings and sentencing. The order in which the guide and instructions appear generally corresponds with the point in the trial when the particular wording or instruction is needed or is otherwise appropriate.

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.

NOTE: The MJ should examine the convening order(s) and any amendments for accuracy. IF A CAPITAL CASE, GO TO CHAPTER 8.

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

NOTE: 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.

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

NOTE: The MJ must pay attention to the date of service. In peacetime, if less than3 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, a suggested guide can be found at 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; _____, 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).

NOTE: When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of each opening and closing of each session, whether a recess, adjournment, or otherwise, for insertion in the record.

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: Oaths for counsel. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the MJ:

"Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) 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 applicable inquiry at 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 applicable inquiry at 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: "(Name of defense counsel), 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.

(OATH FOR CIVILIAN COUNSEL:) MJ: 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. 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 _____, (and investigated by _____). (The Article 32 investigation was waived.)

NOTE: If the accused waived the Article 32 investigation, the MJ should inquire to ensure that it was a knowing and voluntary waiver. The script at paragraph 2-7-8, PRETRIAL AGREEMENT: ARTICLE 32 WAIVER, may be used, but if the waiver was not IAW a pretrial agreement, the first sentence of the first question should be omitted. If the waiver was part of a pretrial agreement, the MJ may defer this inquiry until discussion of the pretrial agreement at paragraph 2-2-6.

2–1–2. 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: Now, 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, 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 enlisted court members and the request is written, mark it as an appellate exhibit. Proceed to paragraph 2-1-3, ARRAIGNMENT. If accused elects officer members, proceed to paragraph 2-1-3, 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.

2–1–3. 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 at this time.)

NOTE: Whenever factual issues are involved in ruling on a motion, the MJ shall state essential findings of fact. If the trial counsel gives notice that the government desires a

continuance to file an 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.

Section II
Guilty Plea Inquiry

2–2–1. GUILTY PLEA INTRODUCTION

MJ: _____, your counsel has entered a plea of guilty for you to ((the) (all) (several) 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 wish to consult with your defense counsel prior to answering any of my questions. If at any time 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, in fact, guilty. If you do not believe that you are guilty, then you should not for any reason plead guilty. 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 offenses 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 any of these rights?

ACC: (Responds.)

MJ: Do you understand that by pleading guilty you no longer have these rights?

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, in fact, 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: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure the accused has a copy. _____, 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: (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, in fact, guilty of the offense(s) to which you have 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 upon 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 whatsoever 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 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, whether 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 (The) Specification (__) of (The) (Additional) Charge (__), in 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 (The) Specification (___) of (The) (Additional) 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: Does either counsel believe any further inquiry is required?

TC/DC: (Respond.)

2–2–4. MAXIMUM PUNISHMENT INQUIRY

MJ: Trial Counsel, what do you calculate to be the maximum punishment authorized 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 in this case based solely on your guilty plea is _____. (A fine may also be adjudged.)

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: On your plea of guilty alone this court could sentence you to the maximum punishment which I just stated. Do you understand that?

ACC: (Responds.)

MJ: Do you have any questions as to the sentence that could be imposed as a result of your guilty plea?

ACC: (Responds.)

MJ: Trial Counsel, is there a pretrial agreement in this case?

TC: (Responds.)

NOTE: If no pretrial agreement exists, continue below. If a pretrial agreement exists and trial is by 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).

2–2–5. IF NO PRETRIAL AGREEMENT EXISTS

MJ: Counsel, even though there is no formal pretrial 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 2-2-8, ACCEPTANCE OF GUILTY PLEA.

2–2–6. PRETRIAL AGREEMENT (JUDGE ALONE)

MJ: Trial Counsel, have both the offer portion and the quantum portion marked as separate Appellate Exhibits and then hand me only the offer portion. Also, ensure that the accused has a copy of the entire agreement in front of (him) (her).

TC: (Complies.)

MJ: _____, I have before me what has been marked as Appellate Exhibit __, which is the offer portion of your pretrial agreement, and your defense counsel is showing to you Appellate Exhibit __, the quantum portion of your pretrial agreement. 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 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 investigation: 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 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 your ETS date arrives while you are serving confinement as a part of your sentence, 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 2-2-8, ACCEPTANCE OF GUILTY PLEA.

2–2–7. PRETRIAL AGREEMENT (MEMBERS)

MJ: Trial Counsel, have both the offer portion and the quantum portion of the pretrial agreement marked as separate appellate exhibits, ensure that the accused has a copy in front of (him) (her), and then hand them to me.

TC: (Complies.)

MJ: _____, I have before me 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 __ the full and complete agreement in this case and are you satisfied that there are no other agreements?

TC/DC: (Respond.)

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 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 investigation: 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 your ETS date arrives while you are serving confinement as a part of your sentence, 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, 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 2-2-8, ACCEPTANCE OF GUILTY PLEA.

2–2–8. 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 1325.7, Enclosure 27: 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: 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 has pled guilty to only some of the charges and specifications or has 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 offenses, 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: For judge alone (sentencing), go to Section IV and for court members (sentencing only), after marking the flyer, go to Section VI.

Section III
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 excused (permanently) (temporarily). 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 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 case.)

MJ: Defense Counsel, any surrebuttal?

DC: (Responds / presents case.)

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, yourself, 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: 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 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: 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.

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

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.)

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. If the matter is raised before argument, the MJ should caution the DC to limit the request to a bad-conduct discharge. See paragraph 2-7-27 for the procedural instructions on ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE.

MJ: The court is closed.

2–4–1. 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: _____. (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; if none exists, go to paragraph 2-4-2, POST-TRIAL AND APPELLATE RIGHTS ADVICE.

MJ: Please hand me Appellate Exhibit __, the quantum portion of the 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: 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.***

2–4–2. 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?

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 these post-trial and appellate rights to you?

ACC: (Responds.)

MJ: Did your defense counsel explain to you what matters you may submit to the convening authority for his/her consideration under RCM 1105 and RCM 1106?

ACC: (Responds.)

MJ: Did your defense counsel explain to you that under RCM 1105 and RCM 1106 you may submit any matters to the convening authority to include, but not limited to, a personal letter and documents, letters and documents from any other person, requests for deferment and waiver of forfeitures, and any other matter you desire for the convening authority to consider before taking action on your case?

ACC: (Responds.)

MJ: Do you understand that it is your responsibility to keep in contact with your defense counsel and let him/her know your desires in this regard?

ACC: (Responds.)

MJ: Do you understand that if your defense counsel cannot locate you it will be difficult for him/her to know what to submit for you to the convening authority?

ACC: (Responds.)

MJ: Now, if your defense counsel tries to contact you but is unsuccessful, do you authorize him or her to submit clemency matters on your behalf to the Convening authority as he or she deems appropriate?

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 and upon whom the staff judge advocate's post-trial recommendation is to be served.***

MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the staff judge advocate's post-trial recommendation to be served?

DC: (Responds.)

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 you find (him) (her) guilty 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. 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. The fact that charges 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 investigated any offense charged, if you have formed or expressed an opinion as to the guilt or innocence of the accused (or as to any enlisted member, that you belong to the same company-sized unit as 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.

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). The way we handle that is to require you to write out the question 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. (There are forms provided to you for your use if you desire to question any witness.) 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.

During any recess or adjournment, you may not discuss the case with anyone, not even among yourselves. You must not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in the case. You must hold your discussion of the case until you are all together in your closed-session deliberations so that all of the panel members have the benefit of your discussion. Do not purposely visit the scene of any incident alleged in the specification(s) or involved in the trial. You must also avoid contact with witnesses or potential witnesses in this case. If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every break or recess, 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).

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 _____; forwarded with recommendations as to disposition by _____ (and investigated 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. 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?

4. Does anyone have any prior knowledge of the facts or events in this case?

5. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

6. (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?

7. If so, will that experience influence the performance of your duties as a court member in this case in any way?

> ***NOTE: If Question 7 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the hearing of the other members.***

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

9. (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?

10. 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?

11. 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?

12. You are all basically familiar with the military justice system, and you know that the accused has been charged, (his) (her) charges 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 charges have been referred to trial?

13. 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?

14. 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?

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

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

17. 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?

18. 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?

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

> ***NOTE: If Question 19 is answered in the affirmative, the military judge may want to ask questions 20 and 21 out of the hearing of the other members.***

20. (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?

21. (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?

22. 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?

23. 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?

24. 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)?

25. 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 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 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?

26. 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?

27. 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?

28. 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, however, 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.)

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: Members of the Court, there are some matters that we must now take up outside of your presence. Please return to the deliberation room.

MBRS: (Comply.)

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.)

MJ: (Granted/Denied.)

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 THE MJ IS GRANTING THE CHALLENGE) MJ: The challenge is granted.

(FOR EACH CHALLENGE THE MJ IS DENYING) 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 (_____).

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

TC: (Responds.)

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

DC: (Responds.)

NOTE: The MJ will verify that a quorum remains, and if enlisted members are detailed, at least one-third are enlisted. If any member is excused as a result of a challenge, the member will be informed that s/he has been excused; the seating for the remaining members will be rearranged according to rank.

MJ: Call the members.

2–5–4. ANNOUNCEMENT OF PLEA

TC: All parties are present as before, to now include the court members (with the exception of _____, who (has) (have) been excused).

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 court members.) 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. (If the motion is made before the court members and is denied, give 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, have them marked as appellate exhibits, show them to the TC and the DC, 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 in this case?

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 using Chapter 3 of the Benchbook.*** **_____ _____ _____ _____.**

> ***NOTE: If lesser included offenses are in issue, continue; 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 primarily (in that the offense charged requires as (an) essential 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) (but it does require that you be satisfied beyond a reasonable doubt that (state any different element(s) applicable only to the lesser offense)).

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

MJ: Another lesser included offense of the offense alleged in (__) (The) Specification _____ (of) (The) (Additional) Charge __ is the offense of _____, in violation of Article __. To find the accused guilty of this lesser offense, you must be convinced beyond a reasonable doubt of the following elements: (list the elements).

This lesser included offense differs from the lesser included offense I discussed with you previously in that this offense does not require as (an) essential element(s) that the accused (<u>state the element(s) applicable only to the greater offense</u>) but it does require that you be satisfied beyond a reasonable doubt that (<u>state any different element(s) applicable only to the lesser offense</u>)).

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.

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.

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.)

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 members of the court are required to vote.

(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.

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

No. of Members	Two-thirds
3	2
4	3
5	4
6	4
7	5
8	6
9	6
10	7
11	8
12	8

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 of (the) (all) charge(s) and specifications(s). The second part will be used if the accused is convicted as charged of (the) (all) charge(s) and specification(s); (and the third portion will be used if the accused is convicted of some but not all of the offenses). Once you have finished filling in what is applicable, 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(s) (has) (have) been modified to reflect the words that would be deleted, (as well as the words that would be substituted therefore) 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 whatsoever. The worksheet(s) (is) (are) provided only as an aid in finalizing your decision.

MJ: 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 the trial, you must all remain together in the deliberation room during deliberations. While in your closed-session deliberations, you may not make communications to or receive communications from anyone outside the deliberation room, by telephone or otherwise. If you have need of a recess, if you have a question, or when you have reached 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. Further, during your deliberations you may not consult the Manual for Courts-Martial or any other legal publication unless it has been admitted into evidence.

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) __ and (Defense Exhibit(s) __) for use during the court's 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).

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, yourself, 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, or 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 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 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 to 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: Defense Counsel and Accused, please rise. (COL) (___) _____, please announce the findings of the court.

ACC/DC: (Comply.)
PRES: (Complies.)

MJ: Defense Counsel and Accused may be seated. (Trial Counsel) (Bailiff), please retrieve all exhibits from the president.)

> ***NOTE: If there are findings of guilty, go to paragraph 2-5-17, SENTENCING PROCEEDINGS; if acquitted, 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. This court-martial is adjourned.

2–5–17. SENTENCING PROCEEDINGS

> ***NOTE: If the MJ has not previously advised the accused of his allocution rights at the beginning of Section IV, 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.

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

TC: (Responds and presents case on sentencing.)

TC: The government rests.

MJ: Defense Counsel, you may proceed.

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 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 the maximum sentence to be based upon the findings of the court?

TC/DC: (Respond.)

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.

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. If the matter is raised before argument is made, the MJ should caution the DC to limit the request to a bad-conduct discharge. See paragraph 2-7-27 for procedural instructions on ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE.

2–5–21. 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: Confinement for Life without Eligibility for Parole: Whenever an accused is eligible to be sentenced to confinement for life for an offense occurring after 19 November 1997, the military judge must instruct that confinement for life without eligibility for parole is also a permissible punishment.***

(MAXIMUM PUNISHMENT) MJ: The maximum punishment that may be adjudged in this case is:

a. Reduction to the grade of _____;

b. Forfeiture of ((2/3ds) (_____) pay per month for (12) (__) months) (all pay and allowances);

c. Confinement for _____; (and)

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

MJ: The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence.

MJ: In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe ((IF NO MANDATORY MINIMUM SENTENCE:) or you may adjudge no punishment). There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal 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.

2–5–22. TYPES OF PUNISHMENT

NOTE: The following specific instructions on each type of punishment are optional but recommended. The instruction on the maximum punishment and the use by the members of a legally sufficient Sentence Worksheet listing the full range of punishments will suffice. However, the MJ must instruct on the effect of Article 58a and b, the nature of punitive discharges, and pretrial confinement credit, if applicable.

(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.)

(EFFECT OF ARTICLE 58a—U.S. ARMY:) MJ: I also advise you that any sentence of an enlisted service member in a pay grade above E-1 which 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. 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 without eligibility for parole) (life) (a maximum of __(years) (months)). (Unless confinement for life without eligibility for parole or 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 without eligibility for parole is an available punishment, instruct further as follows:***

(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 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 (with eligibility for parole) for the offense(s) of which the accused has been convicted. Accordingly, the sentence you adjudge must include a term of confinement for life (with eligibility for parole). (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 with eligibility for parole," (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 with eligibility for parole" in the sentence, 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 with eligibility for parole" 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 $_____.

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 $_____.

If reduced to the grade of E-__, the accused's total basic pay would be $_____.

MJ: This court may adjudge any forfeiture up to and including forfeiture of all pay and allowances.

(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: 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.

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: 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. See 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.)

NOTE: Vested benefits. Before giving the optional instruction concerning vested benefits contained in the below instructions, see United States v. McElroy, 40 MJ 368 (CMA 1994).

(DISHONORABLE DISCHARGE ALLOWED:) MJ: This court may adjudge either a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a dishonorable discharge or a bad-conduct discharge that would terminate the accused's current term of service.) 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 deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a bad-conduct discharge that would terminate the accused's current term of service). 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. 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 deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army 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.

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

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 _____, _____, _____.)

(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 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. The accused cannot be cross-examined by the prosecution or interrogated by court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, 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 the treatment or sentence of others, command options, or other matters***

that would be inadmissible but for their being presented in an unsworn statement, the instruction below may be appropriate. 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.

(For example, 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) (_____).)

(Your duty is to adjudge an appropriate sentence for this accused 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).)

(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 whatsoever in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court.

Second, such lies must have been, in your view, willful and material, 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.

(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. 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:) Once again, I advise you that any proposed sentence must include at least confinement for life with eligibility for parole.) The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

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

Table 2–2
Votes Needed for Sentencing

No. of Members	Two-thirds	Three-fourths
3	2	*
4	3	*
5	4	4
6	4	5
7	5	6
8	6	6
9	6	7
10	7	8
11	8	9
12	8	9

The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you 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 reballot concerns increasing or decreasing the sentence. I will 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. 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. When the court returns, I will examine the Sentence Worksheet. The president will then announce the sentence.

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) ___ (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.
TC: (Complies.)

MJ: The court is closed.

2–5–25. ANNOUNCEMENT OF SENTENCE

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

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 2-7-18, "HUNG JURY" INSTRUCTION.

MJ: (_____), is the sentence reflected on the Sentence Worksheet?

PRES: (Respond.)

MJ: (_____), please fold the Sentence Worksheet and give it to the Bailiff so that I can examine it.

BAILIFF: (Complies.)

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: Defense Counsel and Accused, please rise.

ACC/DC: (Comply.)

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.)

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, the 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.

MBRS: (Comply.)

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 there was no pretrial agreement, go to paragraph 2-6-14, POST-TRIAL AND APPELLATE RIGHTS ADVICE; if there was a pretrial agreement continue:

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: (Responds.)

MJ: Do counsel also agree with that interpretation?
TC/DC: (Respond.)

2–5–26. 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?
DC: Yes, Your Honor. Appellate Exhibit ___ is the written advisement.

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

MJ: _____, is that your signature on Appellate Exhibit ___?
ACC: Yes, Your Honor.

MJ: Defense Counsel, is that your signature on Appellate Exhibit ___?
DC: Yes, Your Honor.

MJ: _____, did your defense counsel explain your post-trial and appellate rights to you?
ACC: (Responds.)

MJ: Did your defense counsel explain to you what matters you may submit to the convening authority for his/her consideration under RCM 1105 and RCM 1106?
ACC: (Responds.)

MJ: Did your defense counsel explain to you that under RCM 1105 and RCM 1106 you may submit any matters to the convening authority to include, but not limited to, a personal letter and documents, letters and documents from any other person, requests for deferment and waiver of forfeitures, and any other matter you desire for the convening authority to consider before taking action on your case?
ACC: (Responds.)

MJ: Do you understand that it is your responsibility to keep in contact with your defense counsel and let him/her know your desires in this regard?

ACC: (Responds.)

MJ: Do you understand that if your defense counsel cannot locate you it will be difficult for him/her to know what to submit for you to the convening authority?

ACC: (Responds.)

MJ: Now, if your defense counsel tries to contact you but is unsuccessful, do you authorize him or her to submit clemency matters on your behalf to the Convening authority as he or she deems appropriate?

ACC: (Responds.)

MJ: _____, do you have any questions about your post-trial and appellate rights?

ACC: (Responds.)

(IF MORE THAN ONE DEFENSE COUNSEL:) MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the staff judge advocate's post-trial recommendation to be served?

DC: (Responds.)

MJ: Are there any 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, yourself, 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: Based upon the findings, I calculate the maximum punishment to be _____.

TC/DC: (Respond.)

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

TC/DC: (Respond.)

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: 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.

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

DC: (Responds.)

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 investigated any offense charged, if you have formed a fixed opinion as to what an appropriate punishment would be for this accused (as to any enlisted member, that you belong to the same company sized unit as 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.

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. The way we handle that is to require you to write out the question 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. (There are forms provided to you for your use if you desire to question any witness.) 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.

During any recess or adjournment, you may not discuss the case with anyone, not even among yourselves. You must not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in the case. You must hold your discussion of the case until you are all together in your closed session deliberations so that all of the members have the benefit of your discussion. Do not purposely visit the scene of any incident alleged in the specification(s) or involved in the trial. You must also avoid contact with witnesses or potential witnesses in this case. If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every break or recess, 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, 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 charges 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 _____; forwarded with recommendations as to disposition by _____ (and investigated 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. 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?

4. Does anyone have any prior knowledge of the facts or events in this case?

5. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

6. 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?

7. If so, will that experience influence your performance of duty as a court member in this case in any way?

> ***NOTE: If Question 7 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the hearing of the other members.***

8. How many of you are serving as court members for the first time?

9. (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?

10. 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?

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

> ***NOTE: If question 11 is answered in the affirmative, the military judge may want to ask questions 12 and 13 out of the hearing of the other members.***

12. (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?

13. (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?

14. 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?

15. 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?

16. 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)?

17. 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?

18. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence in this case?

19. 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?

20. 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, however, 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.)

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: Members of the Court, there are some matters that we must now take up outside of your presence. Please return to the deliberation room.

MBRS: (Comply.)

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.)

MJ: (Granted/Denied.)

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 THE MJ IS GRANTING THE CHALLENGE) MJ: The challenge is granted.

(FOR EACH CHALLENGE THE MJ IS DENYING) 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 (_____).

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

TC: (Responds.)

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

DC: (Responds.)

NOTE: The MJ will verify that a quorum remains and, if enlisted members are detailed, at least one-third are enlisted. If any member is excused as a result of a challenge, the member will be informed that s/he has been excused; the seating for the remaining members will be rearranged according to rank.

MJ: Call the members.

2–6–5. SENTENCING PROCEEDINGS

TC: All parties are present as before, to now include the court members (with the exception of _____, who (has) (have) been excused).

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.) 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 TC will collect the written questions, have them marked as appellate exhibits, examine them, show them to the DC, 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.

MJ: Defense Counsel, you may proceed.

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, 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. If the matter is raised before argument is made, the MJ should caution the DC to limit the request to a bad-conduct discharge. See paragraph 2-7-27 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: Confinement for Life without Eligibility for Parole. Whenever an accused is eligible to be sentenced to confinement for life for an offense occurring after 19 November 1997, the military judge must instruct that confinement for life without eligibility for parole is also a permissible punishment.***

(MAXIMUM PUNISHMENT:) MJ: The maximum punishment that may be adjudged in this case is:

a. Reduction to the grade of _____,

b. Forfeiture of ((2/3ds) (___) pay per month for (12) (___) months) (all pay and allowances),

c. Confinement for _____, (and),

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

The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence.

MJ: In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe ((IF NO MANDATORY MINIMUM SENTENCE:) or you may adjudge no punishment). There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal 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.

2–6–10. TYPES OF PUNISHMENT

NOTE: The following specific instructions on each type of punishment are optional but recommended. The instruction on the maximum punishment and the use by the members of a legally sufficient Sentence Worksheet listing the full range of punishments will suffice. However, the MJ must instruct on the effect of Article 58a and b, the nature of punitive discharges, and pretrial confinement credit, if applicable.

(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).

(EFFECT OF ARTICLE 58a—U.S. ARMY:) MJ: I also advise you that any sentence of an enlisted service member in a pay grade above E-1 which 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. 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 without eligibility for parole) (life) (a maximum of _____(years) (months)). (Unless confinement for life without eligibility for parole or 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 without eligibility for parole is an available punishment, instruct further as follows:***

(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 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 (with eligibility for parole) for the offense(s) of which the accused has been convicted. Accordingly, the sentence you adjudge must include a term of confinement for life (with eligibility for parole). (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 with eligibility for parole," (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 with eligibility for parole" in the sentence, 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 with eligibility for parole," 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 $ _____.

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 $ _____.

If reduced to the grade of E-___, the accused's total basic pay would be $ _____.

MJ: This court may adjudge any forfeiture up to and including forfeiture of all pay and allowances.

(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: 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. See 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.)

NOTE: Vested benefits. Before giving the optional instruction concerning vested benefits contained in the below instructions, see United States v. McElroy, 40 MJ 368 (CMA 1994).

(DISHONORABLE DISCHARGE ALLOWED:) MJ: This court may adjudge either a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a dishonorable discharge or a bad-conduct discharge that would terminate the accused's current term of service). 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 deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a bad-conduct discharge that would terminate the accused's current term of service.) 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. 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 deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army 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.

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

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

2–6–11. OTHER INSTRUCTIONS

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 _____, _____, _____.)

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 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. The accused cannot be cross-examined by the prosecution or interrogated by court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, 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. Jeffery, 48 MJ 229 (CAAF 1998); United States v. Britt, 48 MJ 233 (CAAF 1998). If the accused addresses the treatment or sentence of others, command options, or other matters that would be inadmissible but for their being presented in an unsworn statement, the instruction below may be appropriate. 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.

(For example, 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) (_____).)

(Your duty is to adjudge an appropriate sentence for this accused 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).)

(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 whatsoever in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court.

Second, such lies must have been, in your view, willful and material, 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.

(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. 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:) Once again, I advise you that any proposed sentence must include at least confinement for life with eligibility for parole.) The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

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

Table 2–3
Votes Needed for Sentencing

No. of Members	Two-thirds	Three-fourths
3	2	*
4	3	*
5	4	4
6	4	5
7	5	6
8	6	6
9	6	7
10	7	8
11	8	9
12	8	9

The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you 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 reballot 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. When the court returns, I will examine the Sentence Worksheet. The president will then announce the sentence.

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.

MJ: The court is closed.

2–6–13. 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.)

MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (_____). (Trial Counsel) (Bailiff), you may return it to the president.

TC/BAILIFF: (Complies.)

MJ: Defense Counsel and accused, please rise.

ACC/DC: (Comply.)

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.)

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 there was no pretrial agreement, go to paragraph 2-6-14, POST-TRIAL AND APPELLATE RIGHTS ADVICE; if there was a pretrial agreement continue:

MJ: _____, we are now going to discuss the operation of your pretrial agreement on the sentence of the court.

MJ: My understanding of the effect of the pretrial agreement on the sentence is that the convening authority may approve _____. Do you agree with that interpretation?

ACC: (Responds.)

MJ: Do counsel also agree with that interpretation?

TC/DC: (Respond.)

2–6–14. 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?

DC: Yes, Your Honor. Appellate Exhibit ___ is the written advisement.

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

DC: (Responds.)

MJ: _____, is that your signature on Appellate Exhibit ___?

ACC: Yes, Your Honor.

MJ: Defense Counsel, is that your signature on Appellate Exhibit ___?

DC: Yes, Your Honor.

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

ACC: (Responds.)

MJ: Did your defense counsel explain to you what matters you may submit to the convening authority for his/her consideration under RCM 1105 and RCM 1106?

ACC: (Responds.)

MJ: Did your defense counsel explain to you that under RCM 1105 and RCM 1106 you may submit any matters to the convening authority to include, but not limited to, a personal letter and documents, letters and documents from any other person, requests for deferment and waiver of forfeitures, and any other matter you desire for the convening authority to consider before taking action on your case?

ACC: (Responds.)

MJ: Do you understand that it is your responsibility to keep in contact with your defense counsel and let him/her know your desires in this regard?

ACC: (Responds.)

MJ: Do you understand that if your defense counsel cannot locate you it will be difficult for him/her to know what to submit for you to the convening authority?

ACC: (Responds.)

MJ: Now, if your defense counsel tries to contact you but is unsuccessful, do you authorize him or her to submit clemency matters on your behalf to the Convening authority as he or she deems appropriate?

ACC: (Responds.)

MJ: _____, do you have any questions about your post-trial and appellate rights?

ACC: (Responds.)

(IF MORE THAN ONE DEFENSE COUNSEL:) MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the staff judge advocate's post-trial recommendation to be served?

DC: (Responds.)

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 have to 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 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 AGREEMENT: DISMISSAL OF CHARGE CLAUSE

MJ: Your pretrial 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 imposition 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 AGREEMENT: TESTIFY IN ANOTHER CASE

MJ: In your pretrial 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 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 and approved, 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 AGREEMENT: SUSPENSION WITHOUT DEFERMENT

MJ: Your pretrial 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 AGREEMENT: ARTICLE 32 WAIVER

MJ: Your pretrial agreement states that you agreed to waive the Article 32 investigation. Have you discussed what an Article 32 investigation 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 investigation concerning that charge unless you agree otherwise?

ACC: (Responds.)

MJ: Do you understand that the primary purpose of the Article 32 investigation is to have a fair and impartial hearing officer inquire into the truth of the matters set forth in the charge(s) and to obtain information on which to recommend what disposition should be made of the case?

ACC: (Responds.)

MJ: Do you also understand that you have the right to be present at the Article 32 investigation and to be represented by counsel at the investigation?

ACC: (Responds.)

MJ: Do you understand that you could call witnesses, cross-examine government witnesses, and present documents for the investigating 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 investigation?

ACC: (Responds.)

MJ: Do you also understand that one possible strategy for you and your counsel at the Article 32 investigation could have been an attempt to have the Article 32 officer recommend a 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 investigation at the time you elected to give up the right to have the Article 32 investigation?

ACC: (Responds.)

MJ: Do you freely and willingly agree to proceed to trial by general court-martial without an Article 32 investigation 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 investigation or is it permanently waived?

DC: (Responds.)

MJ: Trial Counsel, do you agree?

TC: (Responds.)

2–7–9. PRETRIAL AGREEMENT: WAIVER OF MEMBERS

MJ: Your pretrial 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 agreement?

ACC: (Responds.)

MJ: Did you understand that you were giving up trial with members when you signed your pretrial agreement?

ACC: (Responds.)

MJ: Was that waiver a free and voluntary act on your part?

ACC: (Responds.)

2–7–10. PRETRIAL AGREEMENT: WAIVER OF MOTIONS

NOTE 1: Waiver of motions in a pretrial agreement. RCM 705 prohibits any term in a pretrial 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 pretrial 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 agreement?

DC: (Responds.)

MJ: (To accused) Your pretrial agreement states that you waive, or give up, the right to make a motion regarding (state the specific motion(s) waived by the pretrial 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 or failure to state an offense, for example, can never be given up. Do you understand that this term of your pretrial 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 pretrial agreement precludes 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 pretrial agreement and the consequences to you?

ACC: (Responds.)

MJ: Did anyone force you to enter into this term of your pretrial 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. 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 agreement,) Did you freely and voluntarily agree to this term of your pretrial agreement in order to receive what you believed to be a beneficial pretrial 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 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 agreement?

ACC: (Responds.)

MJ: Do you have any questions about this provision of your pretrial agreement?

ACC: (Responds.)

2–7–11. PRETRIAL AGREEMENT: WAIVER OF MOTION FOR ILLEGAL PRETRIAL PUNISHMENT (ARTICLE 13) SENTENCING CREDIT

MJ: Your pretrial 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 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 pretrial agreement?

ACC: (Responds.)

MJ: Defense Counsel, which side originated this term of the pretrial agreement?

DC: (Responds.)

MJ: (Although the government originated this term of your pretrial agreement,) Did you freely and voluntarily decide to agree to this term of your pretrial agreement in order to receive what you believed to be a beneficial pretrial 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 agreement continues to exist?

ACC: (Responds.)

MJ: Do you have any questions about this provision of your pretrial 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: An instruction substantially as follows must be given when any court member proposes reconsideration:

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 2–4
Votes Needed Reconsideration of Findings

No. of Members	Not Guilty	Guilty
3	2	2
4	3	2
5	3	2
6	4	3
7	4	3
8	5	3
9	5	4
10	6	4
11	6	4
12	7	5

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.

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. Either type of punitive discharge and its consequences remain with the accused for the rest of (his) (her) life, whereas the (period of confinement once served) (or) (money once forfeited) does not have the same 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)

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 2–5
Votes Needed for Reconsideration of Sentence

No. of Members	Increase Sentence	Decrease Sentence (10 yrs or less)	Decrease Sentence (Conf > 10 years)
3	2	2	
4	3	2	
5	3	2	2
6	4	3	2
7	4	3	2
8	5	3	3
9	5	4	3
10	6	4	3
11	6	4	3
12	7	5	4

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.

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 2–6
Table of Equivalent Punishments

Confinement at hard labor	Hard labor without confinement	Restriction to limits	Forfeiture
1 day	1 1/2 days	2 days	1 day's pay

Table 2–7
Table of Equivalent Nonjudicial Punishments

Kind of Punishment	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)	Upon other personnel
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 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. CONFESSIONAL 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 whatsoever 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. ADVICE ON CONSEQUENCES OF VOLUNTARY ABSENCE

NOTE: The following inquiry is suggested when the accused is arraigned, but trial on the merits is postponed to a later date. 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 stage of your trial. However, if you are voluntarily absent on the date this trial is scheduled to proceed, you may forfeit the right to be present. The trial could go forward on the date scheduled 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 the trial date. Do you have any questions about what I've told you?

ACC: (Responds.)

2–7–27. 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 and if a dishonorable discharge is possible, the defense counsel may only argue for a bad-conduct discharge. 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 (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 (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 bad-conduct discharge) (being dismissed), you will lose substantially all benefits from the Department of Veterans Affairs and the Army establishment, as well as other benefits normally given by other governmental agencies?

ACC: (Responds.)

(IF RETIREMENT ELIGIBLE: MJ: Do you understand that a (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 (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 bad-conduct discharge) (dismissed from the service) (if, as you indicate, it will preclude (your going to 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 bad-conduct discharge) (dismissed from the service) (if it will preclude (your going to confinement) (an extended period of confinement) (_____))?

ACC: (Responds.)

NOTE 2: Sentence Appropriateness. The sentencing authority should not adjudge a 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."

Chapter 3
INSTRUCTIONS ON ELEMENTS OF OFFENSES

3–1–1. PRINCIPALS—AIDING, ABETTING, COUNSELING, COMMANDING, OR PROCURING (ARTICLE 77)

a. This paragraph does not contain any instructions, but will assist the military judge in formulating instructions when issues of vicarious liability are raised by the evidence.

b. Article 77 does not define an offense; it merely makes clear that a person who did not personally perform an act charged may still be criminally responsible for that offense.

c. *See* Instruction 7-1-4 for the instructions on the vicarious liability of co-conspirators.

d. When the evidence shows that the accused is the person who actually committed the offense, the military judge should use that Chapter 3 instruction corresponding to the offense charged.

e. If the evidence shows that the accused did not actually commit the offense, but may be criminally responsible as one who aided and abetted, commanded, counseled, procured, or caused the commission of the offense, the military judge should follow the guidance in Instruction 7-1. Depending on the evidence, one, two, or all of Instructions 7-1-1 through 7-1-3 will be given.

f. As Instruction 7-1 indicates, when instructing on an offense in which the accused is not the one who actually committed the offense, the military judge should:

(1) Give the elements of the offense charged indicating that the actual perpetrator, and not the accused, is the one who is alleged to have committed the offense.

(2) After all the elements of the charged offense have been given, add the following element: "That (state the name of the accused) ((aided and abetted) (counseled) (commanded) (procured) (caused)) (state the name of the actual perpetrator) ((to commit) (in committing)) the offense of (state the alleged offense) by (state the manner alleged)."

(3) Give the instructions and definitions of the offense charged, remembering that "the accused" as used in those instructions and definitions will refer to the actual perpetrator and not the accused at trial.

(4) Give Instructions 7-1-1 through 7-1-3 as required by the evidence.

3–1–2. JOINT OFFENDERS (ARTICLE 77)

When an accused is charged as a joint offender, the military judge should consult Instruction 7-1 for assistance in drafting appropriate instructions.

3–2–1. ACCESSORY AFTER THE FACT (ARTICLE 78)

a. MAXIMUM PUNISHMENT: Maximum authorized for principal offense, but not death, no more than 1/2 confinement authorized for principal offense, and not more than 10 years.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), knowing that (at/onboard—location), on or about _____, _____ had committed an offense punishable by the Uniform Code of Military Justice, to wit: _____, did, (at/on board—location) on or about _____, in order to (hinder) (prevent) the (apprehension) (trial) (punishment) of the said _____, (receive) (comfort) (assist) the said _____ by _____.

c. ELEMENTS:

(1) That (state the alleged offense), an offense punishable by the Uniform Code of Military Justice, was committed by (state the name of the principal) at (state the time and place alleged);

(2) That the accused knew that (state the name of the principal) had committed such offense;

(3) That the accused thereafter (state the time and place alleged) [(received) (comforted) (assisted)] (state the name of the principal) by (state the manner alleged); and

(4) That the accused [(received) (comforted) (assisted)] (state the name of the principal) in order to [(hinder) (prevent)] (his) (her) [(apprehension) (trial) (punishment)].

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The accused may be found guilty as an accessory after the fact only if, in addition to all other elements of the offense, you are satisfied beyond a reasonable doubt that:

NOTE 1: Elements of principal's offense. Here, the members must be instructed on the elements of the offense allegedly committed by the principal. The instructions given should be those setting forth the elements of the pertinent offense and should be carefully tailored to include such factors as value, amount, or other essential ingredients which might affect the maximum punishment.

NOTE 2: Principal offense housebreaking or burglary. In cases in which the offense alleged to have been committed by the principal is burglary or housebreaking, the

members should be advised as to the relevant elements of the particular offense or offenses which the evidence indicates the principal may have intended to commit inside the house, building, or structure involved.

NOTE 3: Maximum punishment for principal offense affected by value. If the offense committed by the principal is one for which the maximum punishment is graduated according to the value of the property, damage, or amount involved, and if the allegations and evidence will support a finding as to specific value, damage, or amount, the element(s) of the instruction should be phrased so as to set out that value, damage, or amount. For example, if the offense committed by the principal is larceny, element 1 of the instruction should state: "That larceny, an offense punishable by the Uniform Code of Military Justice, of property of a value of (state the value alleged) was committed by (state the name of the principal) at (state the time and place alleged)." Offenses other than larceny and wrongful appropriation which require similar modification of the instruction include: simple arson (Article 126), fraud against the United States (Article 132), knowingly receiving stolen property (Article 134), and other offenses in violation of Articles 103, 108, 109, and 123a. When value, damage, or amount is in issue an instruction in accordance with Instruction 7-16, Variance - Value, Damage, or Amount, should be given.

NOTE 4: Conviction of the principal not required. Conviction of the principal of the offense to which the accused is allegedly an accessory after the fact is not a prerequisite to the trial of the accused. Furthermore, evidence of the acquittal or conviction of the principal in a separate trial is not admissible to show that the principal did or did not commit the offense.

NOTE 5: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–3–1. CONVICTION OF LESSER INCLUDED OFFENSE (ARTICLE 79)

a. This paragraph does not contain any instructions but will assist the military judge when the evidence raises a lesser included offense.

b. When the evidence raises a lesser included offense and the requirements of Paragraph 3b, MCM (2008 Edition) are satisfied, the military judge must instruct on the lesser included offense. This is done after instructing upon the charged offense. In the usual case, the order of instructions will be:

(1) Instructions and definitions of the charged offense.

(2) Introducing the lesser included offense. *See* paragraph 2-5-10 and paragraph 8-3-9.

(3) Elements and definitions of the lesser included offense.

(4) Comparison between the offense charged and the lesser included offense. *See* paragraph 2-5-10b and paragraph 8-3-9b.

(5) If more than one lesser included offense is raised by the evidence, follow the instructional pattern in subparagraphs (2) through (4) above for each lesser included offense.

c. When lesser included offenses are raised by the evidence, the military judge must ensure that a properly tailored Findings Worksheet is prepared and the military judge instructs the members on the use of that worksheet.

d . *See also* Instructions 7-15 and 7-16 with respect to variance and findings by exceptions and substitutions.

3–4–1. ATTEMPTS—OTHER THAN MURDER AND VOLUNTARY MANSLAUGHTER (ARTICLE 80)

NOTE 1: Applicability of this instruction. The following instruction will ordinarily apply to all attempts under Article 80 except attempted murder and attempted voluntary manslaughter. Also, do not use this instruction in the following cases: assault by attempt (use instructions for appropriate assault offense tailored for attempt), attempted desertion (use Instruction 3-9-4), attempted mutiny (use Instruction 3-18-6), attempting to aid the enemy (use Instruction 3-28-2) and attempted espionage (use Instruction 3-30A-2) and attempting to kill an unborn child (use Instruction 3-44A-3).

a. MAXIMUM PUNISHMENT: That authorized for commission of the offense attempted, except (1) mandatory minimum sentences do not apply, and (2) that in no case shall the death penalty or confinement exceeding 20 years be adjudged.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location) on or about _____, attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

c. ELEMENTS:

(1) That, (state the time and place alleged), the accused did (a) certain act(s), that is: (state the act(s) alleged or raised by the evidence);

(2) That the act(s) (was) (were) done with specific intent to commit the offense of (state the alleged attempted offense);

(3) That the act(s) amounted to more than mere preparation, that is, (it was) (they were) a substantial step and a direct movement toward the commission of the intended offense; and

(4) That such act(s) apparently tended to bring about the commission of the offense of (state the alleged attempted offense), (that is, the act(s) apparently would have resulted in the actual commission of the offense of (state the alleged attempted offense) except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (_____) which prevented completion of that offense.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the

accused guilty of this offense, you must find beyond a reasonable doubt that the accused went beyond preparatory steps, and (his) (her) act(s) amounted to a substantial step and a direct movement toward the commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of (his) (her) resolve to commit the offense.

Proof that the offense of (state the alleged attempted offense) actually occurred or was completed by the accused is not required. However, it must be proved beyond a reasonable doubt that, at the time of the act(s), the accused intended every element of (state the alleged attempted offense).

The elements of the attempted offense are: (state the elements of the offense allegedly intended along with necessary definitions).

NOTE 2: Instructing on the elements of the offense attempted. When instructing on the elements of the attempted offense, the military judge may describe the intended offense in summarized fashion, along with applicable definitions, rather than enumerate each element. For example, where the alleged offense is attempted larceny of an item of a value greater than $500, the military judge may state: "Larceny is the wrongful taking of the property of another of a value greater than $500 with the intent to permanently deprive the owner of the use and benefit of the property or the intent to permanently appropriate the property to the accused's own use or the use of anyone other than the lawful owner. A taking is wrongful only when done without the consent of the owner and with a criminal state of mind." When the offense attempted involves elements of another offense, such as burglary with intent to commit rape, the elements of both offenses (burglary and rape), along with applicable definitions, must be stated.

NOTE 3: Graduated punishment possibilities for the attempted offense. If the offense attempted has maximum punishments graduated according to value, amounts, type of property, or other factors, the elements of the attempted offense should include the value, amount, type of property, or other factor alleged. For example, where the offense attempted is larceny of military property, that the property was military property must be stated as an element and the definition of military property given. The elements for the offense need not be enumerated but may be summarized as in the example in NOTE 2, above.

NOTE 4: Factual impossibility. If the evidence indicates that it was impossible for the accused to have committed the offense attempted for reasons unknown to him or her, the accused may still be found guilty of attempt. A person who purposefully engages in conduct which would constitute an offense if the circumstances were as that person believes them to be is guilty of an attempt. For example, if with intent to commit robbery, a person by force and against the victim's will reaches into the victim's pocket to steal money, believing money might be there, the person is guilty of attempted robbery even

though the victim has no money on his person. When factual impossibility is raised, the following may be appropriate:

> The evidence has raised the issue that it was impossible for the accused to have committed the offense of _____ because (here state the facts or contention of the counsel). If the facts were as the accused believed them to be, and under those facts the accused's conduct would constitute the offense of (_____), the accused may be found guilty of attempted (_____) even though under the facts as they actually existed it was impossible for the accused to complete the offense of (_____). The burden of proof to establish the accused's guilt beyond a reasonable doubt is upon the government. If you are satisfied beyond a reasonable doubt of all the elements of the offense as I have explained them to you, you may find the accused guilty of attempted (_____) even though under the facts as they actually existed it was impossible for the accused to commit the offense of (_____).

NOTE 5: Offenses requiring an intent to commit murder. When an attempt to commit an offense which requires the intent to commit murder is charged (e.g., burglary with intent to commit murder), the military judge MUST instruct that the requisite intent is to kill; an intent to inflict great bodily harm is not sufficient. See United States v. DeAlva, 34 MJ 1256 (ACMR 1992).

NOTE 6: Other Instructions. Where the evidence raises the issue that the accused may have abandoned his or her criminal purpose, Instruction 5-15, Voluntary Abandonment, may be applicable. Where there is evidence that the accused may not have had the ability to formulate the requisite intent, Instruction 5-17, Evidence Negating Mens Rea, should be given. Instruction 5-17 is required even when evidence of the defense of lack of mental responsibility is not presented. Ellis v. Jacob, 26 MJ 10 (CMA 1988); United States v. Berri, 33 MJ 337 (CMA 1991). If voluntary intoxication in relation to the ability to formulate the requisite intent is raised by the evidence, Instruction 5-12, Voluntary Intoxication, should ordinarily be given. Instruction 7-3, Circumstantial Evidence (Intent), is normally applicable.

e. REFERENCES: United States v. Jones, 37 MJ 459 (CMA 1993); United States v. Schoof, 37 MJ 96 (CMA 1993); United States v. Byrd, 24 MJ 286 (CMA 1987).

3–4–2. ATTEMPTS—MURDER, PREMEDITATED AND UNPREMEDITATED (ARTICLE 80)

NOTE 1: Applicability of this instruction. Use this instruction only for attempted premeditated or attempted unpremeditated murder. For attempted voluntary manslaughter as the charged offense, see Instruction 3-4-3; as a lesser included offense, see NOTE 6, below. For other attempts, see Instruction 3-4-1.

a. MAXIMUM PUNISHMENT:

(1) Attempted murder: DD, TF, life without eligibility for parole, E-1.

(2) Attempted voluntary manslaughter: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

NOTE 2: About this specification. There is no MCM form specification specifically for attempted murder or attempted voluntary manslaughter. The specification above is for Article 80 attempts generally.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused did (a) certain act(s), that is: (state the act(s) alleged or raised by the evidence);

(2) That such act(s) (was) (were) done with the specific intent to kill (state the name of the alleged victim); that is, to kill without justification or excuse;

(3) That such act(s) amounted to more than mere preparation, that is, (it was) (they were) a substantial step and a direct movement toward the unlawful killing of (state the name of the alleged victim); (and)

(4) That such act(s) apparently tended to bring about the commission of the offense of (premeditated murder) (unpremeditated murder); that is, the act(s) apparently would have resulted in the actual commission of the offense of (premeditated murder) (unpremeditated murder) except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (_____) which prevented completion of that offense; [and]

NOTE 3: <u>Attempted premeditated murder</u>. If the accused is charged with attempted premeditated murder, give element (5).

((5)) That at the time the accused committed the act(s) alleged, (he) (she) had the premeditated design to kill (<u>state the name of the alleged victim</u>).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The killing of a human being is unlawful when done without legal justification or excuse.

Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must find beyond a reasonable doubt that the accused went beyond preparatory steps, and (his) (her) act(s) amounted to a substantial step and a direct movement toward commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of (his) (her) resolve to unlawfully kill.

Proof that a person was actually killed is not required. However, it must be proved beyond a reasonable doubt that the accused specifically intended to kill (<u>state the name of the alleged victim</u>) without justification or excuse.

The intent to kill does not have to exist for any measurable or particular length of time before the act(s) of the accused that constitute(s) the attempt.

(For attempted premeditated murder, the intent to kill must precede the act(s) that constitute(s) the attempt. "Premeditated design to kill" means the formation of a specific intent to kill and consideration of the act intended to bring about death. The "premeditated design to kill" does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the act(s) that constitute(s) the attempt.)

(For (the lesser included offense of) attempted unpremeditated murder, the intent to kill must exist at the time of the act(s) that constitute(s) the attempt.)

The intent to kill may be proved by circumstantial evidence, that is, by facts or circumstances from which you may reasonably infer the existence of such an intent. Thus, you may infer that a person intends the natural and probable results of an act (he) (she) purposely does. Therefore, if a person does an intentional act which is likely to result in death, you may infer that (he) (she) intended to inflict death. The drawing of this inference, however, is not required.

NOTE 4: Instructions on attempted unpremeditated murder as a lesser included offense—generally. The evidence may indicate that all the elements of attempted premeditated murder have been proven except premeditation. If so, give the instruction below. If the military judge will also be instructing on attempted voluntary manslaughter as a lesser included offense, the portion in parentheses of the instruction below should also be given. If the evidence indicates that premeditation is in issue because of the accused's passion or the accused lacked the ability to premeditate, NOTE 5 and the instruction following are normally applicable:

If you find beyond a reasonable doubt all the elements of attempted premeditated murder except the element of premeditation (and you find beyond a reasonable doubt that the attempted killing was not done in the heat of sudden passion caused by adequate provocation, which I will mention in a moment), you may find the accused guilty of the lesser included offense of attempted unpremeditated murder.

NOTE 5: Attempted unpremeditated murder as a lesser included offense—accused's passion and ability to premeditate. If the evidence indicates that the passion of the accused may have affected his or her capacity to premeditate, the court may be instructed as below: (See also NOTE 6 below for additional instructions on this issue.)

With respect to the accused's ability to premeditate, an issue has been raised by the evidence as to whether the accused acted in the heat of sudden "passion." "Passion" means a degree of rage, pain, or fear which prevents cool reflection. If sufficient cooling off time passes between the provocation and the time of the attempted killing which would allow a reasonable person to regain self-control and refrain from killing, the

provocation will not reduce attempted murder to the lesser offense of attempted voluntary manslaughter. However, you may consider evidence of the accused's passion in determining whether (he) (she) possessed sufficient mental capacity to have "the premeditated design to kill." An accused cannot be found guilty of attempted premeditated murder if, at the time of the attempted killing, (his) (her) mind was so confused by (anger) (rage) (pain) (sudden resentment) (fear) (or) (_____) that (he) (she) could not or did not premeditate. On the other hand, the fact that the accused's passion may have continued at the time of the attempted killing does not necessarily demonstrate that (he) (she) was deprived of the ability to premeditate or that (he) (she) did not premeditate. Thus, (if you are convinced beyond a reasonable doubt that sufficient cooling off time had passed between the provocation and the time of the attempted killing which would allow a reasonable person to regain (his) (her) self-control and refrain from attempting to kill), you must decide whether (he) (she) in fact had the premeditated design to kill. If you are not convinced beyond a reasonable doubt that the accused attempted to kill with premeditation you may still find (him) (her) guilty of attempted unpremeditated murder if you are convinced beyond a reasonable doubt that the accused attempted to kill (state the name of the alleged victim) without justification or excuse.

NOTE 6: Attempted voluntary manslaughter as a lesser included offense. When there is evidence that an attempted killing may have been in the heat of sudden passion caused by adequate provocation, the military judge must instruct upon the lesser included offense of attempted voluntary manslaughter using the instructions below:

The lesser offense of attempted voluntary manslaughter is included in the crime of attempted (premeditated) (and) (unpremeditated) murder.

"Attempted voluntary manslaughter" is the attempted unlawful killing of a human being, done with an intent to kill, in the heat of sudden passion caused by adequate provocation. The presence of sudden passion caused by adequate provocation differentiates attempted unpremeditated murder from attempted voluntary manslaughter.

Acts of the accused which might otherwise amount to attempted (premeditated) (or) (unpremeditated) murder constitute only the lesser offense of attempted voluntary manslaughter if those acts were done in the heat of sudden passion caused by adequate provocation. "Passion" means a degree of anger, rage, pain, or fear which prevents cool reflection. The law recognizes that a person may be provoked to such an extent that in the heat of sudden passion caused by adequate provocation, (he) (she) attempts to strike a fatal blow before (he) (she) has had time to control (himself) (herself). A person who attempts to kill because of passion caused by adequate provocation is not guilty of (either) attempted (premeditated) (or) (unpremeditated) murder. Provocation is adequate if it would cause uncontrollable passion in the mind of a reasonable person. The provocation must not be sought or induced as an excuse for attempting to kill.

If you are not satisfied beyond a reasonable doubt that the accused is guilty of attempted (premeditated) (or) (unpremeditated) murder, but you are satisfied beyond a reasonable doubt that the attempted killing, although done in the heat of sudden passion caused by adequate provocation, was done with the intent to kill, you may still find (him) (her) guilty of attempted voluntary manslaughter.

NOTE 7: Factual impossibility. If the evidence indicates that it was impossible for the accused to have committed the offense for reasons unknown to him/her, the accused may still be found guilty of attempt. A person who purposely engages in conduct which would constitute an offense if the circumstances were as that person believes them to be is guilty of an attempt. For example, if a person points a pistol he or she believes is loaded at the victim and pulls the trigger with intent to kill the victim, the person is guilty of attempted murder or attempted voluntary manslaughter even though the pistol is not loaded. In such cases, the following instruction may be appropriate:

The evidence has raised the issue that it was impossible for the accused to have committed the offense (or lesser included offense) of (premeditated murder) (unpremeditated murder) (voluntary manslaughter) (because (here the military judge may state the facts or contention of counsel)). If the facts were as the accused believed them to be, and under those facts the accused's conduct would constitute the

offense of (premeditated murder) (unpremeditated murder) (voluntary manslaughter), the accused may be found guilty of attempted (premeditated murder) (unpremeditated murder) (voluntary manslaughter), even though under the facts as they actually existed it was impossible for the accused to complete the offense of (premeditated murder) (unpremeditated murder) (voluntary manslaughter). The burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the government. If you are satisfied beyond a reasonable doubt of all the elements of the offense(s) as I have explained them to you, you may find the accused guilty of attempted (premeditated murder) (unpremeditated murder) (voluntary manslaughter) even though under the facts as they actually existed it was impossible for the accused to commit the offense attempted.

NOTE 8: Inapplicability of transferred intent instruction. The military judge should not ordinarily give a transferred intent instruction (NOTE 4, Instruction 3-43-2) when the accused is charged with an attempt. If the person intends to kill X and in attempting to consummate that intent, shoots at Y believing that Y is in fact X, the evidence establishes the intent to kill Y. In these cases, an exceptions and substitutions or variance instruction (Instruction 7-15) may be applicable. The factual impossibility instruction in NOTE 7 above should not be used for situations posed in the hypothetical in this note because an unlawful killing is not factually impossible.

NOTE 9: Voluntary intoxication as a defense. If the issue of voluntary intoxication with respect to the ability to premeditate is raised by the evidence, Instruction 5-12, Voluntary Intoxication, should ordinarily be given. Voluntary intoxication by itself is not a defense to unpremeditated murder and will not reduce unpremeditated murder to a lesser form of unlawful killing. United States v. Morgan, 37 MJ 407 (CMA 1993). Voluntary intoxication is, however, a defense to the offense of attempt. Attempts require the specific intent to commit the offense intended and accordingly, voluntary intoxication by itself may defeat that specific intent. When this issue is raised by the evidence, Instruction 5-12, Voluntary Intoxication, is ordinarily applicable.

NOTE 10: Other instructions. When there is evidence that the accused may not have had the ability to formulate the requisite intent, Instruction 5-17, Evidence Negating Mens Rea, should be given. Instruction 5-17 is required even when evidence of the defense of lack of mental responsibility is not presented. Ellis v. Jacob, 26 MJ 10 (CMA 1988); United States v. Berri, 33 MJ 337 (CMA 1991). When an issue of self-defense, accident, or other legal justification or excuse is raised, tailored instructions must be given. See the instructions in Chapter 5. If the evidence raised the defense that the accused may have abandoned his or her criminal purpose, Instruction 5-15, Voluntary Abandonment, may be applicable. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

e. REFERENCES: United States v. Jones, 37 MJ 459 (CMA 1993); United States v. Schoof, 37 MJ 96, (CMA 1993); United States v. Byrd, 24 MJ 286 (CMA 1987).

3–4–3. ATTEMPTS—VOLUNTARY MANSLAUGHTER (ARTICLE 80)

NOTE 1: Applicability of this instruction. Use this instruction only for attempted voluntary manslaughter. For attempted premeditated or attempted unpremeditated murder, see Instruction 3-4-2. For other attempts, see Instruction 3-4-1.

a. MAXIMUM PUNISHMENT: DD, TF, 15 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

NOTE 2: About this specification. There is no MCM form specification specifically for attempted murder or attempted voluntary manslaughter. The specification above is for Article 80 attempts generally.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused did (a) certain act(s), that is, (state the act(s) alleged or raised by the evidence);

(2) That such act(s) (was) (were) done with the specific intent to unlawfully kill (state the name of the alleged victim); that is, to kill without justification or excuse;

(3) That such act(s) amounted to more than mere preparation; that is, (it was) (they were) a substantial step and a direct movement toward the unlawful killing of (state the name of the alleged victim); and

(4) That such act(s) apparently tended to bring about the commission of the offense of voluntary manslaughter, that is, the act(s) apparently would have resulted in the actual commission of the offense of voluntary manslaughter except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (_____) which prevented completion of that offense.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The killing of a human being is unlawful when done without legal justification or excuse.

Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must find beyond reasonable doubt that the accused went beyond preparatory steps, and (his) (her) act(s) amounted to a substantial step and a direct movement toward commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of (his) (her) resolve to commit the offense.

Proof that a person was actually killed is not required. However, it must be proved beyond reasonable doubt that the accused specifically intended to kill (state the name of the alleged victim) without justification or excuse.

The intent to kill may be proved by circumstantial evidence, that is, by facts or circumstances from which you may reasonably infer the existence of such an intent. Thus, it may be inferred that a person intends the natural and probable results of an act (he) (she) purposely does. Therefore, if a person does an intentional act which is likely to result in death, it may be inferred that (he) (she) intended to inflict death. The drawing of this inference, however, is not required.

The intent to kill does not have to exist for any measurable or particular time before the act(s) of the accused that constitute the attempt. All that is required is that it exist at the time of the act(s) that constitute(s) the attempt.

NOTE 3: Sudden passion/adequate provocation. When attempted voluntary manslaughter is the charged offense, the existence of sudden passion caused by adequate provocation is not an element. The following instruction may be appropriate if an explanation is necessary:

The offense of attempted voluntary manslaughter is committed when a person, with intent to kill, unlawfully attempts to kill a human being in the heat of sudden passion caused by adequate provocation. The term "passion" means anger, rage, pain, or fear. Proof that the accused was acting in the heat of passion caused by adequate provocation is not

required. It is essential, however, that the four elements I have listed for you be proved beyond reasonable doubt before the accused can be convicted of attempted voluntary manslaughter.

NOTE 4: Factual impossibility. If the evidence indicates that it was impossible for the accused to have committed the offense for reasons unknown to him/her, the accused may still be found guilty of attempt. A person who purposely engages in conduct which would constitute an offense if the circumstances were as that person believes them to be is guilty of an attempt. For example, if a person points a pistol he/she believes is loaded at the victim and pulls the trigger with intent to kill the victim, the person is guilty of attempted murder or attempted voluntary manslaughter even though the pistol is not loaded. In such cases, the following instruction may be appropriate:

The evidence has raised the issue that it was impossible for the accused to have committed the offense of voluntary manslaughter because (here state the facts or contention of counsel). If the facts were as the accused believed them to be, and under those facts the accused's conduct would constitute the offense of voluntary manslaughter, the accused may be found guilty of attempted voluntary manslaughter, even though under the facts as they actually existed it was impossible for the accused to commit the offense of voluntary manslaughter. The burden of proof to establish the accused's guilt beyond reasonable doubt is upon the government. If you are satisfied beyond reasonable doubt of all the elements of the offense as I have explained them to you, you may find the accused guilty of attempted voluntary manslaughter even though under the facts as they actually existed it was impossible for the accused to commit the offense of voluntary manslaughter.

NOTE 5: Inapplicability of transferred intent instruction. The military judge should not ordinarily give a transferred intent instruction (NOTE 4, Instruction 3-43-2) when the accused is charged with an attempt. If the person intends to kill X and in attempting to consummate that intent, shoots at Y believing that Y is in fact X, the evidence establishes the intent to kill Y. In these cases, an exceptions and substitutions or variance instruction (Instruction 7-15) may be applicable. The Factual Impossibility Instruction in NOTE 4 above should not be used for situations posed in the hypothetical in this note because an unlawful killing is not factually impossible.

NOTE 6: Voluntary intoxication as defense to attempted voluntary manslaughter. Voluntary intoxication by itself is not a defense to voluntary manslaughter. See United States v. Morgan, 37 MJ 407 (CMA 1993). Voluntary intoxication is a defense to attempted voluntary manslaughter. Attempts require the specific intent to commit the offense intended and

accordingly, voluntary intoxication by itself may defeat that specific intent. When this issue is raised by the evidence, Instruction 5-12, Voluntary Intoxication, is ordinarily applicable.

NOTE 7: Other instructions. When there is evidence that the accused may not have had the ability to formulate the requisite intent to kill, Instruction 5-17, Evidence Negating Mens Rea, should be given. Instruction 5-17 is required even when evidence of the defense of lack of mental responsibility is not presented. Ellis v. Jacob, 26 MJ 10 (CMA 1988); United States v. Berri, 33 MJ 337 (CMA 1991). When an issue of self-defense, accident, or other legal justification or excuse is raised, tailored instructions must be given. See the instructions in Chapter 5. If the evidence raises the defense that the accused may have abandoned his or her criminal purpose, Instruction 5-15, Voluntary Abandonment, may be applicable. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

e. *REFERENCES:* United States v. Jones, 37 MJ 459 (CMA 1993); United States v. Schoof, 37 MJ 96 (CMA 1993); United States v. Byrd, 24 MJ 286 (CMA 1987).

3–5–1. CONSPIRACY (ARTICLE 81)

a . MAXIMUM PUNISHMENT: Maximum authorized for the offense which is the object of the conspiracy, except that in no case shall the death penalty be imposed.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location) on or about _____, conspire with _____ (and _____) to commit an offense under the Uniform Code of Military Justice, to wit: (larceny of _____, of a value of (about) $_____, the property of _____), and in order to effect the object of the conspiracy the said _____ (and _____) did _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused entered into an agreement with (state the name(s) of the alleged co-conspirator(s)) to commit (state the name of the offense allegedly conspired), an offense under the Uniform Code of Military Justice; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, (state name of accused or co-conspirator who allegedly performed overt act), performed (one or more of) the overt act(s) alleged, that is, (state the alleged overt act(s)), for the purpose of bringing about the object of the agreement.

The elements of the offense which the accused is charged with conspiracy to commit are as follows:

NOTE 1: Elements listed. List the elements here, carefully tailoring them to be relevant to a conspiracy to commit such offense.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Proof that the offense of (state the name of the offense allegedly conspired) actually occurred is not required. However, it must be proved beyond a reasonable doubt that the agreement included every element of the offense of (state the name of the offense allegedly conspired).

(The agreement in a conspiracy does not have to be in any particular form or expressed in formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the

conspiracy, and this may be proved by the conduct of the parties. The agreement does not have to express the manner in which the conspiracy is to be carried out or what part each conspirator is to play.)

(The overt act required for this offense does not have to be a criminal act, but it must be a clear indication that the conspiracy is being carried out.)

(The overt act may be done either at the time of or following the agreement.)

(The overt act must clearly be independent of the agreement itself; that is, it must be more than merely the act of entering into the agreement or an act necessary to reach the agreement.)

(You are advised that there is no requirement (that all co-conspirators be named in the specification) (or) (that all co-conspirators be subject to military law).)

NOTE 2: More than one overt act alleged. When more than one overt act is alleged, the members should also be instructed that with respect to the overt acts alleged, their findings should specify only the overt act or acts, if any, of which they are convinced beyond a reasonable doubt. The following instruction may be appropriate in such a case:

You will note that more than one overt act has been listed in the specification. You may find the accused guilty of conspiracy only if you are convinced beyond a reasonable doubt that at least one of the overt acts described in the specification has been committed. Accordingly, if you find beyond a reasonable doubt that the accused (or a co-conspirator) committed one (or more) of the described overt acts, but not (all) (both) of them, your findings should reflect this by appropriate exceptions.

NOTE 3: Multiple overt acts alleged; variance. When multiple overt acts are alleged, the preceding instruction should be followed by the applicable portions of Instruction 7-15, Variance—Findings by Exceptions and Substitutions.

NOTE 4: Abandonment or withdrawal raised. The following additional instruction should be given when an issue arises as to whether the accused may have abandoned or withdrawn from the alleged conspiracy:

There has been some evidence that the accused may have abandoned or withdrawn from the charged conspiracy. (Here the military judge may specify significant evidentiary factors bearing upon the issue and indicate the respective contentions of all counsel.)

An effective (abandonment) (or) (withdrawal) requires some action by the accused which is completely inconsistent with support for the unlawful agreement and which shows that the accused is no longer part of the conspiracy. If, at the time of the overt act, the accused is no longer a part of the conspiracy, the accused cannot be convicted of the offense. In other words if the accused (abandoned) (or) (withdrew from) the agreement before any conspirator committed an overt act, the accused cannot be convicted of conspiracy.

You may find the accused guilty of conspiracy only if you are satisfied beyond a reasonable doubt that the accused did not (abandon) (or) (withdraw from) the conspiracy before the commission of an overt act by any of the conspirators.

NOTE 5: Maximum punishment affected by value. If the maximum punishment is affected by an essential ingredient, such as value of property, damage, or amount involved, such matter should be included when stating the elements of the allegedly intended offense. Instruction 7-16, Variance - Value, Damage, or Amount, should be given when applicable.

NOTE 6: Burglary or housebreaking as object of conspiracy. If burglary or housebreaking is the object of the alleged conspiracy, additional instructions should be given on the relevant elements of the offense allegedly intended to be committed within the structure involved. Terms such as "breaking," "entering," and "dwelling house" should be defined when applicable.

NOTE 7: Vicarious liability in issue. If the accused is charged with criminal responsibility for a consummated offense actually committed by a co-conspirator, see instructions on vicarious liability at Instruction 7-1-4.

3–6–1. SOLICITATION OF DESERTION OR MUTINY (ARTICLE 82)

a. MAXIMUM PUNISHMENT:

(1) Desertion: DD, TF, 3 years, E-1.

(2) Mutiny: DD, TF, 10 years, E-1.

(3) In time of war, *see* Article 82, UCMJ, and paragraph 6, Part IV, MCM, 2008.

b. MODEL SPECIFICATION:

NOTE 1: Offense solicited not attempted or committed. If the offense solicited or advised was not attempted or committed, omit the words contained in brackets.

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise) _____ (and _____) to (desert in violation of Article 85) (mutiny in violation of Article 94), [and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____, (at/on board—location), attempted) (committed) by _____ (and _____)].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (specify the statement, acts or conduct allegedly constituting solicitation or advice, and the name of the person(s) allegedly solicited or advised);

(2) That the (statement(s) (acts)) (conduct) of the accused amounted to (solicitation) (advice) to (desert in violation of Article 85) (mutiny in violation of Article 94); and

(3) That the accused specifically intended that (state the name of person allegedly solicited or advised) commit the offense of (desertion) (mutiny).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 2: Offense solicited or advised not alleged to have been committed or attempted. If there is no allegation that the offense solicited or advised was committed or attempted, the elements of the offense allegedly solicited or advised should be stated, tailored as appropriate to a solicitation, rather than commission or attempt. For example, if the offense of desertion with intent to remain away permanently was allegedly solicited, the following instruction, to be added after (2), above, would be appropriate:

That is, the accused (solicited) (advised) (state the name of the person(s) allegedly solicited or advised) to absent (himself) (herself)

without proper authority from ((his) (her)) ((unit) (station) (organization)) with the intent to remain away permanently from that (unit) (station) (organization).

NOTE 3: Mutiny as offense solicited or advised. If the offense allegedly solicited or advised but not attempted or committed was mutiny, the following instruction, instead of that under NOTE 2, would be appropriate:

That is, the accused (solicited) (advised) (state the name of the person(s) allegedly solicited or advised): (To create (violence) (a disturbance)); (To refuse, together with (state the name(s) of the other person(s)), (to obey orders) (to otherwise do (his) (her) duty)); and to do so (in furtherance of a common intent with another) with the intent to override military authority.

NOTE 4: Offense solicited actually committed. When the specification alleges that the solicited offense was committed, the following additional element and instructions must be substituted for the instructions under NOTEs 2 and 3, above:

(4) That, because of the (solicitation) (advice), the offense of (desertion) (mutiny) was committed.

To find the accused guilty of this specification, you must also be satisfied by legal and competent evidence beyond a reasonable doubt: That (state the name(s) of the person(s) allegedly committing the offense) committed (desertion) (mutiny), the elements of which are as follows: (list relevant elements, tailored to cover the particular type of desertion or mutiny raised by the evidence and consistent with the allegations of the specification).

NOTE 5: Offense solicited was allegedly attempted. When the specification alleges that the solicited offense was attempted, the following additional element and instructions must be substituted for those under NOTEs 2, 3, and 4, above:

(3) That, because of the (solicitation) (advice), the offense of (desertion) (mutiny) was attempted.

To find the accused guilty of this specification, you must also be satisfied by legal and competent evidence beyond a reasonable doubt: That (list the elements of an attempt, using Instruction 3-4-1, Attempts, as a guide,

and carefully tailor the instruction as required by the particular mutiny or desertion allegedly attempted).

NOTE 6: Definition of "solicitation" and "advice". The following instruction should be used to explain the terms "solicitation" or "advice," whether or not there is an allegation that the offense solicited or advised was attempted or committed:

("Solicitation") ("Advice") means any statement, oral or written, or any other act or conduct which can reasonably be understood as a serious request or advice to commit the offense named in the specification. (The accused may act through others in soliciting or advising.)

NOTE 7: Other instructions. When applicable, Instruction 7-3, Circumstantial Evidence (Intent), should be given.

3–6–2. SOLICITATION OF MISBEHAVIOR BEFORE THE ENEMY OR SEDITION (ARTICLE 82)

a. MAXIMUM PUNISHMENT: DD, TF, 10 years, E-1. (In time of war, *see* Article 82, UCMJ, and paragraph 6e, Part IV, MCM, 2008.)

b. MODEL SPECIFICATION:

NOTE 1: Tailoring specification. If the offense solicited or advised is not committed, omit the words contained in brackets.

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (a time of war), by (here state the manner and form of solicitation or advice), (solicit) (advise) _____ (and _____) to commit (an act of misbehavior before the enemy in violation of Article 99) (sedition in violation of Article 94), [and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____, (at/on board—location), committed by _____ (and _____).]

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (specify the conduct allegedly constituting solicitation or advice, and the name(s) of the person(s) allegedly solicited or advised);

(2) That the (statement(s)) (act(s)) (conduct) of the accused amounted to (solicitation) (advice) to (misbehave before the enemy in violation of Article 99) (to commit sedition in violation of Article 94); and

(3) That the accused specifically intended that (state the name of person allegedly solicited or advised) commit the offense of (misbehavior before the enemy) (sedition).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 2: No allegation offense solicited or advised was committed. If there is no allegation that the offense solicited or advised was committed, the following instruction must be added. See Instruction 3-6-1, NOTEs 2 and 3:

The elements of the offense of (misbehavior before the enemy) (sedition) are as follows: (list the elements of the offense allegedly solicited or advised, tailoring them as appropriate to a solicitation rather than a commission).

NOTE 3: Solicited offense allegedly committed. When the specification alleges that the solicited offense was committed the following additional element and instructions must be substituted for that following NOTE 2, above:

That, because of the (solicitation) (advice), the offense of (misbehavior before the enemy) (sedition) was committed.

To find the accused guilty of this specification, you must also be satisfied by legal and competent evidence beyond a reasonable doubt: That (state the name(s) of the person(s) allegedly committing the offense) (misbehaved before the enemy) (committed sedition), the elements of which are as follows: (list the relevant elements, tailored to the evidence and consistent with the allegations of the specification).

NOTE 4: Defining "solicitation" and "advice". The following instruction should be used to explain the terms "solicitation" or "advice," whether or not there is an allegation that the offense solicited was committed:

("Solicitation") ("Advice") means any statement, oral or written, or any other act or conduct which can reasonably be understood as a serious request or advice to commit the offense named in the specification. (The accused may act through others in soliciting or advising.)

NOTE 5: Other instructions. When applicable, Instruction 7-3, Circumstantial Evidence (Intent), should be given.

3–7–1. FRAUDULENT ENLISTMENT OR APPOINTMENT (ARTICLE 83)

a. MAXIMUM PUNISHMENT: DD, TF, 2 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, by means of [knowingly false representations that (here state the fact or facts material to qualification for enlistment or appointment which were represented), when in fact (here state the true fact or facts)] [deliberate concealment of the fact that (here state the fact or facts disqualifying the accused for enlistment or appointment which were concealed)], procure himself/herself to be (enlisted as a _____) (appointed as a _____) in the (here state the armed force in which the accused procured the enlistment or appointment), and did thereafter, (at/on board—location), receive (pay) (allowances) (pay and allowances) under the (enlistment) (appointment) so procured.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was (enlisted) (appointed) in the United States (Army) (_____) as described in the specification;

(2) That the accused (knowingly misrepresented) (deliberately concealed) (a) certain material fact(s) about (his) (her) qualifications, that is, (state the facts allegedly concealed or misrepresented);

(3) That the accused's (enlistment) (appointment) was obtained or procured by the (knowingly false representation) (deliberate concealment); and

(4) That under this (enlistment) (appointment) the accused received (pay) (and) (allowances).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Enlistment" as used in the specification means a voluntary entry or enrollment for a specific term of service in one of the Armed Forces by any person except a commissioned or warrant officer.)

("Appointment" as used in the specification means any method by which a commissioned or warrant officer enters into the service of an Armed Force.)

"Material" means important.

"Receipt of allowances" includes the acceptance of money, food, clothing, shelter, or transportation from the Government. (However, items furnished to the accused while in custody, confinement, arrest, or other restraint pending trial for fraudulent enlistment or appointment are not considered allowances.)

NOTE: Other instructions. If the accused's enlistment or appointment was allegedly procured by a knowingly false representation, Instruction 7-3, Circumstantial Evidence (Knowledge), should ordinarily be given. If the accused's enlistment or appointment was procured by a deliberate concealment of material facts, Instruction 7-3, Circumstantial Evidence (Intent), should ordinarily be given. If the receipt of pay or allowances is established by circumstantial evidence, Instruction 7-3, Circumstantial Evidence, should ordinarily be given.

3–7–2. FRAUDULENT SEPARATION (ARTICLE 83)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, by means of [(knowingly false representations that (here state the fact or facts material to eligibility for separation which were represented), when in fact (here state the true fact or facts)] [deliberate concealment of the fact that (here state the fact or facts concealed which made the accused ineligible for separation)], procure (himself) (herself) to be separated from the (here state the armed force from which the accused procured (his) (her) separation).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was separated from the United States (Army) (_____);

(2) That the accused (knowingly misrepresented) (deliberately concealed) (a) certain material fact(s) about (his) (her) eligibility for separation, as described in the specification; that is, (state the facts allegedly concealed or misrepresented); and

(3) That the accused's separation was obtained or procured by that (knowingly false representation) (deliberate concealment).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Material" means important.

"Separation" means any method by which a member of an Armed Force is released from the service. "Release from the service" means any severance or disconnection from an active or inactive duty status.

NOTE: Other instructions. If the accused's separation was procured by a knowingly false representation, Instruction 7-3, Circumstantial Evidence (Knowledge), should ordinarily be given. If the accused's separation was procured by a deliberate concealment of material facts, Instruction 7-3, Circumstantial Evidence (Intent), should ordinarily be given.

3–8–1. EFFECTING UNLAWFUL ENLISTMENT, APPOINTMENT, OR SEPARATION (ARTICLE 84)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1**.**

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location) on or about _____, effect [(the (enlistment) (appointment) of _____ as a _____ in (here state the armed force in which the person was enlisted or appointed)] [the separation of _____ from (here state the armed force from which the person was separated)], then well knowing that the said _____ was ineligible for such (enlistment) (appointment) (separation) because (here state facts whereby the enlistment, appointment, or separation was prohibited by law, regulation, or order).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused effected the (enlistment) (appointment) (separation) of (state the name of the person allegedly unlawfully enlisted, appointed, or separated) (in) (from) the United States (Army) (_____);

(2) That (state the name of the person allegedly unlawfully enlisted, appointed, or separated) was ineligible for this (enlistment) (appointment) (separation) because it was prohibited by (law) (regulation) (order), as described in the specification; and

(3) That the accused knew of the ineligibility at the time (he) (she) caused or brought about the (enlistment) (appointment) (separation).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Enlistment" means a voluntary entry or enrollment for a specific term of service in one of the Armed Forces by any person except a commissioned or warrant officer.)

("Appointment" means any method by which a commissioned or warrant officer enters into the service of an Armed Force.)

("Separation" means any method by which a member of an Armed Force is released from the service. "Release from the service" includes any severance or disconnection from an active or inactive duty status.)

"Material" means important.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–9–1. DESERTION WITH INTENT TO REMAIN AWAY PERMANENTLY (ARTICLE 85)

a. MAXIMUM PUNISHMENT:

(1) In time of war: Death or other lawful punishment.

(2) Terminated by apprehension: DD, TF, 3 years, E-1.

(3) Otherwise: DD, TF, 2 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, on or about _____, (a time of war), without authority and with intent to remain away therefrom permanently, absent himself/herself from his/her (unit) (organization) (place of duty), to wit: _____, located at (_____) (APO _____), and did remain so absent in desertion until (he/she was apprehended) on or about _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused went from or remained absent from (his) (her) (unit) (organization) (place of duty), that is, (state the name of the unit, organization, or place of duty);

(2) That the accused remained absent until (state the alleged date of termination of absence);

(3) That the absence was without proper authority from someone who could give the accused leave; (and)

(4) That the accused, at the time the absence began or at some time during the absence, intended to remain away from (his) (her) (unit) (organization) (place of duty) permanently; [and]

NOTE 1: Aggravating factors alleged. In the event one or more of the aggravating factors are alleged, the military judge must advise the court members of the aggravating factors as elements.

((5)) That the accused's absence was in time of war; [and]

((6)) That the accused's absence was terminated by apprehension.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The intent to remain away permanently from the (unit) (organization) (place of duty) may be formed any time during the unauthorized absence. The intent need not exist throughout the absence, or for any particular period of time, as long as it exists at some time during the absence.

(A prompt repentance and return, while material in extenuation, is no defense, and it is not necessary that the accused be absent entirely from military jurisdiction and control.)

If you are not convinced beyond a reasonable doubt that the accused intended to remain away permanently, you cannot convict (him) (her) of desertion, but you may find the accused guilty of absence without authority in violation of Article 86, if you are satisfied beyond a reasonable doubt that the accused is guilty of this lesser offense.

In determining whether the accused had the intent to remain away permanently, you should consider the circumstances surrounding the beginning, length, and termination of the charged absence and how those circumstances might bear upon the element of intent. No one factor is controlling and each of them should be considered by you.

NOTE 2: Dropped from the rolls (DFR). If the phrase "DFR" or "dropped from the rolls as a deserter" appears in evidence, the following additional instruction should be given:

The term (DFR) (dropped from the rolls as a deserter), as contained in (Prosecution Exhibit __) (the testimony of _____), is purely an administrative term. You cannot consider this term as evidence of an intent on the part of the accused to remain away permanently.

NOTE 3: When desertion terminated by apprehension is alleged. The following instructions are pertinent to the issue of termination by apprehension:

"Apprehension" means that the accused's return to military control was involuntary. It must be shown that neither the accused nor persons acting at the accused's request initiated the accused's return.

(That the accused was apprehended by civilian authorities, for a civilian violation, and was thereafter turned over to military control by the civilian authorities, does not necessarily indicate that the accused's return was involuntary. Such return may be deemed involuntary if, after the accused was apprehended, such civilian authorities learned of the accused's military status from someone other than the accused or persons acting at the accused's request.)

(In addition, the return may be involuntary if, after being apprehended by civilian authorities, the accused disclosed (his) (her) identity as a result of a desire to avoid trial, prosecution, punishment, or other criminal action at the hands of such civilian authorities. However, if the accused disclosed (his) (her) identity to the civilian authorities because of the accused's desire to return to military control, the accused's return should not be deemed involuntary or by apprehension.)

(The arrest of an accused by civilian authorities does not, in the absence of special circumstances, terminate (his) (her) unauthorized absence by apprehension where the record does not show such apprehension to have been connected with or done on behalf of the military authorities. Thus, in the absence of special circumstances, mere apprehension by civilian authorities does not sustain the government's burden of showing that the return to military control was involuntary.)

NOTE 4: <u>When apprehension is contested</u>. When the question of apprehension is at all controverted, the following instruction must be given. If both apprehension and time of war are alleged, the instruction must be modified to reflect that the accused may be convicted of desertion even if neither of the aggravating circumstances are alleged:

You will note that of the elements that I have listed, only the last element concerns apprehension. To convict the accused of desertion terminated by apprehension, you must be convinced beyond a reasonable doubt of all the elements, including the element of apprehension. If you are convinced of all the elements except the element of apprehension, you may convict the accused of desertion, but not of desertion terminated by apprehension.

NOTE 5: Voluntary termination and casual presence. When some evidence has been presented that raises the issue of voluntary termination of an unauthorized absence prior to the end date alleged in the specification (see United States v. Rogers, 59 MJ 584 (ACCA 2003)), the following instruction should be given:

There has been some evidence that the accused was present (on a military (installation) (base) (camp) (post)) (in a military facility) (at/on board—location) prior to the end date alleged in (The) Specification _____ of (The) (Additional) Charge _____. Casual presence for personal reasons (on a military (installation) (base) (camp) (post)) (in a military facility) (at/on board—location), without more, does not terminate an unauthorized absence. To voluntarily terminate an unauthorized absence, the absentee must physically present (himself) (herself) to someone with authority to apprehend (him) (her), that is, a commissioned officer, a noncommissioned officer, or a military policeman (or _____) with the intent to return to military duty. The absentee must properly identify (himself) (herself) and disclose (his) (her) absentee status, and submit to the control exercised over (him) (her). If the absentee does not disclose (his) (her) status, the person to whom the absentee presented (himself) (herself) must have been aware already of the absentee's status, or had a duty to inquire and could have, with reasonable diligence, determined the absentee's status.

The prosecution bears the burden of proof to establish beyond a reasonable doubt that the accused did not voluntarily terminate (his) (her) absentee status. In order to find the accused guilty of an unauthorized absence for the entire period alleged in the specification, you must be convinced beyond a reasonable doubt that the accused did not voluntarily terminate (his) (her) absentee status prior to the end date alleged in the specification.

(If you find that the accused went from or remained absent without authority as alleged, but voluntarily terminated (his) (her) absentee status prior to the end date alleged, but later absented (himself) (herself) from (his) (her) (unit) (organization) (place of duty at which (he) (she) was required to be), you may find the accused guilty, by exceptions and

substitutions, of two or more separate unauthorized absences under one specification, provided that each unauthorized absence is included within the overall period alleged in the specification.)

NOTE 6: Multiple unauthorized absences under single specification. If an accused is found guilty of two or more unauthorized absences under a single specification, the maximum authorized punishment shall not exceed that authorized if the accused had been found guilty as charged in the specification. See United States v. Francis, 15 MJ 424 (CMA 1983).

NOTE 7: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), and Instruction 7-15, Variance, are ordinarily appropriate. If evidence of previous convictions or other acts of misconduct have been admitted as bearing on intent, the applicable portion of Instruction 7-13-1, Other Crimes, Wrongs or Acts Evidence, must be given.

3–9–2. DESERTION WITH INTENT TO AVOID HAZARDOUS DUTY OR TO SHIRK IMPORTANT SERVICE (ARTICLE 85)

a. MAXIMUM PUNISHMENT:

(1) In time of war: Death or other lawful punishment.

(2) Otherwise: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, on or about _____, (a time of war), with intent to [avoid hazardous duty] [shirk important service], namely _____, quit his/her (unit) (organization) (place of duty), to wit: _____, located at (_____) (APO _____), and did remain so absent in desertion until on or about _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused quit (his) (her) (unit) (organization) (place of duty), that is, (state the name of the unit, organization, or place of duty);

(2) That the accused did so with intent to (avoid a certain duty) (shirk a certain service), that is, _____;

(3) That the duty to be performed was (hazardous) (important);

(4) That the accused knew that (he) (she) would be required for such duty; and

(5) That the accused remained so absent until _____.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Quit" means to go from or remain absent from without proper authority.

("Hazardous duty" means a duty that involves danger, risk, or peril to the individual performing the duty. The conditions existing at the time the duty is to be performed determine whether the duty is dangerous, risky, or perilous.)

("Important service" means service that is more significant than the ordinary everyday service of members of the Armed Forces.)

Whether a (duty is hazardous) (service is important) is a question of fact for you to determine and depends upon the circumstances of the particular case. You should consider all the facts and circumstances of the case, including, but not limited to, the tactical situation, the area, the mission, (and) the nature of the duty and its relationship to the mission, (and) (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).

NOTE 1: Offenses separate. The offenses of desertion with intent to avoid hazardous duty and desertion with intent to shirk important service are separate offenses. Neither is included in the other.

NOTE 2: Lesser included offense. The following additional instruction, as well as appropriately tailored Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), and Instruction 7-15, Variance, should be given in all cases in which absence without proper authority in violation of Article 86 is raised as a lesser included offense:

To convict the accused of the offense of desertion, you must be convinced beyond a reasonable doubt of all five elements I have listed. However, if you are convinced only that the accused quit (his) (her) (unit) (organization) (place of duty) for the period specified, but have reasonable doubt as to any of the other elements that concern the accused's intent, knowledge, or nature of the duty supposedly avoided, then you may not find the accused guilty of desertion. You may, however, find the accused guilty of absence without proper authority for the period specified in violation of Article 86.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

3–9–3. DESERTION BEFORE NOTICE OF ACCEPTANCE OF RESIGNATION (ARTICLE 85)

a. MAXIMUM PUNISHMENT:

(1) If terminated by apprehension: Dismissal, TF, 3 years.

(2) If terminated otherwise: Dismissal, TF, 2 years.

(3) In time of war: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), having tendered (his) (her) resignation and prior to due notice of the acceptance of the same, did, on or about _____, (a time of war), without leave and with intent to remain away therefrom permanently, quit his/her (post) (proper duties), to wit: _____, and did remain so absent in desertion until (he/she was apprehended) on or about _____.

c. ELEMENTS:

(1) That the accused was a commissioned officer of the United States (Army) (_____) and had tendered (his) (her) resignation;

(2) That (state the time and place alleged) and before (he) (she) received notice of the acceptance of the resignation, the accused quit (his) (her) (post) (proper duties), that is, (state the post or proper duties alleged), without leave;

(3) That the accused did so with the intent to remain away from (his) (her) (post) (proper duties) permanently, (and)

(4) That the accused remained so absent until (state the date alleged); [and]

NOTE 1: If apprehension is alleged. If the specification alleges termination by apprehension, the following instruction, treating apprehension as an additional element, must be added:

[(5)] That the accused's absence was terminated by apprehension.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 2: Apprehension alleged. When apprehension is in issue, applicable portions of the instructions on apprehension appearing in Instruction 3-9-1, Desertion with Intent to Remain Away Permanently, should be given.

NOTE 3: Intent. With regard to the element of intent, the following additional instruction, along with appropriate portions of Instruction 7-3, Circumstantial Evidence (Intent), should ordinarily be given:

In determining whether the accused had the intent to remain away permanently, you should consider the circumstances surrounding the beginning, length, and termination of the absence and how those circumstances might bear upon the element of intent. No one factor is controlling, and each of them should be considered by you.

NOTE 4: Other misconduct. If evidence of previous convictions or other acts of misconduct has been admitted as bearing on intent, the applicable portions of Instruction 7-13, Uncharged Misconduct, must be given.

NOTE 5: Voluntary termination and casual presence. When some evidence has been presented that raises the issue of voluntary termination of an unauthorized absence prior to the end date alleged in the specification (see United States v. Rogers, 59 MJ 584 (ACCA 2003)), the following instruction should be given:

There has been some evidence that the accused was present (on a military (installation) (base) (camp) (post)) (in a military facility) (at/on board—location) prior to the end date alleged in (The) Specification _____ of (The) (Additional) Charge _____. Casual presence for personal reasons (on a military (installation) (base) (camp) (post)) (in a military facility) (at/on board—location), without more, does not terminate an unauthorized absence. To voluntarily terminate an unauthorized absence, the absentee must physically present (himself) (herself) to someone with authority to apprehend (him) (her), that is, a commissioned officer, a noncommissioned officer, or a military policeman (or _____) with the intent to return to military duty. The absentee must properly identify (himself) (herself) and disclose (his) (her) absentee status, and submit to the control exercised over (him) (her). If the absentee does not disclose (his) (her) status, the person to whom the absentee presented (himself) (herself) must have been aware already of the absentee's status, or had a duty to inquire and could have, with reasonable diligence, determined the absentee's status.

The prosecution bears the burden of proof to establish beyond a reasonable doubt that the accused did not voluntarily terminate (his)

(her) absentee status. In order to find the accused guilty of an unauthorized absence for the entire period alleged in the specification, you must be convinced beyond a reasonable doubt that the accused did not voluntarily terminate (his) (her) absentee status prior to the end date alleged in the specification.

(If you find that the accused went from or remained absent without authority as alleged, but voluntarily terminated (his) (her) absentee status prior to the end date alleged, but later absented (himself) (herself) from (his) (her) (unit) (organization) (place of duty at which (he) (she) was required to be), you may find the accused guilty, by exceptions and substitutions, of two or more separate unauthorized absences under one specification, provided that each unauthorized absence is included within the overall period alleged in the specification.)

NOTE 6: Multiple unauthorized absences under single specification. If an accused is found guilty of two or more unauthorized absences under a single specification, the maximum authorized punishment shall not exceed that authorized if the accused had been found guilty as charged in the specification. See United States v. Francis, 15 MJ 424 (CMA 1983).

3–9–4. ATTEMPTED DESERTION (ARTICLE 85)

a. MAXIMUM PUNISHMENT:

(1) With intent to avoid hazardous duty or to shirk important service: DD, TF, 5 years, E-1.

(2) All others: DD, TF, 2 years, E-1.

(3) In time of war: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (a time of war), attempt to [(absent himself/herself from his/her (unit) (organization) (place of duty) to wit: _____, without authority and with intent to remain away therefrom permanently)] [(quit his/her (unit) (organization) (place of duty), to wit: _____, located at _____, with intent to (avoid hazardous duty) (shirk important service) namely _____].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused did a certain act, that is, (state the act(s) alleged or raised by the evidence);

(2) That the act was done with specific intent to (remain away permanently) (avoid hazardous duty) (shirk important service) (before notice of acceptance of resignation) and to commit the other elements of the offense of desertion which I will define later;

(3) That the act amounted to more than mere preparation; that is, it was a direct movement toward the commission of the intended offense; and

(4) That the act apparently tended to bring about the commission of the offense of desertion (state the type of desertion alleged attempted) (that is, the act apparently would have resulted in the actual commission of the offense of desertion (state the type of desertion allegedly attempted) except for a (circumstance unknown to the accused) (unexpected intervening circumstance) (_____) which prevented the completion of that offense).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Proof that the offense of desertion (state the type of desertion allegedly attempted) actually occurred or was completed by the accused is not

required. However, it must be proved beyond a reasonable doubt that, at the time of the act, the accused intended each element of that offense. These elements are: (list the elements of the particular type of desertion allegedly intended).

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), will ordinarily be applicable. When the offense attempted is either desertion with intent to avoid hazardous duty or desertion with intent to shirk important service, the appropriate definitions and instructions on circumstantial evidence in Instruction 3-9-2 should be given. Instruction 7-3, Circumstantial Evidence (Knowledge), will also ordinarily be applicable.

3–10–1. FAILING TO GO TO OR LEAVING PLACE OF DUTY (ARTICLE 86)

a. MAXIMUM PUNISHMENT: 2/3 x 1 month, 1 month, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____, without authority, (fail to go at the time prescribed to) (go from) his/her appointed place of duty, to wit: (here set forth the appointed place of duty).

c. ELEMENTS:

(1) That (state the certain authority) appointed a certain time and place of duty for the accused, that is, (state the certain time and place of duty);

(2) That the accused knew that (he) (she) was required to be present at this appointed time and place of duty; and

(3) That (state the time and place alleged), the accused, without proper authority, (failed to go to the appointed place of duty at the time prescribed) (went from the appointed place of duty after having reported at such place).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: Applicability of specification. This specification applies whether a place of rendezvous for one or many and contemplates a failure to repair for routine duties as prescribed by routine orders, e.g., kitchen police, etc., but doesn't apply to an ordinary duty situation to be at one's unit or organization.

NOTE 2: "Deliberate avoidance" raised. The following instruction should be given when the issue of "deliberate avoidance," as discussed in United States v. Adams, 63 MJ 223 (CAAF 2006), is raised:

I have instructed you that the accused must have known that (he) (she) was required to be present at the appointed time and place of duty. You may not find the accused guilty of this offense unless you believe beyond reasonable doubt that the accused actually knew that (he) (she) was required to be present at the appointed time and place of duty.

The accused may not, however, willfully and intentionally remain ignorant of a fact important and material to (his) (her) conduct in order to escape the consequences of criminal law. Therefore, if you have a reasonable

doubt that the accused actually knew that (he) (she) was required to be present at the appointed time and place of duty, but you are nevertheless satisfied beyond a reasonable doubt that:

a. The accused was aware that there was a high probability that (he) (she) was required to be present at an appointed time and place of duty; and

b. The accused deliberately and consciously tried to avoid learning that (he) (she) was required to be present at an appointed time and place of duty, then you may treat this as the deliberate avoidance of positive knowledge. Such deliberate avoidance of positive knowledge is the equivalent of actual knowledge.

In other words, if you find the accused had (his) (her) suspicions aroused that (he) (she) was required to be present at a certain place of duty at a time prescribed, but then deliberately omitted making further inquiries because he wished to remain in ignorance, you may find the accused had the required knowledge.

I emphasize, however, that knowledge cannot be established by mere negligence, foolishness, or even stupidity on the part of the accused. The burden is on the prosecution to prove every element of this offense beyond a reasonable doubt, including that the accused actually knew that (he) (she) was required to be present at the appointed time and place of duty. Consequently, unless you are satisfied beyond a reasonable doubt that the accused either had actual knowledge that (he) (she) was required to be present at the appointed time and place of duty, or that the accused deliberately avoided that knowledge, as I have defined that term, then you must find the accused not guilty.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–10–2. ABSENCE FROM UNIT, ORGANIZATION, OR PLACE OF DUTY (ARTICLE 86)

a. MAXIMUM PUNISHMENT:

(1) Up to 3 days: 2/3 x 1 month, 1 month, E-1.

(2) Over 3 to 30 days: 2/3 x 6 months, 6 months, E-1.

(3) Over 30 days: DD, TF, 1 year, E-1.

(4) Over 30 days and terminated by apprehension: DD, TF, 18 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, on or about _____, without authority, absent himself/herself from his/her (unit) (organization) (place of duty at which (he/she was required to be), to wit: _____, located at _____, and did remain so absent until ((he/she was apprehended) on or about _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused went from or remained absent from (his) (her) (unit) (organization) (place of duty at which (he) (she) was required to be), that is, (state name of unit, organization, or place of duty);

(2) That the absence was without proper authority from someone who could give the accused leave; (and)

(3) That the accused remained absent until (state the date of alleged termination of absence); [and]

[(4)] That the accused's absence was terminated by apprehension.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: Termination by apprehension alleged. If termination by apprehension is alleged, give the following:

"Apprehension" means that the accused's return to military control was involuntary. It must be shown that neither the accused nor persons acting at (his) (her) request initiated the accused's return.

(That the accused was apprehended by civilian authorities, for a civilian violation, and was thereafter turned over to military control by the civilian authorities, does not necessarily indicate that the accused's return was involuntary. Such return may be deemed involuntary if, after the accused was apprehended, such civilian authorities learned of the accused's military status from someone other than the accused or persons acting at (his) (her) request.)

(In addition, the return may be involuntary if, after being apprehended by civilian authorities, the accused disclosed (his) (her) identity as a result of a desire to avoid trial, prosecution, punishment, or other criminal action at the hands of such civilian authorities. However, if the accused disclosed (his) (her) identity to the civilian authorities because of the accused's desire to return to military control, the accused's return should not be deemed involuntary or by apprehension.)

(The arrest of an accused by civilian authorities does not, in the absence of special circumstances, terminate (his) (her) unauthorized absence by apprehension where the record does not show such apprehension to have been conducted with or done on behalf of the military authorities. Thus, in the absence of special circumstances, mere apprehension by civilian authorities does not sustain the government's burden of showing that the return to military control was involuntary.)

NOTE 2: Apprehension controverted. When the question of apprehension is at all controverted, the following instruction must be given:

You will note that of the four elements that I have listed, only the last element concerns apprehension. To convict the accused of AWOL terminated by apprehension, you must be convinced beyond a reasonable doubt of all four elements, including the element of apprehension. If you are convinced of all the elements except the element of apprehension, you may convict the accused of AWOL, but not of AWOL terminated by apprehension.

NOTE 3: Apprehension by civil authorities. If raised by the evidence, the following instructions may be appropriate:

There has been evidence presented which may indicate that the accused was taken into custody by civil authorities and returned to military control by civil authorities. This evidence, if you believe it, does not by itself prove that the accused's absence was terminated involuntarily. Rather, it is only some evidence to be considered by you along with all the other evidence in this case in deciding whether the accused's absence ended voluntarily or involuntarily.

A return to military control may be involuntary if, after the accused was apprehended by civil authorities for a civil violation, the civil authorities learned of the accused's military status in some way other than by a voluntary disclosure by the accused or by some person acting at the accused's request.

(In addition) (A return to military control may be involuntary if, after being apprehended by civil authorities for a civil violation, the accused disclosed (his) (her) identity and military status because of a desire to avoid trial, prosecution, punishment, or other criminal action by civil authorities.) (However) (If it appears that, after apprehension by civil authorities for a civil violation, the accused voluntarily disclosed (his) (her) identity and military status to the civil authorities because of a desire to return to military control and not because of a primary desire to avoid criminal action by civil authorities, the accused's return should be considered voluntary and not terminated by apprehension.)

NOTE 4: Voluntary termination and casual presence. When some evidence has been presented that raises the issue of voluntary termination of an unauthorized absence prior to the end date alleged in the specification (see United States v. Rogers, 59 MJ 584 (ACCA 2003)), the following instruction should be given:

There has been some evidence that the accused was present (on a military (installation) (base) (camp) (post)) (in a military facility) (at/on board—location) prior to the end date alleged in (The) Specification _____ of (The) (Additional) Charge _____. Casual presence for personal reasons (on a military (installation) (base) (camp) (post)) (in a military facility) (at/on board—location), without more, does not terminate an unauthorized absence. To voluntarily terminate an unauthorized

absence, the absentee must physically present (himself) (herself) to someone with authority to apprehend (him) (her), that is, a commissioned officer, a noncommissioned officer, or a military policeman (or _____) with the intent to return to military duty. The absentee must properly identify (himself) (herself) and disclose (his) (her) absentee status, and submit to the control exercised over (him) (her). If the absentee does not disclose (his) (her) status, the person to whom the absentee presented (himself) (herself) must have been aware already of the absentee's status, or had a duty to inquire and could have, with reasonable diligence, determined the absentee's status.

The prosecution bears the burden of proof to establish beyond a reasonable doubt that the accused did not voluntarily terminate (his) (her) absentee status. In order to find the accused guilty of an unauthorized absence for the entire period alleged in the specification, you must be convinced beyond a reasonable doubt that the accused did not voluntarily terminate (his) (her) absentee status prior to the end date alleged in the specification.

(If you find that the accused went from or remained absent without authority as alleged, but voluntarily terminated (his) (her) absentee status prior to the end date alleged, but later absented (himself) (herself) from (his) (her) (unit) (organization) (place of duty at which (he) (she) was required to be), you may find the accused guilty, by exceptions and substitutions, of two or more separate unauthorized absences under one specification, provided that each unauthorized absence is included within the overall period alleged in the specification.)

NOTE 5: Multiple unauthorized absences under single specification. If an accused is found guilty of two or more unauthorized absences under a single specification, the maximum authorized punishment shall not exceed that authorized if the accused had been found guilty as charged in the specification. See United States v. Francis, 15 MJ 424 (CMA 1983).

3–10–3. ABSENCE FROM UNIT, ORGANIZATION, OR PLACE OF DUTY WITH INTENT TO AVOID MANEUVERS OR FIELD EXERCISES (ARTICLE 86)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (on/about—location), without authority and with intent to avoid (maneuvers) (field exercises), absent himself/herself from his/her (unit) (organization) (place of duty at which (he/she) was required to be), to wit: _____ located at (_____), and did remain so absent until on or about _____.

c. ELEMENTS:)

(1) That (state the time and place alleged), the accused went from or remained absent from (his) (her) (unit) (organization) (place of duty at which (he) (she) was required to be), that is, (state the name of unit, organization, or place of duty);

(2) That this absence was without proper authority from someone who could give the accused leave;

(3) That the accused remained absent until (state the date of alleged termination of absence);

(4) That the accused knew that the absence would occur during (a part of) a period of (maneuvers) (field exercises) in which (he) (she) was required to participate; and

(5) That the accused intended by (his) (her) absence to avoid all (or part) of the period of such (maneuvers) (field exercises).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: Voluntary termination and casual presence. When some evidence has been presented that raises the issue of voluntary termination of an unauthorized absence prior to the end date alleged in the specification (see United States v. Rogers, 59 MJ 584 (ACCA 2003)), the following instruction should be given:

There has been some evidence that the accused was present (on a military (installation) (base) (camp) (post)) (in a military facility) (at/on board—location) prior to the end date alleged in (The) Specification _____ of (The) (Additional) Charge _____. Casual presence for

personal reasons (on a military (installation) (base) (camp) (post)) (in a military facility) (at/on board—location), without more, does not terminate an unauthorized absence. To voluntarily terminate an unauthorized absence, the absentee must physically present (himself) (herself) to someone with authority to apprehend (him) (her), that is, a commissioned officer, a noncommissioned officer, or a military policeman (or _____) with the intent to return to military duty. The absentee must properly identify (himself) (herself) and disclose (his) (her) absentee status, and submit to the control exercised over (him) (her). If the absentee does not disclose (his) (her) status, the person to whom the absentee presented (himself) (herself) must have been aware already of the absentee's status, or had a duty to inquire and could have, with reasonable diligence, determined the absentee's status.

The prosecution bears the burden of proof to establish beyond a reasonable doubt that the accused did not voluntarily terminate (his) (her) absentee status. In order to find the accused guilty of an unauthorized absence for the entire period alleged in the specification, you must be convinced beyond a reasonable doubt that the accused did not voluntarily terminate (his) (her) absentee status prior to the end date alleged in the specification.

(If you find that the accused went from or remained absent without authority as alleged, but voluntarily terminated (his) (her) absentee status prior to the end date alleged, but later absented (himself) (herself) from (his) (her) (unit) (organization) (place of duty at which (he) (she) was required to be), you may find the accused guilty, by exceptions and substitutions, of two or more separate unauthorized absences under one specification, provided that each unauthorized absence is included within the overall period alleged in the specification.)

NOTE 2: "Deliberate avoidance" raised. The following instruction should be given when the issue of "deliberate avoidance," as discussed in United States v. Adams, 63 MJ 223 (CAAF 2006), is raised:

I have instructed you that the accused must have known that the absence would occur during (a part of) a period of (maneuvers)(field exercises) in which (he)(she) was required to participate. You may not find the accused guilty of this offense unless you believe beyond a reasonable doubt that the accused actually knew that the absence would occur during (a part of) a period of (maneuvers)(field exercises) in which (he)(she) was required to participate.

The accused may not, however, willfully and intentionally remain ignorant of a fact important and material to (his) (her) conduct in order to escape the consequences of criminal law. Therefore, if you have a reasonable doubt that the accused actually knew that the absence would occur during (a part of) a period of (maneuvers)(field exercises) in which (he)(she) was required to participate, but you are nevertheless satisfied beyond a reasonable doubt that:

a. The accused was aware that there was a high probability that the absence would occur during (a part of) a period of (maneuvers)(field exercises) in which (he)(she) was required to participate; and

b. The accused deliberately and consciously tried to avoid learning that the absence would occur during (a part of) a period of (maneuvers)(field exercises) in which (he)(she) was required to participate, then you may treat this as the deliberate avoidance of positive knowledge. Such deliberate avoidance of positive knowledge is the equivalent of actual knowledge.

In other words, if you find the accused had (his) (her) suspicions aroused that the absence would occur during (a part of) a period of (maneuvers)(field exercises) in which (he)(she) was required to participate but then deliberately omitted making further inquiries because he wished to remain in ignorance, you may find the accused had the required knowledge. I emphasize, however, that knowledge cannot be established by mere negligence, foolishness, or even stupidity on the part of the accused. The burden is on the prosecution to prove every

element of this offense beyond a reasonable doubt, including that the accused actually knew that the absence would occur during (a part of) a period of (maneuvers)(field exercises) in which (he)(she) was required to participate. Consequently, unless you are satisfied beyond a reasonable doubt that the accused either had actual knowledge that the absence would occur during (a part of) a period of (maneuvers)(field exercises) in which (he)(she) was required to participate, or that the accused deliberately avoided that knowledge, as I have defined that term, then you must find the accused not guilty.

NOTE 3: Multiple unauthorized absences under single specification. If an accused is found guilty of two or more unauthorized absences under a single specification, the maximum authorized punishment shall not exceed that authorized if the accused had been found guilty as charged in the specification. See United States v. Francis, 15 MJ 424 (CMA 1983).

NOTE 4: Other Instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge) is ordinarily applicable.

3–10–4. ABANDONING WATCH OR GUARD (ARTICLE 86)

a. MAXIMUM PUNISHMENT:

(1) Unauthorized absence: 2/3 x 3 months, 3 months, E-1.

(2) With intent to abandon: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), being a member of the _____ (guard) (watch) (duty section), did, (at/on board—location), on or about _____, without authority, go from his/her (guard) (watch) (duty section) (with intent to abandon the same).

c. ELEMENTS:

(1) That the accused was a member of the (guard) (watch) (duty section) at (state the time and place alleged);

(2) That (state the time and place alleged), the accused went from or remained absent from (his) (her) (guard) (watch) (duty section);

(3) That this absence was without proper authority; and

(4) That the accused intended to abandon (his) (her) (guard) (watch) (duty section).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Intended to abandon" means that the accused, at the time the absence began or at some time during the absence, must have intended to completely separate (himself) (herself) from all further responsibility for (his) (her) particular duty as a member of the (guard) (watch) (duty section).

NOTE 1: Definition of "duty section". The term "duty section" has a specialized meaning, and does not refer to the place where a member performs routine duties. If abandonment of duty section is alleged, give the following additional instruction:

"Duty section" describes a group of personnel who have been designated to remain within the limits of a military (vessel) (command) during those times, such as liberty hours, when personnel strength is

below normal, in order to accomplish the mission and ensure the safety of the (vessel) (command).

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–11–1. MISSING MOVEMENT (ARTICLE 87)

a. MAXIMUM PUNISHMENT:

(1) Through design: DD, TF, 2 years, E-1.

(2) Through neglect: BCD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, through (neglect) (design) miss the movement of (Aircraft No. _____) (Flight _____) (the USS _____) (Company A, 1st Battalion, 7th Infantry) (_____) with which he/she was required in the course of duty to move.

c. ELEMENTS:

(1) That the accused was required in the course of duty to move with (state the ship, aircraft, or unit alleged);

(2) That the accused knew of the prospective movement of the (aircraft) (unit) (ship);

(3) That (state the time and place alleged), the accused missed the movement of the (aircraft) (unit) (ship); and

(4) That the accused missed the movement through (design) (neglect).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Movement" means a major transfer of (a) (an) (aircraft) (unit) (ship) involving a substantial distance and period of time. The word does not include practice marches of short duration and distance, nor minor changes in the location of an aircraft, unit, or ship.

("Movement" may also mean the deployment of one or more individual service members as passengers aboard military or civilian aircraft or watercraft in conjunction with temporary or permanent changes of duty assignments.)

(Failure of a service member to make a routine movement aboard commercial transportation, however, does not violate Article 87 when

such failure is unlikely to cause foreseeable disruption of military operations.)

To be guilty of this offense, the accused must have actually known of the prospective movement that was missed. (Knowledge of the exact hour or even of the exact date of the scheduled movement is not required. It is sufficient if the accused knew the approximate date as long as there is a causal connection between the conduct of the accused and the missing of the scheduled movement.) Knowledge may be proved by circumstantial evidence.

NOTE 1: If "through design" alleged. If "through design" is alleged, give the following:

"Through design" means on purpose, intentionally, or according to plan and requires specific intent to miss the movement.

NOTE 2: If "through neglect" alleged. If "through neglect" is alleged, give the following:

"Through neglect" means the omission to take such measures as are appropriate under the circumstances to assure presence with a ship, aircraft, or unit at the time of a scheduled movement, or doing some act without giving attention to its probable consequences in connection with the prospective movement, such as a departure from the vicinity of the prospective movement to such a distance as would make it likely that one could not return in time for the movement.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable. If missing movement through design alleged, Instruction 7-3, Circumstantial Evidence (Intent), will ordinarily be applicable.

e. REFERENCES: United States v. Quezada, 40 MJ 109 (CMA 1994); United States v. Gibson, 17 MJ 143 (CMA 1984); United States v. Graham, 16 MJ 460 (CMA 1983); United States v. Johnson, 11 CMR 174 (CMA 1953).

3–12–1. CONTEMPT TOWARD OFFICIALS BY COMMISSIONED OFFICER (ARTICLE 88)

a. MAXIMUM PUNISHMENT: Dismissal, TF, 1 year.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____ [use (orally and publicly) (_____) (the following contemptuous words)] [(in a contemptuous manner, use (orally and publicly) (_____) the following words] against the [(President) (Vice President) (Congress) (Secretary of _____)] [(Governor) (Legislature) of the (State of _____) (Territory of _____) (_____), a (State) (Territory) (_____) in which he/she, the said _____ was then (on duty) (present)], to wit: "_____," or words to that effect.

c. ELEMENTS:

(1) That the accused was a commissioned officer of the United States Armed Forces:

(2) That (state the time and place alleged), the accused (used orally and publicly) (caused to be published or circulated writings containing) certain words against the:

(a) (President) (Vice President) (Congress) (Secretary of _____); or

(b) (Governor) (legislature) of the (State of _____) (Commonwealth of _____) (Territory of _____) (_____a possession of the United States), a (State) (Commonwealth) (possession) in which the accused was then (on duty) (present); and

(3) That these words were (state the words alleged) or words to that effect;

(4) That, by an act of the accused, these words came to the knowledge of a person other than the accused; and

(5) That the words used were contemptuous (in themselves) (or) (by virtue of the circumstances under which they were used).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Contemptuous" means insulting, rude, and disdainful conduct, or otherwise disrespectfully attributing to another a quality of meanness, disreputableness, or worthlessness.

3–13–1. DISRESPECT TOWARD A SUPERIOR COMMISSIONED OFFICER (ARTICLE 89)

a. MAXIMUM PUNISHMENT: BCD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, behave himself/herself with disrespect toward _____, his/her superior commissioned officer, then known by the accused to be his/her superior commissioned officer, by (saying to him/her "_____," or words to that effect) (contemptuously turning from and leaving him/her while he/she, the accused, was talking to him/her, the said _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused:

(a) (did) (omitted doing) (a) certain act(s), namely, (state the behavior alleged) or

(b) used certain language (state the words alleged);

(2) That such (behavior) (language) was directed toward (state name and rank);

(3) That (state name and rank) was the superior commissioned officer of the accused at the time;

(4) That the accused at the time knew that (state name and rank) was (his) (her) superior commissioned officer; and

(5) That, under the circumstances, by such (behavior) (language), the accused was disrespectful toward (state name and rank).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Disrespect" is behavior which detracts from the respect which is due to a superior commissioned officer. It may consist of acts or language (and it is not important whether they refer to a superior as an officer or as a private individual provided the behavior is disrespectful).

(Disrespect by words may be conveyed by disgraceful names or other contemptuous or denunciatory language in the presence of a superior commissioned officer.)

(Disrespect by acts may be demonstrated by obvious disdain, rudeness, indifference, gross impertinence, undue and excessive familiarity, silent insolence, or other disgraceful, contemptuous, or denunciatory conduct in the presence of a superior commissioned officer.)

NOTE 1: Disrespect outside the presence of the victim. If the alleged disrespectful behavior did not occur in the presence of the officer-victim, give the following instruction:

It is not essential that the disrespectful behavior be in the presence of the superior, but ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation.

NOTE 2: Victim and accused in the same armed force. When the victim and the accused belong to the same armed force, give the following instruction:

"Superior commissioned officer" includes the commanding officer of the accused, even if that officer is inferior in rank to the accused. "Superior commissioned officer" also includes any commissioned officer in the same armed force as the accused who is superior in rank and not inferior in command to the accused.

NOTE 3: Victim and accused from different armed force. When victim is from a different armed force, use the following:

A commissioned officer of another armed force would not be a superior commissioned officer of the accused just because of higher rank, but the term "superior commissioned officer" does include any commissioned officer of another armed force who is properly placed in the chain of command or in a supervisory position over the accused.

NOTE 4: Divestiture of status raised. When the issue has arisen as to whether the officer has conducted himself or herself in a manner which divested that officer of his or her status as a superior officer, the following instruction should be given:

The evidence has raised an issue as to whether (state the name and rank of the officer alleged) conducted himself/herself prior to the offense

of disrespect to a superior commissioned officer in a manner which took away his/her status as a superior commissioned officer to the accused. An officer whose own (language) (and) (conduct) under all the circumstances departs substantially from the required standards of an officer and a (gentleman) (gentlewoman) appropriate for that officer's rank and position under similar circumstances is considered to have abandoned that rank and position. In determining this issue you must consider all the relevant facts and circumstances (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

You may find the accused guilty of the offense of (specify the offense(s) alleged) only if you are satisfied beyond a reasonable doubt that (state the name and rank of the officer) by his/her (conduct) (and) (language) did not abandon his/her status as a superior commissioned officer of the accused.

NOTE 5: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–14–1. ASSAULTING—STRIKING, DRAWING, LIFTING UP A WEAPON AGAINST, OFFERING VIOLENCE TO—SUPERIOR COMMISSIONED OFFICER (ARTICLE 90)

a. MAXIMUM PUNISHMENT: DD, TF, 10 years, E-1. In time of war, death.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (a time of war) [strike _____ (in) (on) the _____ with (a) (his/her) _____] [(draw) (lift up) a weapon, to wit: a _____, against _____] [by _____, offer violence against _____], his/her superior commissioned officer, then known by the accused to be his/her superior commissioned officer, who was then in the execution of his/her office.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused

(a) struck (state the name and rank of the alleged victim) (with (a) (his/her) _____) (by (state the manner alleged); or

(b) (drew) (lifted up) a weapon, namely, _____, against (state the name and rank of the alleged victim) by (state the manner alleged);
or

(c) offered violence against (state the name and rank of the alleged victim) by (state the violence alleged);

(2) That (state the name and rank of the alleged victim) was the superior commissioned officer of the accused at the time;

(3) That the accused at the time knew that (state the name and rank of the alleged victim) was (his) (her) superior commissioned officer; and

(4) That (state the name and rank of the alleged victim) was in the execution of his/her office at the time.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An officer is in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a

superior, or military usage. In general, any striking or use of violence against any superior officer by a person over whom it is the duty of that officer to maintain discipline at the time, would be striking or using violence against the officer in the execution of office.

(The commanding officer (on board a ship) (of a unit in the field) is generally considered to be on duty at all times.)

("Struck" means an intentional blow, and includes any offensive touching of the person of an officer, however slight.)

("Drew") ("Lifted up") means to raise in an aggressive manner any weapon or object by which bodily harm can be inflicted (or) (brandish in a threatening manner) any weapon or object, by which bodily harm can be inflicted, in the presence of and at a superior commissioned officer).

("Offered violence" means (any attempt to do bodily harm) (any offer to do bodily harm) (any doing of bodily harm) to a superior commissioned officer.)

NOTE 1: Simple assault. If simple assault (i.e., no battery), give the following:

An "assault" is an attempt with unlawful force or violence to do bodily harm to another. An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability to do bodily harm to another. Physical injury or offensive touching is not required.

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim. (The mere use of threatening words is not an assault.)

NOTE 2: Assault by offer. If assault by offer, give the following:

An "assault" is an offer with unlawful force or violence to do bodily harm to another. An "offer to do bodily harm" is an (intentional) (or) (culpably negligent) (act) (failure to act) which foreseeably causes another to reasonably believe that force will immediately be applied to his/her

person. There must be an apparent present ability to bring about bodily harm. Physical injury or offensive touching is not required.

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

(The mere use of threatening words is not an assault.)

NOTE 3: Battery. If a battery, give the following:

An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is actually inflicted, on the other hand, is called "a battery." A "battery" is an unlawful and (intentional) (or) (culpably negligent) application of force or violence to another. The act must be done without legal justification or excuse and without the lawful consent of the victim. "Bodily harm" means any physical injury to (or offensive touching of) another person, however slight.

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 4: Culpable negligence alleged. If culpable negligence is used in the instructions, define as follows:

"Culpable negligence" is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; that is what "due care" means. Culpable negligence is a negligent act or failure to act with a gross, reckless, wanton, or deliberate disregard for the foreseeable result to others, instead of merely a failure to use due care.

NOTE 5: Victim and accused from same armed force. When the victim and the accused belong to the same armed force, give the following instruction:

"Superior commissioned officer" includes the commanding officer of the accused, even if that officer is inferior in rank to the accused. "Superior

commissioned officer" also includes any commissioned officer in the same armed force as the accused who is superior in rank and not inferior in command to the accused.

NOTE 6: Victim and accused from different armed forces. When the victim is from a different armed force, use the following:

A commissioned officer of another armed force would not be a superior commissioned officer of the accused just because of higher rank, but the term "superior commissioned officer" does include any commissioned officer of another armed force who is properly placed in the chain of command or in a supervisory position over the accused.

NOTE 7: Divestiture of status raised. When the issue has arisen as to whether the officer has conducted himself or herself in a manner which divested that officer of his or her status as a superior officer, the following instruction should be given:

The evidence has raised an issue as to whether (state the name and rank of the officer alleged) conducted himself/herself prior to the charged offense in a manner which took away his/her status as a superior commissioned officer of the accused acting in the execution of his/her office. A superior commissioned officer whose own (language) (and) (conduct) under all the circumstances departs substantially from the required standards of an officer and a (gentleman) (gentlewoman) appropriate for that superior commissioned officer's rank and position under similar circumstances is considered to have abandoned that rank and position. In determining this issue you must consider all the relevant facts and circumstances (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

You may find the accused guilty of (specify the offense(s)) only if you are satisfied beyond a reasonable doubt that (state the name and rank of the officer alleged) by his/her (conduct) (and) (language) did not abandon his/her status as a superior commissioned officer of the accused acting in the execution of his/her office.

NOTE 8: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable. For the standard instruction on assault and battery, see Instruction 3-54-2. Those standard instructions may, in the appropriate case, be used to supplement the instructions here.

3–14–2. WILLFUL DISOBEDIENCE OF A SUPERIOR COMMISSIONED OFFICER (ARTICLE 90)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1. In time of war, death.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), having received a lawful command from _____, his/her superior commissioned officer, then known by the accused to be his/her superior commissioned officer, to _____, or words to that effect, did, (at/on board—location), on or about _____, (a time of war) willfully disobey the same.

c. ELEMENTS:

(1) That the accused received a certain lawful command to (state the terms of the command allegedly given) from (state the name and rank of the alleged superior commissioned officer);

(2) That, at the time, (state the name and rank of the alleged superior commissioned officer who allegedly gave the command) was the superior commissioned officer of the accused;

(3) That the accused at the time knew that (state the name and rank of the alleged superior commissioned officer) was (his) (her) superior commissioned officer; and

(4) That (state the time and place alleged), the accused willfully disobeyed the lawful command.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Willful disobedience" means an intentional defiance of authority.

NOTE 1: Victim and accused from same armed force. When the alleged superior commissioned officer is a member of the same armed force, the following instruction is ordinarily applicable:

"Superior commissioned officer" includes the commanding officer of the accused, even if that officer is inferior in rank to the accused. "Superior commissioned officer" also includes any other commissioned officer of the same armed force as the accused who is superior in rank and not inferior in command to the accused.

NOTE 2: Victim and accused from different armed forces. When the alleged superior commissioned officer is not a member of the same armed force, the following instruction is ordinarily applicable:

A commissioned officer of another armed force would not be a superior commissioned officer of the accused just because of higher rank, but the term "superior commissioned officer" does include any commissioned officer of another armed force who is properly placed in the chain of command or a supervisory position over the accused.

NOTE 3: Lawfulness of command. The lawfulness of the command is not a separate element of the offense. Thus, the issue of lawfulness is determined by the MJ and is not submitted to the members. See United States v. New, 55 MJ 95 (CAAF 2001); United States v. Deisher, 61 MJ 313 (CAAF 2005). To be lawful, the command must relate to specific military duty and be one that the superior commissioned officer was authorized to give the accused. The command must require the accused to do or stop doing a particular thing either at once or at a future time. A command is lawful if reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command and is directly connected with the maintenance of good order in the service. (The three preceding sentences may be modified and used by the MJ during a providence inquiry to define "lawfulness" for the accused.) When the MJ determines that, based on the facts, the command was lawful, the MJ should advise the members as follows:

As a matter of law, the command in this case, as described in the specification, if in fact there was such a command, was a lawful command.

NOTE 4: Command determined to be unlawful. A command is illegal if, for example, it is unrelated to military duty, its sole purpose is to accomplish some private end, it is arbitrary and unreasonable, and/or it is given for the sole purpose of increasing the punishment for an offense which it is expected the accused may commit. If the MJ determines that, based on the facts, the command was not lawful, the MJ should dismiss the affected specification, and the members should be so advised.

NOTE 5: Form or method of communication in issue. If the evidence raises an issue as to the form or method of communicating the command, give the following:

As long as the command was understandable, (the form of the command) (and) (the method by which the command was communicated to the accused) (is) (are) not important. The combination, however, must amount to a command from the accused's superior commissioned officer that is directed personally to the accused, and the accused must know it is from (his) (her) superior commissioned officer.

NOTE 6: Time for compliance. If the evidence raises an issue as to when the accused was to comply with the command, the following instruction is appropriate:

When an order requires immediate compliance, an accused's declared intent not to obey and the failure to make any move to comply constitutes disobedience. Immediate compliance is required for any order that does not explicitly or implicitly indicate that delayed compliance is authorized or directed. If an order requires performance in the future, an accused's present statement of intention to disobey the order does not constitute disobedience of that order, although carrying out that intention may.

NOTE 7: Divestiture of status raised. When the issue has arisen as to whether the officer's conduct divested him or her of the status of a superior commissioned officer, the following instruction is appropriate:

The evidence has raised an issue as to whether (state the name and rank of the officer alleged) conducted himself/herself prior to the charged offense in a manner which took away his/her status as a superior of the accused. An officer whose own (language) (and) (conduct) under all the circumstances departs substantially from the required standards of an officer and a (gentleman) (gentlewoman) appropriate for that officer's rank and position under similar circumstances is considered to have abandoned that rank and position.

In determining this issue, you must consider all the relevant facts and circumstances (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

You may find the accused guilty of (specify the offense(s) alleged) only if you are satisfied beyond a reasonable doubt that (state the name and rank of the officer alleged), by his/her (conduct) (and) (language) did not abandon his/her status as a superior commissioned officer of the accused.

NOTE 8: Distinction between abandonment of status and office. Note that the above abandonment instruction mentions abandonment of the status as a commissioned officer, but not abandonment of "execution of office." In this regard, it is different than the abandonment instruction in 3-14-1, but similar to the offense in 3-13-1.

NOTE 9: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

3–15–1. ASSAULT ON WARRANT, NONCOMMISSIONED, OR PETTY OFFICER (ARTICLE 91)

a. MAXIMUM PUNISHMENT:

(1) Striking or assaulting warrant officer: DD, TF, 5 years, E-1.

(2) Striking or assaulting superior noncommissioned or petty officer: DD, TF, 3 years, E-1.

(3) Striking or assaulting other noncommissioned or petty officer: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, (unlawfully) (strike) (assault) _____, a _____ officer, then known to the accused to be a (superior) _____ officer who was then in the execution of his/her office, by _____ him/her (in) (on) (the _____) with (a) _____ (his/her) _____.

c. ELEMENTS:

(1) That (state the time alleged), the accused was (an enlisted service member) (a warrant officer);

(2) That (state the time and place alleged) the accused:

(a) (attempted to do) (offered to do) (did) bodily harm to (state the name and rank or grade of the person alleged), or

(b) (struck) (state the name and rank or grade of the person alleged);

(3) That the accused did so by (state the alleged manner of the striking or assault);

(4) That, at the time, (state the name and rank or grade of the person alleged) was in the execution of his/her office; (and)

(5) That the accused knew, at the time, that (state the name and rank or grade of the person alleged) was a (noncommissioned) (warrant) (petty) officer; [and]

NOTE 1: Victim the superior noncommissioned/petty officer of the accused. If the victim was the accused's superior warrant, noncommissioned, or petty officer, the following two elements apply:

[(6)] That (state the name and rank or grade of the person alleged) was the superior (noncommissioned) (petty) (warrant) officer of the accused; and

[(7)] That the accused then knew that (state the name and rank or grade of the person alleged) was the accused's superior (noncommissioned) (warrant) (petty) officer.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A (noncommissioned) (warrant) (petty) officer is "in the execution of (his/her) office" when that officer is doing any act or service required or authorized to be done by statute, regulation, the order of a superior, custom of the service, or military usage.

NOTE 2: Assault by attempt. If an assault by attempt, give the following:

An "assault" is an attempt with unlawful force or violence to do bodily harm to another. An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability to do bodily harm to another. Physical injury or offensive touching is not required.

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

(The use of threatening words alone does not constitute an assault. However, if the threatening words are accompanied by a menacing act or gesture, there may be an assault since the combination constitutes a demonstration of violence.)

NOTE 3: Assault by offer. If an assault by offer, give the following instruction:

An "assault" is an offer with unlawful force or violence to do bodily harm to another. An "offer to do bodily harm" is an (intentional) (or) (culpably negligent) (act) (or) (failure to act) which foreseeably causes another to reasonably believe that force will immediately be applied to (his/her) person. There must be an apparent present ability to bring about bodily

harm. Physical injury or offensive touching is not required and specific intent to do bodily harm is not required.

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

The use of threatening words alone does not constitute an assault. However, if the threatening words are accompanied by a menacing act or gesture, there may be an assault since the combination constitutes a demonstration of violence.

NOTE 4: Assault consummated by a battery. If an assault consummated by a battery, give the following:

An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is inflicted is called "a battery." A "battery" is an unlawful and (intentional) (or) (culpably negligent) application of force or violence to another. The act must be done without legal justification or excuse and without lawful consent of the victim. "Bodily harm" means any physical injury to (or offensive touching of) another person, however slight.

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 5: Culpable negligence. If culpable negligence is mentioned in the preceding instructions, define as follows:

"Culpable negligence" is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; that is what "due care" means. "Culpable negligence" is a negligent act or failure to act with a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others, instead of merely a failure to use due care.

NOTE 6: Assault on superior charged. If charged with assault upon a superior warrant, noncommissioned, or petty officer, give the following instruction:

"Superior (noncommissioned) (warrant) (petty) officer" includes any (noncommissioned) (warrant) (petty) officer who is superior in rank to the accused, but does not include an acting noncommissioned or petty officer.

NOTE 7: Divestiture of status defense. If divestiture of status is raised, instruct as follows:

The evidence has raised an issue as to whether (state the name and rank of the warrant, noncommissioned, or petty officer) conducted himself/herself prior to the alleged offense in a manner which took away his/her status as a (noncommissioned) (warrant) (petty) officer acting in the execution of his/her office. A (noncommissioned) (petty) (warrant) officer whose own (language) (and) (conduct) under all the circumstances departs substantially from the required standards appropriate for that individual's rank and position under similar circumstances is considered to have abandoned that rank and position. In determining this issue you must consider all the relevant facts and circumstances (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

You may find the accused guilty of the offense of assault on a (noncommissioned) (warrant) (petty) officer in violation of Article 91 of the Uniform Code of Military Justice only if you are satisfied beyond a reasonable doubt that (state the name and rank of the warrant, noncommissioned, or petty officer) did not abandon his/her status as a (noncommissioned) (warrant) (petty) officer acting in the execution of his/her office.

NOTE 8: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–15–2. WILLFUL DISOBEDIENCE OF WARRANT, NONCOMMISSIONED, OR PETTY OFFICER (ARTICLE 91)

a. MAXIMUM PUNISHMENT:

(1) Willfully disobeying warrant officer: DD, TF, 2 years, E-1.

(2) Willfully disobeying a noncommissioned or petty officer: BCD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), having received a lawful order from _____, a _____ officer, then known by the accused to be a _____ officer, to _____, an order which it was his/her duty to obey, did (at/on board--location), on or about _____, willfully disobey the same.

c. ELEMENTS:

(1) That (state the time alleged), the accused was (an enlisted service member) (a warrant officer);

(2) That the accused received a certain lawful order to (state the terms of the order allegedly given) from (state the name and rank or grade of the person alleged);

(3) That the accused, at the time, knew that (state the name and rank or grade of the person alleged) was a (warrant) (noncommissioned) (petty) officer;

(4) That the accused had a duty to obey the order; and

(5) That (state the time and place alleged), the accused willfully disobeyed the lawful order.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Willful disobedience" means an intentional defiance of authority.

NOTE 1: Lawfulness of order. The lawfulness of the order is not a separate element of the offense. Thus, the issue of lawfulness is determined by the MJ and is not submitted to the members. See United States v. New, 55 MJ 95 (CAAF 2001); United States v. Deisher, 61 MJ 313 (CAAF 2005). To be lawful, the order must relate to specific military duty and be one that the noncommissioned/warrant/petty officer was authorized to give the accused. The order must require the accused to do or stop doing a particular thing either at once or at a future time. An order is lawful if reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command and is directly connected with the

maintenance of good order in the services. (The three preceding sentences may be modified and used by the MJ during a providence inquiry to define "lawfulness" for the accused.) When the MJ determines that, based on the facts, the order was lawful, the MJ should advise the members as follows:

As a matter of law, the order in this case, as described in the specification, if in fact there was such an order, was a lawful order.

NOTE 2: Order determined to be unlawful. An order is illegal if, for example, it is unrelated to military duty, its sole purpose is to accomplish some private end, it is arbitrary and unreasonable, and/or it is given for the sole purpose of increasing the punishment for an offense which it is expected the accused may commit. If the MJ determines that, based on the facts, the order was not lawful, the MJ should dismiss the affected specification, and the members should be so advised.

NOTE 3: Form or method of communication in issue. If the evidence raises an issue as to the form or method of communicating the command, give the following:

As long as the order was understandable, (the form of the order) (and) (the method by which the order was communicated to the accused) (is) (are) not important. The communication, however, must amount to an order from a (noncommissioned) (warrant) (petty) officer that is directed personally to the accused, and the accused must know it is from a (noncommissioned) (warrant) (petty) officer.

NOTE 4: Divestiture of status raised. When the issue has arisen whether the officer's conduct divested him or her of the status of a noncommissioned, warrant, or petty officer, the following instruction is appropriate:

The evidence has raised an issue as to whether (state the name and rank or grade of the person alleged) conducted himself/herself prior to the alleged offense in a manner which took away his/her status as a (noncommissioned) (warrant) (petty) officer. A (noncommissioned) (petty) (warrant) officer whose own (language) (and) (conduct) under all the circumstances depart(s) substantially from the required standards appropriate for that individual's rank and position under similar circumstances is considered to have abandoned that rank and position. In determining this issue you must consider all the relevant facts and circumstances (including, but not limited to (here the military judge may specify the significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

You may find the accused guilty of (specify the offense(s)) only if you are satisfied beyond a reasonable doubt that (state the name and rank or grade of the person alleged) did not abandon his/her status as a (noncommissioned) (warrant) (petty) officer.

NOTE 5: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge and Intent), is ordinarily applicable.

3–15–3. CONTEMPT OR DISRESPECT TOWARD WARRANT, NONCOMMISSIONED, OR PETTY OFFICER (ARTICLE 91)

a. MAXIMUM PUNISHMENT:

(1) To a warrant officer: BCD, TF, 9 months, E-1.

(2) To superior noncommissioned or petty officer: BCD, TF, 6 months, E-1.

(3) To other noncommissioned or petty officer: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) (at/on board—location), on or about _____, [did treat with contempt] [was disrespectful in (language) (deportment) toward] _____, a _____ officer, then known to the accused to be a (superior) _____ officer, who was then in the execution of his/her office, by (saying to him/her, "_____," or words to that effect) (spitting at his/her feet) (_____).

c. ELEMENTS:

(1) That (state the time alleged), the accused was (an enlisted service member) (a warrant officer);

(2) That (state the time and place alleged), the accused:

(a) (did) (omitted to do) (a) certain act(s), namely, (state the act(s) or behavior alleged); or

(b) used certain language, namely, (state the words alleged);

(3) That the accused's (behavior) (language) was directed toward and within the (sight) (and) (or) (hearing) of (state the name and rank or grade of the person alleged);

(4) That the accused, at the time, knew that (state the name and rank or grade of the person alleged) was a (noncommissioned) (warrant) (petty) officer;

(5) That (state the name and rank or grade of the person alleged) was then in the execution of his/her office; (and)

(6) That, under the circumstances, by such (behavior) (language), the accused (treated with contempt) (was disrespectful toward) (state the name and rank or grade of the person alleged); [and]

NOTE 1: If victim is alleged to have been the superior of the accused. If the specification alleges that the victim was the superior noncommissioned officer or petty officer of the accused, the military judge must instruct on the following two elements:

[(7)] That (state the name and rank or grade of the person alleged) was the superior (noncommissioned) (petty) officer of the accused at the time; and

[(8)] That the accused, at the time, knew that such person was (his) (her) superior (noncommissioned) (petty) officer.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A (noncommissioned) (warrant) (petty) officer is "in the execution of his/her office" when that officer is doing any act or service required or authorized to be done by statute, regulation, the order of a superior, by custom of the service, or military usage.

("Superior (noncommissioned) (petty) officer" of the accused includes any (noncommissioned) (petty) officer who is superior in rank to the accused.)

("Contempt" means insulting, rude, and disdainful conduct, or otherwise disrespectfully attributing to another qualities of meanness, disreputableness, or worthlessness.)

("Disrespect" means behavior which detracts from the respect due to a (noncommissioned) (warrant) (petty) officer. It may consist of acts or language (and it is not important whether they refer to a (noncommissioned) (warrant) (petty) officer as an officer or as a private individual, provided the behavior is disrespectful and the (noncommissioned) (warrant) (petty) officer is in the execution of (his/her) office at the time of the commission of the charged offense).)

(Disrespect by words may be conveyed by disgraceful names or other contemptuous or denunciatory language toward and within the (sight) (or) (hearing) of the (noncommissioned) (warrant) (petty) officer.)

(Disrespect by acts may be demonstrated by an obvious disdain, rudeness, indifference, gross impertinence, undue and excessive familiarity, silent insolence or other disgraceful, contemptuous, or denunciatory conduct toward and within the (sight) (or) (hearing) of the (noncommissioned) (warrant) (petty) officer.)

NOTE 2: Divestiture of status raised. When the issue has arisen whether the officer's conduct divested that officer of the status as a noncommissioned, warrant, or petty officer acting in the execution of office, the following instruction is appropriate:

The evidence has raised an issue as to whether (state the name and rank or grade of the person alleged) conducted himself/herself prior to the alleged offense in a manner which took away his/her status as a (noncommissioned) (warrant) (petty) officer acting in the execution of his/her office. A (noncommissioned) (petty) (warrant) officer whose own (language) (and) (conduct) under all the circumstances departs substantially from the required standards appropriate for that individual's rank and position under similar circumstances is considered to have abandoned that rank and position. In determining this issue you must consider all the relevant facts and circumstances (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

You may find the accused guilty of (specify the offense(s)) only if you are satisfied beyond a reasonable doubt that (state the name and rank or grade of the person alleged) did not abandon his/her status as a (noncommissioned) (warrant) (petty) officer acting in the execution of his/her office.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–16–1. VIOLATING GENERAL ORDER OR REGULATION (ARTICLE 92)

a. MAXIMUM PUNISHMENT: DD, TF, 2 years, E-1 (but see paragraph 16e (Note), Part IV, MCM, 2008).

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (violate) (fail to obey) a lawful general (order) (regulation), to wit: (paragraph _____, (Army) (Air Force) Regulation _____, dated _____,) (Article _____, U.S. Navy Regulations, dated _____, (General Order No. _____, U.S. Navy, dated _____,) (_____), by (wrongfully) _____.

c. ELEMENTS:

(1) That there was in existence a certain lawful general (order) (regulation) in the following terms: (state the date and specific source of the alleged general order or regulation and quote the order or regulation or the specific portion thereof);

(2) That the accused had a duty to obey such (order) (regulation); and

(3) That (state the time and place alleged), the accused (violated) (failed to obey) this lawful general (order) (regulation) by (here the military judge should enumerate the specific acts and any state of mind or intent alleged which must be established by the prosecution in order to constitute the violation of the order or regulation).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: Proof of existence of order or regulation. The existence of the order or regulation must be proven or judicial notice taken.

NOTE 2: Lawfulness of order or regulation. The lawfulness of the order or regulation is not a separate element of the offense. Thus, the issue of lawfulness is determined by the MJ and is not submitted to the members. See United States v. New, 55 MJ 95 (CAAF 2001); United States v. Deisher, 61 MJ 313 (CAAF 2005). To be lawful, the order or regulation must relate to specific military duty and be one that the noncommissioned/warrant/petty officer was authorized to give the accused. The order or regulation must require the accused to do or stop doing a particular thing either at once or at a future time. An order or regulation is lawful if reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command and is directly connected with the maintenance of good order in the services. (The three preceding sentences may be modified and used by the MJ during a providence inquiry to define "lawfulness" for the accused.) When the MJ determines that, based on the facts, the order or regulation was lawful, the MJ should advise the members as follows:

As a matter of law, the (order) (regulation) in this case, as described in the specification, if in fact there was such (an order) (a regulation), was a lawful (order) (regulation).

NOTE 3: Order or regulation determined to be unlawful. An order or regulation is illegal if, for example, it is unrelated to military duty, its sole purpose is to accomplish some private end, it is arbitrary and unreasonable, and/or it is given for the sole purpose of increasing the punishment for an offense which it is expected the accused may commit. If the MJ determines that, based on the facts, the order was not lawful, the MJ should dismiss the affected specification, and the members should be so advised.

NOTE 4: Dispute as to whether order was general. If there is a factual dispute whether the order was general, that dispute must be resolved by the members in connection with their determination of guilt or innocence. The following instruction may be given:

General (orders) (regulations) are those (orders) (regulations) which are generally applicable to an armed force and which are properly published by (the President) (the Secretary of (Defense) (Homeland Security) (or) (a military department).

General (orders) (regulations) also include those (orders) (regulations) which are generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof and which are issued by (an officer having general court-martial jurisdiction) (or) (a general or flag officer in command) (or) (a commander superior to one of these).

You may find the accused guilty of violating a general (order) (regulation) only if you are satisfied beyond a reasonable doubt that the (order) (regulation) was general.

NOTE 5: If order or regulation determined not to be general. If the military judge should determine, as a matter of law, that the order or regulation was not general and punishable under Article 92(1), the judge may treat the specification as an alleged violation of Article 92(2), if knowledge has been alleged. See Instruction 3-16-2. When knowledge has not been alleged, the judge should dismiss the affected specification, and the members should be so advised.

NOTE 6: Order issued by previous commander. If appropriate, the following additional instruction may be given:

A general (order) (regulation) issued by a commander with authority to do so retains its character as a general (order) (regulation) when another officer takes command, until it expires by its own terms or is rescinded by separate action.

NOTE 7: Orders or regulations containing conditions. When an alleged general order or regulation prohibits a certain act or acts "except under certain conditions," (e.g., "except in the course of official duty"), and the issue is raised by the evidence, the burden is upon the prosecution to prove that the accused is not within the terms of the exception. In such a case, the MJ must inform the members of the specific exception(s) when listing the elements of the offense. Additionally, under present law an instruction substantially as follows must be provided:

When a general (order) (regulation) prohibits (a) certain act(s), except under certain conditions, then the burden is on the prosecution to establish by legal and competent evidence beyond a reasonable doubt that the accused does not come within the terms of the exception(s).

e. REFERENCES: United States v. Cuffee, 10 MJ 381 (CMA 1981).

3–16–2. VIOLATING OTHER WRITTEN ORDER OR REGULATION (ARTICLE 92)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____, (personal jurisdiction data), having knowledge of a lawful order issued by _____, to wit: (paragraph _____, (_____ Combat Group Regulation No. _____) (USS _____, Instruction _____), dated _____) (_____), an order which it was his/her duty to obey, did, (at/on board— location), on or about _____, fail to obey the same by (wrongfully) _____.

c. ELEMENTS:

(1) That there was in existence a certain lawful (order) (regulation) in the following terms: (state the date and specific source of the alleged order or regulation and quote the order or regulation or the specific portion thereof);

(2) That the accused had knowledge of the (order) (regulation);

(3) That the accused had a duty to obey such (order) (regulation); and

(4) That (state the time and place alleged), the accused failed to obey this lawful (order) (regulation) by (state the manner alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: Applicability of this instruction. This instruction (3-16-2) should be given in any case arising under Article 92(2), when the written order or regulation is not "general" in the sense of Article 92(1).

NOTE 2: Lawfulness of order or regulation. The lawfulness of the order or regulation is not a separate element of the offense. Thus, the issue of lawfulness is determined by the MJ and is not submitted to the members. See United States v. New, 55 MJ 95 (CAAF 2001); United States v. Deisher, 61 MJ 313 (CAAF 2005). To be lawful, the order or regulation must relate to specific military duty and be one that the noncommissioned/warrant/petty officer was authorized to give the accused. The order or regulation must require the accused to do or stop doing a particular thing either at once or at a future time. An order or regulation is lawful if reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command and is directly connected with the maintenance of good order in the services. (The three preceding sentences may be modified and used by the MJ during a providence inquiry to define "lawfulness" for the accused.) When the MJ determines that, based on the facts, the order or regulation was lawful, the MJ should advise the members as follows:

As a matter of law, the (order) (regulation) in this case, as described in the specification, if in fact there was such (an order) (a regulation), was a lawful (order) (regulation).

NOTE 3: Order or regulation determined to be unlawful. An order or regulation is illegal if, for example, it is unrelated to military duty, its sole purpose is to accomplish some private end, it is arbitrary and unreasonable, and/or it is given for the sole purpose of increasing the punishment for an offense which it is expected the accused may commit. If the MJ determines that, based on the facts, the order was not lawful, the MJ should dismiss the affected specification, and the members should be so advised.

NOTE 4: Exceptions to prohibited acts. When an alleged order or regulation prohibits a certain act or acts "except under certain conditions," (e.g., "except in the course of official duty"), and the issue is raised by the evidence, the burden is upon the prosecution to prove that the accused is not within the terms of the exception. In such a case, the MJ must inform the members of the specific exception(s) when listing the elements of the offense. Additionally, an instruction substantially as follows must be given:

When (an order) (a regulation) prohibits (a) certain act(s), except under certain conditions, then the burden is on the prosecution to establish by legal and competent evidence beyond a reasonable doubt that the accused does not come within the terms of the exception(s).

NOTE 5: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

e. REFERENCES: United States v. Cuffee, 10 MJ 381 (CMA 1981).

3–16–3. FAILURE TO OBEY LAWFUL ORDER (ARTICLE 92)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:
In that _____, (personal jurisdiction data), having knowledge of a lawful order issued by _____ (to submit to certain medical treatment) (to _____) (not to _____) (_____), an order which it was his/her duty to obey, did (at/on board—location), on or about _____, fail to obey the same by (wrongfully) _____).

c. ELEMENTS:

(1) That a member of the armed forces, namely, (state the name and rank or grade of the person alleged), issued a certain lawful order to (state the particular order or the specific portion thereof);

(2) That the accused had knowledge of the order;

(3) That the accused had a duty to obey the order; and

(4) That (state the time and place alleged), the accused failed to obey the order.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: Lawfulness of order. The lawfulness of the order is not a separate element of the offense. Thus, the issue of lawfulness is determined by the MJ and is not submitted to the members. See United States v. New, 55 MJ 95 (CAAF 2001); United States v. Deisher, 61 MJ 313 (CAAF 2005). To be lawful, the order must relate to specific military duty and be one that the noncommissioned/warrant/petty officer was authorized to give the accused. The order must require the accused to do or stop doing a particular thing either at once or at a future time. An order is lawful if reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command and is directly connected with the maintenance of good order in the services. (The three preceding sentences may be modified and used by the MJ during a providence inquiry to define "lawfulness" for the accused.) When the MJ determines that, based on the facts, the order was lawful, the MJ should advise the members as follows:

As a matter of law, the order in this case, as described in the specification, if in fact there was such an order, was a lawful order.

NOTE 2: Order determined to be unlawful. An order is illegal if, for example, it is unrelated to military duty, its sole purpose is to accomplish some private end, it is arbitrary and unreasonable, and/or it is given for the sole purpose of increasing the punishment for an offense which it is expected the accused may commit. If the MJ determines that, based on

the facts, the order was not lawful, the MJ should dismiss the affected specification, and the members should be so advised.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–16–4. DERELICTION OF DUTY (ARTICLE 92)

a. MAXIMUM PUNISHMENT:

(1) Willful: BCD, TF, 6 months, E-1.

(2) Neglect or inefficiency: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:

In that _____, (personal jurisdiction data), who (knew) (should have known) of his/her duties (at/on board—location), (on or about _____) (from about _____ to about _____), was derelict in the performance of those duties in that he/she (negligently) (willfully) (by culpable inefficiency) failed _____, as it was his/her duty to do (by _____).

c. ELEMENTS:

NOTE 1: Willful and negligent dereliction. Whether the accused is found guilty of willful or negligent dereliction of duty affects the maximum punishment. For the enhanced punishment of willful dereliction to apply, the government must allege, and prove, that the accused actually knew of the duty. United States v. Ferguson, 40 MJ 823 (NMCMR 1994). The military judge must be mindful of this distinction in selecting the elements and definitions to give the court members.

(1) That the accused had (a) certain prescribed (duty) (duties), that is: (state the nature of the duties alleged);

NOTE 2: Willful dereliction alleged. If a willful dereliction is alleged, give element (2a) below:

[(2a)] That the accused actually knew of the assigned (duty) (duties); and

NOTE 3: Neglect or culpable inefficiency. If a willful dereliction is not alleged, give element (2b), below:

[(2b)] That the accused knew or reasonably should have known of the assigned (duty) (duties); and

(3) That (state the time and place alleged), the accused was derelict in the performance of (that duty) (those duties), by (state the manner alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A duty may be imposed by (regulation) (lawful order) (or) (custom of the service). A person is "derelict" in the performance of duty when (he) (she) (willfully) ((or) (negligently)) fails to perform them (or when (he) (she) performs them in a culpably inefficient manner). "Dereliction" is defined as a failure in duty, a shortcoming, or delinquency.

("Willfully" means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act.)

("Negligently" means an act or failure to act by a person under a duty to use due care which demonstrates a lack of care (for the property of others) (_____) which a reasonably prudent person would have used under the same or similar circumstances.)

("Culpably inefficient" means inefficiency for which there is no reasonable or just excuse. It means a reckless, gross, or deliberate disregard for the foreseeable results of a particular (act) (or) (failure to act).)

(That an individual reasonably should have known of duties may be demonstrated by (regulations) (manuals) (customs) (academic literature) (and) (or) (testimony of persons who have held similar or related positions) (_____) or similar evidence.

NOTE 4: Willful dereliction alleged—exceptions and substitutions. If a willful dereliction was alleged and the military judge determines the members could find the accused guilty of a negligent dereliction, Instruction 7-15 and the definitions applicable to a negligent dereliction should be given. A tailored Findings Worksheet is also appropriate.

NOTE 5: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), may be applicable if the accused is charged with a willful dereliction.

e. REFERENCES:

(1) Source of duty; violations of self-imposed duties not an offense. United States v. Dallmon, 34 MJ 274 (CMA 1992).

(2) Noncommissioned officer's failure to report the drug use of others as an offense. United States v. Medley, 33 MJ 75 (CMA 1975).

3–17–1. CRUELTY, OPPRESSION, OR MALTREATMENT OF SUBORDINATES (ARTICLE 93)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), (at/on board—location), on or about _____, [was cruel toward] [did (oppress) (maltreat)] _____, a person subject to his/her orders, by (kicking him/her in the stomach) (confining him/her for twenty-four hours without water] [_____].

c. ELEMENTS:

(1) That (state the name (and rank) of the alleged victim) was subject to the orders of (state the name of the accused), the accused; and

(2) That (state the time and place alleged), the accused (was cruel toward) (oppressed) (maltreated) (state the name of the alleged victim) by (state the manner alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Subject to the orders of" includes persons under the direct or immediate command of the accused and all persons who by reason of some duty are required to obey the lawful orders of the accused, even if those persons are not in the accused's direct chain of command.)

The (cruelty) (oppression) (or) (maltreatment) must be real, although it does not have to be physical. The imposition of necessary or proper duties on a service member and the requirement that those duties be performed does not establish this offense even though the duties are hard, difficult, or hazardous.

("Cruel") ("oppressed") (and) ("maltreated") refer(s) to treatment, that, when viewed objectively under all the circumstances, is abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose and that results in physical or mental harm or suffering, or reasonably could have caused, physical or mental harm or suffering.

((Assault) (Improper punishment) (Sexual harassment) may constitute this offense.)

(Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors.) (Sexual harassment also includes deliberate or repeated offensive comments or gestures of a sexual nature.) (For sexual harassment to also constitute maltreatment, the accused's conduct must, under all of the circumstances, constitute ("cruelty") ("oppression") (and) ("maltreatment") as I have defined those terms for you.)

(Along with all other circumstances, you must consider, evidence of the consent (or acquiescence) of (state the name (and rank) of the alleged victim), or lack thereof, to the accused's actions. The fact that (state the name (and rank) of the alleged victim) may have consented (or acquiesced), does not alone prove that he/she was not maltreated, but it is one factor to consider in determining whether the accused maltreated, oppressed, or acted cruelly toward, (state the name (and rank) of the alleged victim).)

e. REFERENCES: United States v. Carson, 57 MJ 410 (CAAF 2002); United States v. Fuller, 54 MJ 107 (CAAF 2001).

3–18–1. MUTINY BY REFUSING TO OBEY ORDERS OR TO PERFORM DUTY (ARTICLE 94)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____, (personal jurisdiction data) with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board—location), on or about _____, refuse, in concert with (_____) (and) (_____) (others whose names are unknown, to (obey the orders of _____ to _____) (perform his/her duty as _____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused refused to (obey the orders of _____ to _____) (perform (his) (her) duty as _____);

(2) That the accused in refusing to (obey the order) (perform this duty) acted in concert with (another) (other) person(s), namely, (_____) (and) (_____) (others whose names are unknown); and

(3) That the accused in pursuance of a common intent with another did so with intent to (usurp) (and) (override) lawful military authority.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

This offense involves collective insubordination and requires some combination of two or more persons acting together in resisting lawful military authority. "In concert with" means together with, in accordance with a common intent, design, or plan, regardless of whether this intent, design, or plan was developed at some earlier time. There must be concerted action with at least one other person who also shares the accused's intent to (usurp) (and) (override) lawful military authority. (It is not necessary that the act of insubordination be active or violent.) It consists of a persistent and joint (refusal) (failure) to (obey orders) (perform duty) with an insubordinate intent, that is, an intent to (usurp) (and) (override) lawful military authority. ("Usurp" means to seize and to hold by force or without right.) ("Override" means to set aside or supersede.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. Instructions 3-14-2, Willful Disobedience of a Superior Commissioned Officer, 3-15-2, Willful Disobedience of Warrant, Noncommissioned, or Petty Officer, 3-16-1, Violating General Order or Regulation, 3-16-2, Violating Other Written Order or Regulation, and 3-16-3, Failure to Obey Lawful Order, may also be helpful in tailoring appropriate instructions.

e. REFERENCES: United States v. Duggan, 15 CMR 396 (CMA 1954).

3–18–2. MUTINY BY CREATING VIOLENCE OR DISTURBANCE (ARTICLE 94)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____, (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board—location), on or about _____, create (violence) (a disturbance) by (attacking the officers of the said ship) (barricading himself/herself in Barracks T-7, firing his/her rifle at _____, and exhorting other persons to join him/her in defiance of _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused created (violence) (a disturbance) by (state the manner alleged); and

(2) That the accused created this (violence) (disturbance) with intent to (usurp) (and) (override) lawful military authority.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Violence" means the exertion of physical force.) ("Disturbance" means the interruption of or interference with a state of peace or order.) ("Usurp" means to seize and to hold by force or without right.) ("Override" means to set aside or supersede.)

(This offense may be committed by (one person acting alone) (or) (more than one person).)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

e. REFERENCES: United States v. Duggan, 15 CMR 396 (CMA 1954).

3–18–3. SEDITION (ARTICLE 94)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____, (personal jurisdiction data) with intent to cause the (overthrow) (destruction) (overthrow and destruction) of lawful civil authority, to wit: _____, did, (at/on board—location), on or about _____, in concert with (_____) (and) (_____) (others whose names are unknown), create (revolt) (violence) (a disturbance) against such authority by (entering the Town Hall of _____ and destroying property and records therein) (marching upon and compelling the surrender of the police of _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused created (revolt) (violence) (a disturbance) against lawful civil authority by (state the manner alleged);

(2) That the accused acted in concert with (another) (other) person(s), namely, _____ (and _____) (and others whose names are unknown); and

(3) That the accused did so with intent to cause the (overthrow) (destruction) (overthrow and destruction) of lawful civil authority, namely (specify the alleged lawful civil authority).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"In concert with" means together with, in accordance with a common intent, design, or plan, regardless of whether this intent, design, or plan was developed at some earlier time. "Revolt" means a casting off or repudiation of allegiance or an uprising against legitimate authority.) ("Violence" means the exertion of physical force.) ("Disturbance" means the interruption of or interference with a state of peace or order.) ("Overthrow" means overturning or upsetting, causing to fall or fail, subverting, defeating, ruining, or destroying.) ("Destruction" means overthrow, downfall, or causing to fall or fail.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–18–4. FAILURE TO PREVENT AND SUPPRESS A MUTINY OR SEDITION (ARTICLE 94)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____, (personal jurisdiction data) did, (at/on board—location), on or about _____, fail to do his/her utmost to prevent and suppress a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (marines) (_____) of _____, which (mutiny) (sedition) was being committed in his/her presence, in that (he/she took no means to compel the dispersal of the assembly) (he/she made no effort to assist _____ who was attempting to quell the mutiny) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), an offense of (mutiny) (sedition) was being committed in the presence of the accused by (state the description of those engaged in the mutiny or sedition, as alleged); and

(2) That the accused failed to do (his) (her) utmost to prevent and suppress the (mutiny) (sedition) by (state the manner alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The elements of the offense of (mutiny) (sedition) are as follows:

NOTE: Instructions on elements of mutiny or sedition. The members must be instructed on the elements of Mutiny, Instruction 3-18-1 or 3-18-2, or Sedition, Instruction 3-18-3, as alleged.

"Utmost" means taking those measures to prevent or suppress a (mutiny) (sedition) which may properly be called for by the circumstances of the situation, keeping in mind the (rank and responsibilities) (employment) of the accused. (When extreme measures are necessary under the circumstances, the use of a dangerous weapon or the taking of life may be justified, providing excessive force is not used.)

Proof that the accused actually participated in the (mutiny) (sedition) is not required. However, you must be satisfied by legal and competent evidence beyond a reasonable doubt that (service members) (_____) of (_____) were committing (mutiny) (sedition) in

the presence of the accused and that the accused failed, in the manner charged, to do (his) (her) utmost to prevent and suppress the (mutiny) (sedition).

3–18–5. FAILURE TO REPORT A MUTINY OR SEDITION (ARTICLE 94)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____, (personal jurisdiction data) did, (at/on board—location), on or about _____, fail to take all reasonable means to inform his/her superior commissioned officer or his/her commanding officer, of a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (marines) (_____) of _____ which (mutiny) (sedition) the accused (knew) (had reason to believe) was taking place.

c. ELEMENTS:

(1) That (state the time and place alleged), an offense of (mutiny) (sedition) among (state the description of those engaged in the mutiny or sedition, as alleged) was taking place;

(2) That the accused (knew) (or) (had reason to believe) that the offense was taking place; and

(3) That the accused failed to take all reasonable means to inform (his) (her) superior commissioned officer or (his) (her) commanding officer that the (mutiny) (sedition) was taking place.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The elements of the offense of (mutiny) (sedition) are as follows:

NOTE 1: Instructions on elements of mutiny or sedition. The members must be instructed on the elements of the offense of Mutiny, Instruction 3-18-1 or 3-18-2, or Sedition, Instruction 3-18-3, as alleged.

A failure to take "all reasonable means" to inform a superior includes the failure to take the most expeditious means available. (The accused can be said to have had "reason to believe" that (mutiny) (sedition) was taking place when the circumstances which were known to the accused were such as would have caused a reasonable person in the same or similar circumstances to believe that a (mutiny) (sedition) was taking place.)

Proof that the accused actually participated in the (mutiny) (sedition) or that the offense was committed in the accused's presence is

unnecessary. However, you must be satisfied by legal and competent evidence beyond a reasonable doubt that (service members) (_____) of (_____) were committing (mutiny) (sedition), and that the accused (knowing) (or) (having reason to believe) that the offense was taking place, failed to take all reasonable means to inform (state the name and rank of the accused's commanding officer) or any superior commissioned officer of the offense.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), may be applicable.

3–18–6. ATTEMPTED MUTINY (ARTICLE 94)

a. MAXIMUM PUNISHMENT: DD, TF, 20 years, E-1.

b. MODEL SPECIFICATION:
In that _____, (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board—location), on or about _____, attempt to create (violence) (a disturbance) by _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused did a certain act; that is, (state the act(s) alleged or raised by the evidence);

(2) That the act was done with specific intent to commit the offense of mutiny;

(3) That the act amounted to more than mere preparation; that is, it was a direct movement toward the commission of the offense; and

(4) That the act apparently tended to effect the commission of the offense of mutiny; that is, the act apparently would have resulted in the actual commission of mutiny except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (_____) which prevented completion of that offense.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Proof that the offense of mutiny actually occurred or was completed by the accused is not required. However, it must be proved beyond reasonable doubt that, at the time of the act charged in the specification, the accused intended every element of the offense of mutiny. These elements are (list the elements of the offense of mutiny).

NOTE 1: Elements of mutiny. See Instruction 3-18-1 or 3-18-2, Mutiny, for the elements of mutiny.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. Instruction 6-5, Partial Mental Responsibility, Instruction 5-1-7, Evidence Negating Mens Rea, or Instruction 5-12, Voluntary Intoxication, as bearing on the issue of intent to commit mutiny, may be applicable.

3–19–1. RESISTING APPREHENSION (ARTICLE 95)

a. MAXIMUM PUNISHMENT: BCD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board--location), on or about _____, resist being apprehended by _____, (an armed forces policeman) (_____), a person authorized to apprehend the accused.

c. ELEMENTS:

(1) That (state the time and place alleged), (state the name and status of the person alleged to be apprehending) attempted to apprehend the accused;

(2) That (state the name and status of the person alleged to be apprehending) was authorized to apprehend the accused; (and)

(3) That the accused actively resisted the apprehension by (state the manner alleged); [and]

NOTE 1: Accused's belief in authority of apprehending individual. If there is any evidence from which it may justifiably be inferred that the accused may not have believed that the person attempting to apprehend the accused was empowered to do so, give the following additional element to the members:

[(4)] That the accused had reason to believe that the person attempting the apprehension was empowered to do so.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Apprehension" means taking a person into custody; that is, placing a restraint on a person's freedom of movement. The restraint may be physical and forcible, or it may be imposed by clearly informing the person being apprehended that (he) (she) is being taken into custody. An apprehension is attempted, then, by clearly informing a person orally or in writing that (he) (she) is being taken into custody or by attempting to use a degree and kind of force which clearly indicates that (he) (she) is being taken into custody.

To resist apprehension, a person must actively resist the restraint attempted to be imposed by the person apprehending. (This resistance may be accomplished by assaulting or striking the person attempting to apprehend the accused.) (Mere use of words of protest or of argumentative or abusive language will not amount to the offense of resisting apprehension.)

(An attempt to escape from custody after an apprehension is complete does not amount to the offense of resisting apprehension.)

NOTE 2: Flight. In United States v. Harris, 29 MJ 169 (CMA 1989), the court held that mere flight is insufficient to establish the offense. Note that fleeing apprehension is an offense under Article 95 (See Instruction 3-19-2). Accordingly, the following instruction may be given when appropriate:

(Evidence of flight, if any, may be considered by you, along with all other evidence, in determining whether the accused committed the offense of resisting apprehension. (However, mere flight is insufficient to establish the offense of resisting apprehension.))

NOTE 3: Lawfulness of apprehension at issue. The military judge resolves, as an interlocutory question, whether a certain status would authorize that person to apprehend the accused and ordinarily determines whether the apprehension was lawful. The fact finder decides whether the person who attempted to make the apprehension actually had such a status. Resisting a person not authorized to apprehend is not an offense under Article 95, but may violate Article 134. United States v. Rhodes, 47 MJ 790 (ACCA 1998); United States v. Nocifore, 31 MJ 769 (ACMR 1990); United States v. Hutcherson, 29 CMR 770 (AFBR 1960); United States v. Hunt, 18 CMR 498 (AFBR 1954). Specifically, resisting apprehension by non-military affiliated law enforcement officers for non-military offenses is not a violation of Article 95. Military affiliated law enforcement officials and commissioned, warrant, petty, and noncommissioned officers may lawfully apprehend any person subject to the UCMJ. Article 7c, UCMJ. MCM, RCM 302(b). A civil officer who has the authority to apprehend offenders under the laws of the United States or a state, territory, commonwealth, or the District of Columbia may lawfully apprehend a deserter from the armed forces. Article 8, UCMJ. (In such cases, the military judge must conclude from the evidence that the reason for the apprehension was, inter alia, because the accused was suspected of desertion.) When there is an issue as to whether the person who either attempted to apprehend or apprehended the accused actually occupied a position that authorized him to apprehend the accused, the following instruction may be appropriate:

An accused may not be convicted of this offense unless the person who (attempted to apprehend) (apprehended) (him) (her) was authorized to apprehend the accused.

As a matter of law, a [military or military affiliated law enforcement official] [(commissioned) (warrant) (petty) (noncommissioned) officer] [police officer] [constable] [highway patrolman] [_____] was authorized to apprehend the accused at the time of the alleged offense.

However, you may find the accused guilty of this offense only if you are satisfied beyond a reasonable doubt that the person who (attempted to apprehend) (apprehended) the accused actually was a (military or military affiliated law enforcement official) ([commissioned] [warrant][petty] [noncommissioned] officer) ([police officer] [constable] [highway patrolman] [_____]) at the time of the [attempted] apprehension.

NOTE 4: Accused's belief in apprehending individual's authority. The following instruction may be appropriate when element (4) above has been given:

The accused may be said to have reason to believe that (state the name and status of the person alleged to be apprehending) was lawfully empowered to apprehend (him) (her) when the circumstances which were known to the accused would have caused a reasonable person in the same or similar circumstances to believe that (state the name and status of the person alleged to be apprehending) was authorized to apprehend (him) (her).

NOTE 5. Other instructions. Instruction 5-11,* Ignorance or Mistake of Fact or Law—*General Discussion, may be appropriate concerning element (4).

3–19–2. FLEEING APPREHENSION (ARTICLE 95)

a. MAXIMUM PUNISHMENT: BCD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board--location), on or about _____, flee apprehension by _____, (an armed force policeman) (_____), a person authorized to apprehend the accused.

c. ELEMENTS:

(1) That (state the time and place alleged), (state the name and status of the person alleged to be apprehending) attempted to apprehend the accused;

(2) That (state the name and status of the person alleged to be apprehending) was authorized to apprehend the accused; (and)

(3) That the accused fled from the apprehension by (state the manner alleged); [and]

NOTE 1: Accused's belief in authority of apprehending individual. If there is any evidence from which it may justifiably be inferred that the accused may not have believed that the person attempting to apprehend the accused was empowered to do so, give the following additional element to the members:

[(4)] That the accused had reason to believe that the person attempting the apprehension was empowered to do so.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Apprehension" means taking a person into custody; that is, placing a restraint on a person's freedom of movement. The restraint may be physical and forcible, or it may be imposed by clearly informing the person being apprehended that (he) (she) is being taken into custody. An apprehension is attempted, then, by clearly informing a person orally or in writing that (he) (she) is being taken into custody or by attempting to use a degree and kind of force which clearly indicates that (he) (she) is being taken into custody. Flight from apprehension must be active, such as running or driving away from the person attempting to apprehend the

accused. (Mere use of words of protest or of argumentative or abusive language will not amount to the offense of fleeing apprehension.)

NOTE 2: Relationship with Resisting Apprehension (Instruction 3-19-1). Mere flight is insufficient to establish the offense of resisting apprehension. United States v. Harris, 29 MJ 169 (CMA 1989). In 1996, Congress amended the UCMJ to establish fleeing apprehension as an offense under Article 95.

NOTE 3: Lawfulness of apprehension at issue. Ordinarily, the military judge resolves, as an interlocutory question, whether a certain status would authorize that person to apprehend the accused and whether the apprehension was lawful. The fact finder decides whether the person who attempted to make the apprehension actually had such a status. Resisting a person not authorized to apprehend does not constitute an offense under Article 95, but may violate Article 134. United States v. Rhodes, 47 MJ 790 (ACCA 1998); United States v. Nocifore, 31 MJ 769 (ACMR 1990); United States v. Hutcherson, 29 CMR 770 (AFBR 1960); United States v. Hunt, 18 CMR 498 (AFBR 1954). Specifically, fleeing apprehension by non-military affiliated law enforcement officers for non-military offenses is not a violation of Article 95. Military affiliated law enforcement officials and commissioned, warrant, petty, and noncommissioned officers may lawfully apprehend any person subject to the UCMJ. Article 7c, UCMJ. MCM, RCM 302(b). A civil officer who has the authority to apprehend offenders under the laws of the United States or a state, territory, commonwealth, or the District of Columbia may lawfully apprehend a deserter from the armed forces. Article 8, UCMJ. (In such cases, the military judge must conclude from the evidence that the reason for the apprehension was, inter alia, because the accused was suspected of desertion.) When there is an issue as to whether the person who either attempted to apprehend or apprehended the accused actually occupied a position that authorized him to apprehend the accused, the following instruction may be appropriate:

An accused may not be convicted of this offense unless the person who (attempted to apprehend) (apprehended) (him) (her) was authorized to apprehend the accused.

As a matter of law, a [military or military affiliated law enforcement official] [(commissioned) (warrant) (petty) (noncommissioned) officer] [police officer] [constable] [highway patrolman] [_____] was authorized to apprehend the accused at the time of the alleged offense.

However, you may find the accused guilty of this offense only if you are satisfied beyond a reasonable doubt that the person who (attempted to apprehend) (apprehended) the accused actually was a (military or military affiliated law enforcement official) ([commissioned] [warrant][petty] [noncommissioned] officer) ([police officer] [constable]

[highway patrolman] [_____]) at the time of the [attempted] apprehension.

NOTE 4: Accused's belief in apprehending individual's authority. The following instruction may be appropriate when element (4) above has been given:

The accused may be said to have reason to believe that (state the name and status of the person alleged to be apprehending) was lawfully empowered to apprehend (him) (her) when the circumstances which were known to the accused would have caused a reasonable person in the same or similar circumstances to believe that (state the name and status of the person alleged to be apprehending) was authorized to apprehend (him) (her).

NOTE 5: Other instructions. Instruction 5-11, Ignorance or Mistake of Fact or Law—General Discussion, may be appropriate concerning element (4).

3–19–3. BREAKING ARREST (ARTICLE 95)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), having been placed in arrest (in quarters) (in his/her company area) (_____) by a person authorized to order the accused into arrest, did, (at/on board--location) on or about _____, break said arrest.

c. ELEMENTS:

(1) That the accused was placed in arrest (in quarters) (in (his) (her) company area) (_____) by (state the name and status of the person ordering the accused into arrest);

(2) That (state the name and status of the person ordering the accused into arrest) was authorized to order the accused into arrest; (and)

(3) That (state the time and place alleged), the accused went beyond the limits of (his) (her) arrest before being released from that arrest by proper authority; [and]

NOTE 1: Knowledge of arrest status raised. If there is any evidence from which it may justifiably be inferred that the accused may not have known of his/her arrest and its limits, give the element below:

[(4)] That the accused knew of (his) (her) arrest and its limits.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 2: Types of Arrest. There are two types of arrest: pretrial arrest under Article 9, UCMJ, and arrest in quarters under Article 15, UCMJ. If the accused is alleged to have broken pretrial arrest, give the definition below:

Arrest is restraint imposed upon a person by oral or written orders of competent authority, not imposed as punishment for an offense, directing that person to remain within certain specified limits pending disposition of charges. The restraint imposed is binding upon the person arrested because of (his) (her) moral and legal obligation to obey the order of arrest.

NOTE 3: Arrest in Quarters. If the accused is alleged to have broken arrest in quarters, give the definition below:

An officer undergoing arrest in quarters as nonjudicial punishment is required to remain within that officer's quarters during the period of punishment unless the limits of arrest are otherwise extended by appropriate authority. The quarters of an officer may consist of a military residence, whether a tent, stateroom, or other quarters assigned, or a private residence when government quarters have not been provided.

NOTE 4: Lawfulness of arrest in issue. Ordinarily, the legality of the arrest is a question of law to be decided by the military judge. A commissioned or warrant officer may be ordered into pretrial arrest by a commanding officer with authority over the arrestee. Rules for Courts-Martial 304(b) (1). An enlisted person may be ordered into pretrial arrest by any commissioned officer, or a warrant, noncommissioned, or petty officer when authorized to do so by a commanding officer with authority over the arrestee. Rules for Courts-Martial 304(b) (2) and (3). An officer may be ordered into arrest in quarters as nonjudicial punishment by an officer exercising general court-martial jurisdiction, a general officer in command, or a principal assistant to an officer exercising general court-martial jurisdiction or a general officer in command. Paragraphs 2c and 5b, Part V, Manual for Courts-Martial. The military judge resolves, as an interlocutory question, whether a certain status would authorize that person to place the accused in arrest and whether the arrest was lawful. The fact finder decides whether the person who placed the accused in arrest actually had such a status. When there is an issue as to whether the person who ordered the accused into arrest actually occupied a position that authorized him to do so, the following instruction may be appropriate. The military judge should tailor the instruction based upon the rank of the accused.

An accused may not be convicted of breaking arrest unless the person who placed the accused in arrest was authorized to order the accused into arrest.

You may find the accused guilty of breaking arrest only if you are satisfied beyond a reasonable doubt that (state the name of the person who ordered the accused into arrest) held the status of (a commanding officer with authority over the accused) (a commissioned officer) (a [warrant] [noncommissioned] officer authorized to arrest the accused by a commanding officer with authority over the accused) ([an officer exercising general court-martial jurisdiction] [a general officer in command] [a principal assistant to (an officer exercising general court-martial jurisdiction) (a general officer in command)]) at the time that he/she ordered the accused into arrest.

NOTE 5: Other instructions. If the 4th element is given, Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable. Consider whether Instruction 5-11, Ignorance or Mistake of Fact or Law—General Discussion (General Intent), should be given as well.

3–19–4. ESCAPE FROM CUSTODY (ARTICLE 95)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board--location), on or about _____, escape from the custody of _____, a person authorized to apprehend the accused.

c. ELEMENTS:

(1) That the accused was apprehended by (state the name and status of the person who apprehended the accused);

(2) That (state the name and status of the person who apprehended the accused) was authorized to apprehend the accused; (and)

(3) That (state the time and place alleged), the accused freed (himself) (herself) from the restraint of (his) (her) custody before being released therefrom by proper authority; [and]

NOTE 1: Accused's belief in authority of apprehending individual. If there is any evidence from which it may justifiably be inferred that the accused may not have believed that the person from whose custody he/she allegedly escaped was empowered to hold him/her in custody, give element (4) below:

[(4)] That the accused had reason to believe that (state the name and status of the person from whose custody the accused allegedly escaped) was empowered to hold the accused in his/her custody.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Apprehension" means taking a person into custody; that is, placing a restraint on a person's freedom of movement. The restraint may be physical and forcible. Restraint may also be imposed by clearly informing the person being apprehended, either orally or in writing, that (he) (she) is being taken into custody, if followed by the accused's submission to the apprehending authority. Once a person has submitted to an apprehension or has been forcibly taken into custody, continuing custody may consist of control exercised in the presence of the prisoner by official acts or orders.

(The accused may be said to have reason to believe that (state the name of the person alleged) was lawfully empowered to hold (him) (her) in custody when the circumstances which were known to the accused would have caused a reasonable person in the same or similar circumstances to believe that (he) (she) was in lawful custody.)

NOTE 2: Lawfulness of apprehension at issue. Ordinarily, the military judge resolves, as an interlocutory question, whether a certain status would authorize that person to apprehend the accused and whether the apprehension was lawful. The fact finder decides whether the person who attempted to make the apprehension actually had such a status. Resisting a person not authorized to apprehend is not an offense under Article 95, but may violate Article 134. United States v. Rhodes, 47 MJ 790 (ACCA 1998); United States v. Nocifore, 31 MJ 769 (ACMR 1990); United States v. Hutcherson, 29 CMR 770 (AFBR 1960); United States v. Hunt, 18 CMR 498 (AFBR 1954). Military affiliated law enforcement officials and commissioned, warrant, petty, and noncommissioned officers may lawfully apprehend any person subject to the Uniform Code of Military Justice. Article 7c, Uniform Code of Military Justice. Manual for Courts-Martial, Rules for Courts-Martial 302(b). A civil officer who has the authority to apprehend offenders under the laws of the United States or a state, territory, commonwealth, or the District of Columbia may lawfully apprehend a deserter from the armed forces. Article 8, Uniform Code of Military Justice. (In such cases, the military judge must conclude from the evidence that the reason for the apprehension was, inter alia, because the accused was suspected of desertion.) When there is an issue as to whether the person who either attempted to apprehend or apprehended the accused actually occupied a position that authorized him to apprehend the accused, the following instruction may be appropriate:

An accused may not be convicted of this offense unless the person who (attempted to apprehend) (apprehended) (him) (her) was authorized to apprehend the accused.

As a matter of law, a [military or military affiliated law enforcement official] [(commissioned) (warrant) (petty) (noncommissioned) officer] [police officer] [constable] [highway patrolman] [_____] was authorized to apprehend the accused at the time of the alleged offense.

However, you may find the accused guilty of this offense only if you are satisfied beyond a reasonable doubt that the person who(attempted to apprehend) (apprehended) the accused actually was a (military or military affiliated law enforcement official) ([commissioned] [warrant] [petty] [noncommissioned] officer) ([police officer] [constable] [highway patrolman] [_____]) at the time of the [attempted] apprehension.

NOTE 3: Escape from confinement and custody distinguished. Though escape from confinement and custody both include throwing off of lawful restraint, the offenses differ in how the restraint was imposed. See United States v. Felty, 12 MJ 438 (CMA 1982) (proper charge is escape from confinement when an accused escapes from a guard while outside the confinement facility for a magistrate hearing); United States v. Ellsey, 37 CMR 75 (CMA 1966) (an accused ordered into confinement, but who escapes before entering the confinement facility is guilty of escape from custody, not escape from confinement). However, the status of the prisoner at the time of the escape, rather than the actual physical restraints imposed, may be the more relevant factor. See United States v. McDaniel, 52 MJ 618 (ACCA 1999), pet. denied, 53 MJ 427 (CAAF 2000) (an escape by one lawfully ordered into confinement is an escape from confinement; the nature of the facility in which the prisoner is held is not material); but see United States v. Anderson, 36 MJ 963, 984, n. 33 (AFCMR 1993), aff'd, 39 MJ 431 (CMA 1994), cert. denied, 513 U.S. 819 (1994) (citing a requirement for both a status of confinement and a fact of physical restraint to prove escape from confinement).

NOTE 4: Other instructions. If element (4) is given, Instruction 5-11, Ignorance or Mistake of Fact or Law—General Discussion, may be appropriate.

3–19–5. ESCAPE FROM CONFINEMENT—PRETRIAL AND POST–TRIAL CONFINEMENT (ARTICLE 95)

a. MAXIMUM PUNISHMENT:

(1) Pretrial confinement: DD, TF, 1 year, E-1.

(2) Post-trial confinement: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), having been placed in (post-trial) confinement in (place of confinement), by a person authorized to order the accused into confinement did, (at/on board--location), on or about _____, escape from confinement.

c. ELEMENTS:

(1) That the accused was placed in confinement in (state the place of confinement) by (state the name and status of the person ordering the accused into confinement);

(2) That the accused knew of (his) (her) confinement;

(3) That (state the name and status of the person ordering the accused into confinement) was authorized to order the accused into confinement; (and)

(4) That (state the time and place alleged), the accused freed (himself) (herself) from the physical restraint of (his) (her) confinement before being released therefrom by proper authority; [and]

NOTE 1: Escape from post-trial confinement alleged. If escape from post-trial confinement is alleged, add the following element:

[(5)] That the confinement was the result of a court-martial conviction.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Confinement" is the physical restraint of a person within a confinement facility or under guard or escort after having been placed in a confinement facility. The status of confinement, once created, continues until the confined individual is released by proper authority. Any completed casting off of the physical restraint of the confinement facility

or guard before being set free by proper authority is escape from confinement. An escape is not complete until the prisoner has, at least momentarily, freed (himself) (herself) from the physical restraint of the confinement facility, guard, or escort (so if the prisoner's movement toward an escape is opposed, or if immediate pursuit follows before the escape is actually completed, there will be no escape until the opposition is overcome or the pursuit is shaken off.)

(An escape may be accomplished either with or without force or trickery and either with or without the consent of the prisoner's immediate custodian.)

NOTE 2: Detention cell and other locations as a confinement facility. If an issue is raised whether the accused has been delivered to a place that constitutes a confinement facility, the military judge may use the following instruction. In United States v. Jones, 36 MJ 1154 (ACMR 1993), a detention cell was considered to be a confinement facility.

You are advised that, as a matter of law, the (Fort Lewis Regional Correctional facility) (Cumberland County Jail) (Fort _____ Provost Marshal Detention Cell) (_____) is a confinement facility.

NOTE 3: The status of confinement and the fact of physical restraint. Although the status of confinement requires physical restraint, it is not necessary that the prisoner actually have physical restraints (in the form of irons or a guard) applied to him. In fact, the status of the prisoner at the time of the escape, rather than the actual physical restraints imposed, may be the more relevant factor. See United States v. McDaniel, 52 MJ 618 (ACCA 1999), pet. denied, 53 MJ 427 (CAAF 2000) (an escape by one lawfully ordered into confinement is an escape from confinement; the nature of the facility in which the prisoner is held is not material); but see United States v. Anderson, 36 MJ 963, 984, n. 33 (AFCMR 1993), aff'd, 39 MJ 431 (CMA 1994), cert. denied, 513 U.S. 819 (1994) (citing a requirement for both a status of confinement and a fact of physical restraint to prove escape from confinement) and United States v. Ellsey, 37 CMR 75 (CMA 1966) (an accused ordered into confinement, but who escapes before entering the confinement facility is guilty of escape from custody, not escape from confinement). However, a prisoner lawfully placed into confinement is still in a confinement status even if legitimately away from a confinement facility without irons or an escort or guard. See United States v. Felty, 12 MJ 438 (CMA 1982) (proper charge is escape from confinement when an accused escapes from a guard while outside the confinement facility for a magistrate's review) and United States v. Cornell, 19 MJ 735 (AFCMR 1984) (escape from confinement existed when accused left the base after authorized to leave confinement facility without guard to go to gymnasium) (See NOTEs 4 and 5).

NOTE 4: Moral suasion as confinement. Although physical restraint is required for confinement to exist, a confined prisoner who is allowed to go to a designated location, unescorted, remains confined by moral suasion or moral restraint which serves as a

substitute for the physical restraint. See United States v. Standifer, 35 MJ 615, 617 (AFCMR 1992) (prisoner's escort allowed accused to visit wife alone); cf. United States v. Maslanich, 13 MJ 611, 614 (AFCMR 1982), pet. denied, 14 MJ 236 (CMA 1982) (accused left defense counsel's office where guard had left him.) If an issue of moral suasion or restraint is raised by the evidence, the following instruction may be appropriate:

> A prisoner who has been placed into confinement and who is later allowed outside the confinement facility to perform details or visit other locations remains in confinement. This status of confinement continues even if the details were performed or the visit occurred without the supervision of a guard or escort. For example, confinement continues when the prisoner is placed into minimum custody or in a work release program, or is permitted to visit a specific place for a certain period of time, without the presence of a guard or escort. The moral restraint or moral suasion placed upon the prisoner is a substitute for the physical restraint necessary for the continuation of the prisoner's confinement.

NOTE 5: Escape from moral suasion. If there is an issue whether a prisoner has cast off his restraint when there was only a moral restraint or moral suasion, the following instruction may be helpful. See United States v. Standifer, 35 MJ 615, 617 (AFCMR 1992); cf. United States v. Anderson, 36 MJ 963, 984 (AFCMR 1993), aff'd, 39 MJ 431 (CMA 1994), cert. denied, 513 U.S. 819 (1994) (no casting off of restraint where escort left accused, unsupervised, off-post and the escort returned to post alone).

> A prisoner who is authorized by confinement officials to go to a certain location under escort, and who then persuades the escort to allow him to go to a different place, with or without the escort, has not escaped from confinement, so long as (he) (she) remains within the area permitted by the escort.

NOTE 6: Effectiveness of the guard's restraint. The status of confinement does not depend on whether the guard or escort is armed or has the actual ability to restrain the prisoner. See United States v. Jones, 36 MJ 1154 (ACMR 1993) (escape by pushing aside unarmed escort); United States v. Standifer, 35 MJ 615, 617 (AFCMR 1992). Likewise, an ineffective effort by the guard or escort to restrain the accused does not negate the existence of the physical restraint necessary to confinement. See United States v. Felty, 12 MJ 438 (CMA 1982) (escape where accused falsely told escort he had been released by magistrate and then slipped away); United States v. Maslanich, 13 MJ 611, 614 (AFCMR 1982), pet. denied, 14 MJ 236 (CMA 1982). If this issue is raised by the evidence, the following instruction may be helpful:

The status of confinement while under guard or escort does not depend on whether the guard or escort is armed or has the actual physical prowess to restrain the prisoner. Nor is it necessary that the prisoner be shackled. Once confinement is imposed and the accused knows of (his) (her) confinement, that status continues until it is lifted by an official with the authority to do so.

NOTE 7: Inception of post-trial confinement—accused not in pretrial confinement when sentence was adjudged. If there is an issue whether post-trial confinement has begun, and the accused was not in pretrial confinement when the sentence was adjudged, the following instruction may be appropriate. (See NOTE 10 regarding the distinction between escape from custody and from confinement):

As a general rule, post-trial confinement begins when the accused has been ordered into confinement pursuant to the sentence of a court-martial and the accused is delivered to a confinement facility.

NOTE 8: Inception of post-trial confinement—accused in pretrial confinement when sentence was adjudged. If there is an issue whether post-trial confinement has begun, and the accused was in pretrial confinement when the sentence was adjudged, the following instruction may be appropriate:

An individual in pretrial confinement at the time a sentence to confinement is adjudged remains in a confinement status. Upon adjournment of the court-martial and an order by competent authority, such as a commanding officer or the trial counsel, the status of pretrial confinement automatically becomes one of post-trial confinement.

NOTE 9: Mistake of fact as to status, release, or limits of confinement. If the evidence raises an issue of whether the accused knew he or she was confined, believed he or she had been released, or knew the limits of confinement, Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily appropriate. Instruction 5-11, Ignorance or Mistake of Fact or Law—General Discussion (Actual Knowledge), may be appropriate.

NOTE 10: Escape from confinement and custody distinguished. Though escape from confinement and custody both include throwing off of lawful restraint, the offenses differ in how the restraint was imposed. See United States v. Felty, 12 MJ 438 (CMA 1982); United States v. Ellsey, 37 CMR 75 (CMA 1966). However, the status of the prisoner at the time of the escape, rather than the actual physical restraints imposed, may be the more relevant factor. See United States v. McDaniel, 52 MJ 618 (ACCA 1999), pet. denied, 53 MJ 427 (CAAF 2000) (an escape by one lawfully ordered into confinement is an escape from confinement; the nature of the facility in which the prisoner is held is not material); but see United States v. Anderson, 36 MJ 963, 984, n. 33 (AFCMR 1993), aff'd, 39 MJ 431 (CMA 1994),

***cert. denied*, 513 U.S. 819 (1994) (citing a requirement for both a status of confinement and a fact of physical restraint to prove escape from confinement).**

NOTE 11: Escape from correctional custody and breaking restriction. These offenses are not listed in the MCM as lesser included offenses. See paragraphs 70 and 102, Part IV, MCM.

NOTE 12: Legality of the confinement. Ordinarily, the legality of confinement is a question of law to be decided by the military judge.

3–20–1. RELEASING PRISONER WITHOUT AUTHORITY (ARTICLE 96)

a. MAXIMUM PUNISHMENT: DD, TF, 2 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, without proper authority release _____, a prisoner committed to his/her charge.

c. ELEMENTS:

(1) That (state the name of the prisoner alleged to have been released) was a prisoner committed to the charge of the accused; and

(2) That (state the time and place alleged), the accused released the prisoner without proper authority.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Prisoner" refers to a person who is physically restrained because of confinement or custody. "Release" refers to an unauthorized removal of restraint by the custodian, rather than by the prisoner, under circumstances which demonstrate to the prisoner that (he) (she) is no longer in legal (confinement) (custody).

3–20–2. SUFFERING A PRISONER TO ESCAPE THROUGH NEGLECT (ARTICLE 96)

a. MAXIMUM PUNISHMENT: BCD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, through neglect, suffer _____, a prisoner committed to his/her charge to escape.

c. ELEMENTS:

(1) That (state the name of the prisoner alleged to have escaped) was a prisoner committed to the charge of the accused;

(2) That (state the time and place alleged), (state the name of the prisoner alleged) escaped;

(3) That the accused did not take such care to prevent the escape as a reasonably prudent person, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances; and

(4) That the escape was the proximate result of the accused's neglect.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Prisoner" refers to a person who is physically restrained because of confinement or custody. A prisoner has escaped only after the prisoner has overcome the opposition that restrained (him) (her) and shaken off any immediate pursuit.

"Proximate result" means a direct result of the accused's neglect, and not the result of an unforeseeable cause not involving the accused.

NOTE: Other definitions. For the definition of "custody," see Instruction 3-19-3; for the definition of "confinement," see Instruction 3-19-4.

3–20–3. SUFFERING A PRISONER TO ESCAPE THROUGH DESIGN (ARTICLE 96)

a. MAXIMUM PUNISHMENT: DD, TF, 2 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, through design, suffer _____, a prisoner committed to his/her charge, to escape.

c. ELEMENTS:

(1) That (state the name of the prisoner alleged to have escaped) was a prisoner committed to the charge of the accused;

(2) That the design of the accused was to suffer the escape of (state the name of the prisoner alleged); and

(3) That (state the time and place alleged), (state the name of the prisoner alleged) escaped as a result of the carrying out of the design of the accused.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Prisoner" refers to a person who is physically restrained because of confinement or custody. A prisoner has escaped only after the prisoner has overcome the opposition that restrained him/her and shaken off any immediate pursuit.

"Suffer" means to allow or permit. An escape is suffered by design when it was planned or intended by the one who permitted it.

NOTE 1: Other definitions. For the definition of "custody," see Instruction 3-19-3; for the definition of "confinement," see Instruction 3-19-4.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–21–1. UNLAWFUL DETENTION (ARTICLE 97)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, unlawfully (apprehend _____) (place _____ in arrest) (confine _____ in _____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (apprehended) (arrested) (confined) (state the name of the person allegedly detained); (and)

(2) That the accused unlawfully exercised (his) (her) authority to do so; [and]

NOTE 1: Belief in lawfulness of confinement in issue. Element (3) must be given if there is any evidence from which it may justifiably be inferred that the accused may have had a reasonable belief that the restraint was lawful. See also Instruction 5-11, Ignorance or Mistake of Fact or Law—General Discussion, for additional instructions which may be appropriate when such issue arises.

[(3)] That the accused had no reasonable belief that the (apprehension) (arrest) (confinement) was lawful.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Apprehension" means to take a person into custody; that is, to place a restraint on a person's freedom of movement.) ("Arrest" is the moral restraint imposed upon a person by oral or written orders, directing that person to remain within certain specified limits.) ("Confinement" is the physical restraint of a person within a confinement facility or under guard.) There does not have to be actual force exercised in imposing the (apprehension) (arrest) (confinement), but there must be restraint of another's freedom of movement. The offense can only be committed by a person who is duly authorized to (apprehend) (arrest) (confine) but exercises the authority unlawfully.

NOTE 2: Lawfulness of apprehension in issue. When it is clear as a matter of law that the lawfulness of the alleged apprehension, arrest, or confinement may be resolved as an interlocutory question, the military judge should do so and advise the members

accordingly. However, if there is a factual dispute as to the lawfulness of the alleged detention, that dispute must be resolved by the members in connection with their determination of guilt or innocence.

3–22–1. UNNECESSARY DELAY IN DISPOSING OF CASE (ARTICLE 98)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), being charged with the duty of (investigating) (taking immediate steps to determine the proper disposition of) charges preferred against _____, a person accused of an offense under the Uniform Code of Military Justice) (_____), was, (at/on board—location), on or about _____, responsible for unnecessary delay in (investigating said charges) (determining the proper disposition of said charges) (_____), in that he/she (did _____) (failed to _____) (_____).

c. ELEMENTS:

(1) That the accused was charged with the duty of (state the duty alleged) in connection with the disposition of the case of (state the name of the person alleged), a person accused under the Uniform Code of Military Justice;

(2) That the accused knew that (he) (she) was charged with this duty;

(3) That (state the time and place alleged), delay occurred in the disposition of the case;

(4) That the accused was responsible for the delay; and

(5) That, under the circumstances, the delay was unnecessary and unreasonable.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–22–2. FAILING TO ENFORCE OR COMPLY WITH CODE (ARTICLE 98)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, and E-1.

b. MODEL SPECIFICATION:

In that _____, (personal jurisdiction data), being charged with the duty of _____ did, (at/on board—location), on or about _____, knowingly and intentionally fail to (enforce) (comply with) Article _____, Uniform Code of Military Justice, in that (he/she) _____.

c. ELEMENTS:

(1) That, at (state the time and place alleged), the accused failed to (enforce) (comply with) Article (___) of the Uniform Code of Military Justice regulating a proceeding (before) (during) (after) trial of an accused by (state the manner alleged);

(2) That the accused had the duty of (enforcing) (complying with) that provision of the Code;

(3) That the accused knew that (he) (she) was charged with this duty; and

(4) That the accused's failure to (enforce) (comply with) that provision was intentional.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Intentionally" as used in this specification means that the act was done on purpose, and not merely through carelessness, by accident, or under good faith error of law.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge and Intent), is ordinarily applicable.

3–23–1. MISBEHAVIOR BEFORE THE ENEMY, RUNNING AWAY (ARTICLE 99)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____, (personal jurisdiction data) did, (at/on board—location), on or about _____, (before) (in the presence of) the enemy, run away (from his/her company) (and hide) (_____), (and did not return until after the engagement had been concluded) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was (before) (in the presence of) the enemy;

(2) That the accused misbehaved by running away (and _____); and

(3) That the accused intended to avoid actual or impending combat with the enemy by running away.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Running away" means an unauthorized departure by the accused from (his) (her) (place of duty) (_____). "Running away" does not necessarily mean that the accused actually ran from the enemy or that the accused's departure was motivated by fear or cowardice. The departure by the accused, however, must have been with the intent to avoid actual or impending combat, and must have taken place (before) (in the presence of) the enemy.

"(Before) (In the presence of) the enemy" refers to the tactical relationship with the enemy rather than distance. A unit is considered "(before) (in the presence of) the enemy" if it is actually engaged with the enemy in a tactical operation or an engagement with the enemy is imminent. To determine whether or not the accused was "(before) (in the presence of) the enemy," you should consider all the circumstances, including the duty assignment of the accused, the mission of the accused's organization, and the tactical relationship of the accused and (his) (her) organization with the enemy.

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–23–2. MISBEHAVIOR BEFORE THE ENEMY—ABANDONMENT, SURRENDER, OR DELIVERING UP OF COMMAND (ARTICLE 99)

NOTE: Applicability of offense limited to commanders. This specification concerns primarily commanders chargeable with responsibility for defending a command, unit, place, ship, or military property. Abandonment by a subordinate would ordinarily be chargeable as running away.

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, (before) (in the presence of) the enemy, shamefully (abandon) (surrender) (deliver up) _____, which it was his/her duty to defend.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was charged by (orders (specify the orders)) (or) (circumstances (specify the circumstances)) with the duty to defend (a) certain (command) (unit) (place) (ship) (military property), namely, (state what was to be defended);

(2) That, without justification, the accused shamefully (abandoned) (surrendered) (delivered up) that (command) (unit) (place) (ship) (military property); and

(3) That this act occurred while the accused was (before) (in the presence of) the enemy.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The behavior of the accused was "shameful" if the (command) (unit) (place) (ship) (military property) was (abandoned) (surrendered) (delivered up) except as a result of the utmost necessity or unless directed to do so by competent authority. "Deliver up" means surrender or abandon. Surrender or abandonment, without absolute necessity, is shameful. "Abandon" means to completely separate oneself from all further responsibility to defend that (command) (unit) (place) (ship) (military property). (Stated differently, "abandon" means (relinquishing

control) (giving up) (yielding) (leaving) because of threatened dangers or encroachments.)

"(Before) (In the presence of) the enemy" refers to the tactical relationship with the enemy rather than distance. A unit is considered "(before) (in the presence of) the enemy" if it is actually engaged with the enemy in a tactical operation or an engagement with the enemy is imminent. To determine whether or not the accused was "(before) (in the presence of) the enemy," you should consider all the circumstances, including the duty assignment of the accused, the mission of the accused's organization, and the tactical relationship of the accused and (his) (her) organization with the enemy.

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing), (such as rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

3–23–3. MISBEHAVIOR BEFORE THE ENEMY—ENDANGERING SAFETY OF COMMAND (ARTICLE 99)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, (before) (in the presence of) the enemy, endanger the safety of _____, which it was his/her duty to defend, by (disobeying an order from _____ to engage the enemy) (neglecting his/her duty as a sentinel by engaging in a card game while on his post) (intentional misconduct in that he/she became drunk and fired flares, thus revealing the location of his/her unit) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), it was the duty of the accused to defend (a) certain (command) (unit) (place) (ship) (military property), namely, (state what was to be defended);

(2) That the accused did (state the act or failure to act alleged);

(3) That such (act) (failure to act) amounted to (negligence) (disobedience) (intentional misconduct);

(4) That thereby the accused endangered the safety of the (command) (unit) (place) (ship) (military property); and

(5) That this (act) (failure to act) occurred while the accused was (before) (in the presence of) the enemy.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Negligence" is the absence of due care. It is an act or failure to act by a person under a duty to use due care which demonstrates a lack of care for the (safety of others) (_____) which a reasonably careful person would have used under the same or similar circumstances.) ("Intentional misconduct" implies a wrongful intention and not mere negligence.)

"(Before) (In the presence of) the enemy" refers to the tactical relationship with the enemy rather than distance. A unit is considered "(before) (in the presence of) the enemy" if it is actually engaged with the

enemy in a tactical operation or an engagement with the enemy is imminent. To determine whether or not the accused was "(before) (in the presence of) the enemy," you should consider all the circumstances, including the duty assignment of the accused, the mission of the accused's organization, and the tactical relationship of the accused and (his) (her) organization with the enemy.

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), may be applicable.

3–23–4. MISBEHAVIOR BEFORE THE ENEMY—CASTING AWAY ARMS OR AMMUNITION (ARTICLE 99)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, (before) (in the presence of) the enemy, cast away his/her (rifle) (ammunition) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was (before) (in the presence of) the enemy; and

(2) That, at the time specified, the accused cast away (his) (her) (rifle) (ammunition) (_____).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Cast away" means to intentionally dispose of, throw away, discard, or abandon, without proper authority or justification.

"(Before) (In the presence of) the enemy" refers to the tactical relationship with the enemy rather than distance. A unit is considered "(before) (in the presence of) the enemy" if it is actually engaged with the enemy in a tactical operation or an engagement with the enemy is imminent. To determine whether or not the accused was "(before) (in the presence of) the enemy" you should consider all the circumstances, including the duty assignment of the accused, the mission of his organization, and the tactical relationship of the accused and (his) (her) organization with the enemy.

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

3–23–5. MISBEHAVIOR BEFORE THE ENEMY—COWARDLY CONDUCT (ARTICLE 99)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) (at/on board—location), on or about _____, (before) (in the presence of) the enemy, was guilty of cowardly conduct as a result of fear, in that _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused did (state the alleged act of cowardice);

(2) That the accused's conduct was cowardly;

(3) That this conduct occurred while the accused was (before) (in the presence of) the enemy; and

(4) That this conduct was the result of fear.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Conduct is "cowardly" only if it amounts to misbehavior which was motivated by fear. A mere display of apprehension is not sufficient. "Cowardly conduct" is the refusal or abandonment of a performance of duty (before) (in the presence of) the enemy as a result of fear.

"(Before) (In the presence of) the enemy" refers to the tactical relationship with the enemy rather than distance. A unit is considered "(before) (in the presence of) the enemy" if it is actually engaged with the enemy in a tactical operation or an engagement with the enemy is imminent. To determine whether or not the accused was "(before) (in the presence of) the enemy," you should consider all circumstances, including the duty assignment of the accused, the mission of his organization and the tactical relationship of the accused and (his) (her) organization with the enemy.

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such

as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

3–23–6. MISBEHAVIOR BEFORE THE ENEMY—QUITTING PLACE OF DUTY TO PLUNDER OR PILLAGE (ARTICLE 99)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, (before) (in the presence of) the enemy, quit his/her place of duty for the purpose of (plundering) (pillaging) (plundering and pillaging).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was (before) (in the presence of) the enemy;

(2) That, at the time specified, the accused quit (his) (her) place of duty; and

(3) That the accused's intention in so quitting was to (plunder) (pillage) (plunder and pillage) public or private property unlawfully.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Plunder" and "pillage" mean to unlawfully seize or appropriate public or private property by force or violence. The word "quit" means that the accused went from or remained absent from (his) (her) place of duty without proper authority. "Place of duty" includes any place of duty whether permanent or temporary, fixed or mobile. Proof that plunder or pillage actually occurred or was committed by the accused is not required.

"(Before) (In the presence of) the enemy" refers to the tactical relationship with the enemy rather than distance. A unit is considered "(before) (in the presence of) the enemy" if it is actually engaged with the enemy in a tactical operation or an engagement with the enemy is imminent. To determine whether or not the accused was "(before) (in the presence of) the enemy," you should consider all the circumstances, including the duty assignment of the accused, the mission of (his) (her) organization, and the tactical relationship of the accused and his

organization with the enemy. The term “enemy” includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). (“Enemy” is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–23–7. MISBEHAVIOR BEFORE THE ENEMY—CAUSING FALSE ALARM (ARTICLE 99)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, (before) (in the presence of) the enemy, cause a false alarm in (Fort _____) (the said ship) (the camp) (_____) by [needlessly and without authority (causing the call to arms to be sounded) (sounding the general alarm) (_____)].

c. ELEMENTS:

(1) That (state the time and place alleged), an alarm was caused in a certain (command) (unit) (place) under control of the armed forces of the United States, namely, (state the organization or place alleged);

(2) That the accused caused the alarm by (state the manner alleged);

(3) That the alarm was caused without any reasonable or sufficient justification or excuse; and

(4) That this act occurred while the accused was (before) (in the presence of) the enemy.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Alarm" means any excitement, commotion, or apprehension of danger. An "alarm" can be caused by (the spreading of any false or disturbing rumor or report) (the false sounding or giving of any alarm signal established for an alert or notification of approaching danger) (or) (a wrongful and intentional act which falsely creates the wrong impression about the (condition) (movements) (operations) of the enemy or friendly forces).

"(Before) (In the presence of) the enemy" refers to the tactical relationship with the enemy rather than distance. A unit is considered "(before) (in the presence of) the enemy" if it is actually engaged with the enemy in a tactical operation or an engagement with the enemy is imminent. To determine whether or not the accused was "(before) (in the

presence of) the enemy," you should consider all the circumstances, including the duty assignment of the accused, the mission of the accused's organization, and the tactical relationship of the accused and (his) (her) organization with the enemy.

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

3–23–8. MISBEHAVIOR BEFORE THE ENEMY—FAILURE TO DO UTMOST (ARTICLE 99)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) being (before) (in the presence of) the enemy, did, (at/on board—location), on or about _____, by (ordering his/her own troops to halt their advance) (_____), willfully fail to do (his) (her) utmost to (encounter) (engage) (capture) (destroy), as it was his/her duty to do, (certain enemy troops which were in retreat) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was serving (before) (in the presence of) the enemy;

(2) That the accused had a duty to (encounter) (engage) (capture) (destroy) certain enemy (troops) (combatants) (vessels) (aircraft) (_____); and

(3) That the accused willfully failed to do (his) (her) utmost to perform this duty by (state the manner in which (he) (she) failed to perform).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Willfully failed" means intentionally failed. "Utmost" means taking every reasonable measure called for by the circumstances, keeping in mind such factors as the accused's rank or grade, responsibilities, age, intelligence, training, (and) physical condition (and _____).

"(Before) (In the presence of) the enemy" refers to the tactical relationship with the enemy rather than distance. A unit is considered "(before) (in the presence of) the enemy" if it is actually engaged with the enemy in a tactical operation or an engagement with the enemy is imminent. To determine whether or not the accused was "(before) (in the presence of) the enemy," you should consider all the circumstances, including the duty assignment of the accused, the mission of the accused's organization, and the tactical relationship of the accused and (his) (her) organization with the enemy.

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–23–9. MISBEHAVIOR BEFORE THE ENEMY—FAILURE TO AFFORD RELIEF (ARTICLE 99)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, (before) (in the presence of) the enemy, fail to afford all practicable relief and assistance to (the U.S.S. _____, which was engaged in battle and had run aground, in that he/she failed to take her in tow) (certain troops of the ground forces of _____, which were engaged in battle and were pinned down by enemy fire, in that he/she failed to furnish air cover) (_____) as he/she properly should have done.

c. ELEMENTS:

(1) That certain (state the troops, combatants, vessels, or aircraft of the armed forces alleged) belonging to (the United States) (an ally of the United States) were engaged in battle and required relief and assistance;

(2) That the accused was in a position and able, without jeopardy to (his) (her) mission, to render assistance to these (troops) (combatants) (vessels) (aircraft);

(3) That (state the time and place alleged), the accused failed to afford all practicable relief and assistance as (he) (she) properly should have done in that (state what the accused is alleged to have failed to do); and

(4) That, at the time specified, the accused was (before) (in the presence of) the enemy.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"All practicable relief and assistance" means all relief and assistance reasonably required which could be provided within the limitations imposed upon the accused by reason of (his) (her) own specific task or mission.

"(Before) (In the presence of) the enemy" refers to the tactical relationship with the enemy rather than distance. A unit is considered "(before) (in the presence of) the enemy" if it is actually engaged with the enemy in a tactical operation or an engagement with the enemy is

imminent. To determine whether or not the accused was "(before) (in the presence of) the enemy," you should consider all the circumstances, including the duty assignment of the accused, the mission of the accused's organization, and the tactical relationship of the accused and (his) (her) organization with the enemy.

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as wells members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

NOTE: Defense. If the task or mission of the accused was so important that it could not be delayed or deviated from, no offense is committed by failing to afford such relief or assistance.

3–24–1. COMPELLING SURRENDER (ARTICLE 100)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, compel _____, the commander of _____, (to give up to the enemy) (to abandon) said _____, by _____.

c. ELEMENTS:

(1) That (state the name and rank of the person alleged) was the commander of (state the name of the place, vessel, aircraft, military property, or body of members of the armed forces, as alleged);

(2) That (state the name and place alleged), the accused, by (state the act alleged), did an act which was intended to and did compel that commander to (give up to the enemy) (abandon) the (state the name of the place, vessel, aircraft, military property, body of members of the armed forces, as alleged); and

(3) That (state the name of the place, vessel, aircraft, military property, or body of members of the armed forces, as alleged) was actually (given up to the enemy) (abandoned).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Abandon" means to completely separate oneself from all further responsibility to defend that (place) (vessel) (aircraft) (military property) (body of members of the armed forces). (Stated differently, "abandon" means (relinquishing control) (giving up) (yielding) (leaving) because of threatened dangers or encroachments.))

("Give up to the enemy" means to surrender.)

("Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to

the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–24–2. COMPELLING SURRENDER—ATTEMPTS (ARTICLE 100)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, attempt to compel _____, the commander of _____, (to give up to the enemy) (to abandon) said _____, by _____.

c. ELEMENTS:

(1) That (state the name and rank of the person alleged) was the commander of (state the name of the place, vessel, aircraft, military property, or body of members of the armed forces, as alleged);

(2) That (state the time and place alleged), the accused did a certain act that is, (state the act(s) alleged or raised by the evidence);

(3) That the act was done with the specific intent to compel (state the name and rank of the commander alleged) to (give up to the enemy) (abandon) the (state the name of the place, vessel, aircraft, military property, or body of members of the armed forces, as alleged);

(4) That the act amounted to more than mere preparation; that is, it was a direct movement toward the commission of the offense of compelling surrender; and

(5) That the act apparently tended to bring about the offense of compelling (surrender) (abandonment), (that is, the act apparently would have resulted in the actual commission of the offense of compelling (surrender) (abandonment) except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (_____) which prevented the completion of that offense).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

While actual abandonment or surrender is not required, there must be some act done with this purpose in mind, even if it falls short of actual accomplishment.

("Abandon" means to completely separate oneself from all further responsibility to defend that (place) (vessel) (aircraft) (military property) (body of members of the armed forces). (Stated differently, "abandon" means (relinquishing control) (giving up) (yielding) (leaving) because of threatened dangers or encroachments.)) ("Give up to the enemy" means surrender.)

("Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.))

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. See Instruction 3-4-1, Attempts, for the standard instruction on this subject.

3–24–3. STRIKING THE COLORS OR FLAG (ARTICLE 100)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, without proper authority, offer to surrender to the enemy by (striking the (colors) (flag)) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), there was an offer to surrender to an enemy;

(2) That this offer was made by (striking the (colors) (flag) to the enemy) (_____);

(3) That the accused (made) (was responsible for) the offer; and

(4) That the accused did so without proper authority.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

To “strike the colors or flag” means to haul down the colors or flag in the face of the enemy or to make any other offer of surrender. The offense is committed when a person takes upon (himself) (herself) the authority to surrender a military force or position (except as a result of the utmost necessity or extremity) (unless authorized to do so by competent authority). (An engagement with the enemy does not have to be in progress when the offer to surrender is made, but it is essential that there is sufficient contact with the enemy to give the opportunity for making the offer.) (It is not essential that the enemy receive, accept, or reject the offer. However, the offer must be transmitted in some manner designed to result in receipt by the enemy.)

“Enemy” includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). (“Enemy” is not restricted to

the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

3–25–1. IMPROPER USE OF COUNTERSIGN—DISCLOSING PAROLE OR COUNTERSIGN (ARTICLE 101)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, a time of war, disclose the (parole) (countersign), to wit: _____, to _____, a person who was not entitled to receive it.

c. ELEMENTS:

(1) That, in time of war, (state the time and place alleged), the accused disclosed the (parole) (countersign), namely (state the parole or countersign allegedly disclosed) to (state the name or describe the recipient alleged); and

(2) That (state the name or description of the recipient alleged) was not entitled to receive this (parole) (countersign).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

(A "countersign" is a word, signal, or procedure given from the headquarters of a command to aid guards and sentinels in their scrutiny of persons who seek to pass the lines. It consists of a secret challenge and a password, signal, or procedure.)

(A "parole" is a word used as a check on the countersign; it is made known only to those who are entitled to inspect guards and to commanders of guards.)

NOTE: Time of war in issue. When it is clear as a matter of law that the offense was committed "in time of war," this should be resolved as an interlocutory question, and the members should be so advised. However, if there is a factual dispute involved, it should be resolved by the members in connection with their determination of guilt or innocence. See RCM 103(19).

3–25–2. GIVING DIFFERENT PAROLE OR COUNTERSIGN (ARTICLE 101)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, a time of war, give to _____, a person entitled to receive and use the (parole) (countersign), a (parole) (countersign), namely: _____ which was different from that which, to his/her knowledge, he/she, as authorized and required to give, to wit: _____.

c. ELEMENTS:

(1) That, in time of war, the accused knew that (he) (she) was authorized and required to disclose a certain (parole) (countersign), namely: (state the parole or countersign allegedly authorized and required);

(2) That (state the name of the recipient alleged) was a person entitled to receive and use this (parole) (countersign); and

(3) That (state the time and place alleged), the accused disclosed to (state the name of the recipient alleged) a (parole) (countersign) namely, (state the parole or countersign actually given), which was different from the (parole) (countersign) which (he) (she) was authorized and required to give.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

(A "countersign" is a word, signal, or procedure given from the headquarters of a command to aid guards and sentinels in their scrutiny of persons who seek to pass the lines. It consists of a secret challenge and a password, signal, or procedure.)

(A "parole" is a word used as a check on the countersign; it is made known only to those who are entitled to inspect guards and to commanders of guards.)

NOTE 1: Time of war in issue. When it is clear as a matter of law that the offense was committed "in time of war," this should be resolved as an interlocutory question, and the members should be so advised. However, if there is a factual dispute involved, it should be resolved by the members in connection with their determination of guilt or innocence. See RCM 103(19).

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–26–1. FORCING A SAFEGUARD (ARTICLE 102)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, force a safeguard [known by him/her to have been placed over the premises occupied by _____ at _____ by (overwhelming the guard posted for the protection of the same) (_____)] [_____].

c. ELEMENTS:

(1) That a safeguard had been (issued) (posted) for the protection of (state the persons, place, or property allegedly protected);

(2) That the accused (knew) (should have known) of the safeguard; and

(3) That (state the time and place alleged), the accused forced the safeguard by (state the manner alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"A safeguard" is a (detachment, guard, or detail posted by a commander) (written order left by a commander with an enemy subject or posted upon enemy property) for the protection of persons, places, or property of an enemy or neutral.

"Force the safeguard" means to perform (an) act(s) which violate(s) the protection of the safeguard. Any trespass on the protection of the safeguard will constitute an offense under this article, whether the offense was imposed in time of war or in circumstances amounting to a state of belligerency short of a formal state of war.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), may be applicable. However, proof of actual knowledge is not required; it is sufficient if the accused should have known of the existence of the safeguard.

3–27–1. FAILING TO SECURE PUBLIC PROPERTY TAKEN FROM THE ENEMY (ARTICLE 103)

a. MAXIMUM PUNISHMENT:

(1) $500 or less: BCD, TF, 6 months, E-1.

(2) Over $500 or any firearm or explosive: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, fail to secure for the service of the United States certain public property taken from the enemy, to wit: _____, (a firearm) (an explosive), of a value of (about) $_____.

c. ELEMENTS:

(1) That certain public property, namely, (describe the property allegedly taken), was taken from the enemy;

(2) That this property was of the value of (state the value alleged) (or of some lesser value, in which case the finding should be in the lesser amount); and

(3) That (state the time and place alleged), the accused failed to do what was reasonable under the circumstances to secure this property for the service of the United States.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"What was reasonable under the circumstances" means the performance of those responsibilities which a reasonably careful person would have performed to secure the property under the same or similar circumstances.

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and all the citizens of the other.)

NOTE: Other instructions. Instruction 7-1 6, Variance - Value, Damage, or Amount, is ordinarily applicable.

3–27–2. CAPTURED OR ABANDONED PROPERTY—FAILURE TO REPORT AND TURN OVER (ARTICLE 103)

a. MAXIMUM PUNISHMENT:

(1) $500 or less: BCD, TF, 6 months, E-1.

(2) Over $500 or any firearm or explosive: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, fail to give notice and turn over to proper authority without delay certain (captured) (abandoned) property which had come into his/her (possession) (custody) (control), to wit: _____, (a firearm) (an explosive), of a value of (about) $_____.

c. ELEMENTS:

(1) That certain (captured) (abandoned) (public) (private) property came into the (possession) (custody) (control) of the accused, namely, (describe the property alleged);

(2) That this property was of the value of (state the value alleged) (or of some lesser value, in which case the finding should be in the lesser amount); and

(3) That (state the time and place alleged), the accused failed to give notice of its receipt and failed to turn over to proper authority, without delay, the (captured) (abandoned) (public) (private) property.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Abandoned" refers to property which the enemy has relinquished, given up, discarded, or left behind. "Enemy" includes (not only) organized opposing forces in time of war, (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations.) ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and all the citizens of the other.))

"Proper authority" means any authority competent to order the disposition of the (captured) (abandoned) property.

NOTE: Other instructions. Instruction 7-16, Variance - Value, Damage, or Amount, is ordinarily applicable.

3–27–3. CAPTURED OR ABANDONED PROPERTY—DEALING IN (ARTICLE 103)

a. MAXIMUM PUNISHMENT:

(1) $500 or less: BCD, TF, 6 months, E-1.

(2) Over $500 or any firearm or explosive: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (buy) (sell) (trade) (deal in) (dispose of) (_____) certain (captured) (abandoned) property, to wit: _____, (a firearm) (an explosive), of a value of (about) $_____, thereby (receiving) (expecting) a (profit) (benefit) (advantage) to (himself/herself) (_____, his/her accomplice) (_____, his/her brother) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (bought) (sold) (traded) (dealt in) (disposed of) certain (public) (private) (captured) (abandoned) property, namely, (describe the property alleged);

(2) That this property was of the value of (state the value alleged) (or of some lesser value, in which case the finding should be in the lesser amount); and

(3) That, by so doing, the accused (received) (expected) some (profit) (benefit) (advantage) to ((himself) (herself)) ((a) certain person(s) connected either directly or indirectly in a certain manner with (himself) (herself)), namely, (state the manner alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Abandoned" refers to property which the enemy has relinquished, given up, discarded, or left behind. "Enemy" includes (not only) organized opposing forces in time of war, (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations.) ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and all the citizens of the other.))

NOTE: Other instructions. Instruction 7-16, Variance - Value, Damage, or Amount, is ordinarily applicable.

3–27–4. LOOTING OR PILLAGING (ARTICLE 103)

a. MAXIMUM PUNISHMENT: DD, TF, life without eligibility for parole, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, engage in (looting) (pillaging) (looting and pillaging) by unlawfully (seizing) (appropriating) _____, [property which had been left behind] [the property of _____, (an inhabitant of _____) (_____)].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused engaged in (looting) (and) (pillaging) by unlawfully (seizing) (appropriating) certain property, namely, (describe the property seized or appropriated);

(2) That this property was:

(a) located in (enemy) (occupied) territory; or

(b) on board a (seized) (captured) vessel; and

(3) That this property was:

(a) ((left behind by) (owned by) (in the custody of)) ((the enemy) (an occupied state) (an inhabitant of an occupied state) (a person under the protection of the (enemy) (occupied state)) (or) (a person who, immediately prior to the occupation of the place where the act occurred, was under the protection of the (enemy) (occupied state)); or

(b) part of the equipment of a (seized) (captured) vessel; or

(c) (owned by) (in the custody of) the (officers) (crew) (passengers) on board a (seized) (captured) vessel.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Looting") (and) ("pillaging") mean(s) unlawfully seizing or appropriating property which is located in enemy or occupied territory (or on board a seized or captured vessel).

"Unlawfully (seized) (appropriated)" means to take possession of property in an unauthorized manner or to exercise control over property without proper authorization or justification.

"Property" includes public or private property.

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and all the citizens of the other.)

NOTE: Definition of vessel. Should there be an issue whether the seizure or appropriation occurred on a "vessel," see RCM 103(20) and 1 USC section 3.

e. REFERENCES: United States v. Mello, 36 MJ 1067 (ACMR 1993); United States v. Manginell, 32 MJ 891 (AFCMR 1991).

3–28–1. AIDING THE ENEMY—FURNISHING ARMS OR AMMUNITION (ARTICLE 104)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, aid the enemy with (arms) (ammunition) (supplies) (money) (_____), by (furnishing and delivering to _____, members of the enemy's armed forces _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused aided (a) certain person(s), namely: (state the name or description of the enemy who purportedly received the aid);

(2) That the (state the name or description of the enemy who purportedly received the aid) was an enemy; and

(3) That the accused did so with certain (arms) (ammunition) (supplies) (money) (_____) by (state the manner in which the aid was allegedly supplied).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

To "aid the enemy" means to furnish the enemy with (arms) (ammunition) (supplies) (money) (_____), (whether or not the articles furnished were needed by the enemy) (and) (whether or not the transaction was a sale or a donation).

"Enemy" includes (not only) organized opposing forces in time of war, (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and all the citizens of the other.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–28–2. AIDING THE ENEMY—ATTEMPTING TO FURNISH ARMS OR AMMUNITION (ARTICLE 104)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, attempt to aid the enemy with (arms) (ammunition) (supplies) (money) (_____), by (furnishing and delivering to _____, members of the enemy's armed forces _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused did a certain act, namely: (state the manner in which the giving of aid was allegedly attempted);

(2) That the act was done with reference to certain (arms) (ammunition) (supplies) (money) (_____) which the accused intended to (furnish and deliver) (cause to be furnished and delivered) to (state the name or description of the enemy who purportedly was to receive the aid);

(3) That the act was done with the specific intent to aid an enemy;

(4) That the (state the name or description of the enemy who purportedly was to receive the aid) was an enemy;

(5) That the act amounted to more than mere preparation; that is, it was a direct movement toward the offense of aiding the enemy; and

(6) That the act apparently tended to bring about the offense of aiding the enemy; that is, the act apparently would have resulted in the actual commission of the offense of aiding the enemy except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (_____) which prevented the completion of the offense).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Proof that the offense of aiding the enemy actually occurred or was completed is not required.

To “aid the enemy” means to furnish it with (arms) (ammunition) (supplies) (money) (_____), (whether or not the articles furnished were needed by the enemy) (and) (whether or not the transaction was a sale or a donation).

“Enemy” includes (not only) organized opposing forces in time of war, (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). (“Enemy” is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. See Instruction 3-4-1, Attempts, for the standard instruction on the subject.

3–28–3. AIDING THE ENEMY—HARBORING OR PROTECTING (ARTICLE 104)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, without proper authority, knowingly (harbor) (protect) _____, an enemy, by (concealing the said _____, in his/her house) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused, without proper authority, (harbored) (protected) (a) certain person(s), namely: (state the name or description of the enemy alleged to have been harbored or protected);

(2) That the accused did so by (state the manner alleged);

(3) That (state the name or description of the enemy alleged to have been harbored or protected) was an enemy; and

(4) That the accused knew that (he) (she) was (harboring) (protecting) an enemy.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An enemy is "harbored" or "protected" when, without proper authority, that enemy is shielded, either physically or by the use of any trick, aid, or representation, from an injury or mishap which, in the chance of war, may occur.

"Enemy" includes (not only) organized opposing forces in time of war, (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–28–4. AIDING THE ENEMY—GIVING INTELLIGENCE TO THE ENEMY (ARTICLE 104)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, without proper authority, knowingly give intelligence to the enemy (by informing a patrol of the enemy's forces of the whereabouts of a military patrol of the United States forces) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused, without proper authority, knowingly gave intelligence information to (a) certain person(s), namely: (state the name or description of the enemy alleged to have received the intelligence information);

(2) That the accused did so by (state the manner alleged);

(3) That (state the name or description of the enemy alleged to have received the intelligence information) was an enemy; and

(4) That this intelligence information was true, at least in part.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Intelligence" means any helpful information, given to and received by the enemy, which is true, at least in part.

"Enemy" includes (not only) organized opposing forces in time of war, (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–28–5. AIDING THE ENEMY—COMMUNICATING WITH THE ENEMY (ARTICLE 104)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, without proper authority, knowingly (communicate with) (correspond with) (hold intercourse with) the enemy (by writing and transmitting secretly through lines to one_____ whom he/she, the accused, knew to be (an officer of the enemy's armed forces) (_____) a communication in words and figures substantially as follows, to wit: (_____) (indirectly by publishing in _____, a newspaper published at _____, a communication in words and figures as follows, to wit: _____, which communication was intended to reach the enemy) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused without proper authority, (communicated) (corresponded) (held intercourse) with (a) certain person(s), namely: (state the name or description of the enemy alleged to have received the communication, correspondence, etc.);

(2) That the accused did so by (state the manner alleged);

(3) That (state the name or description of the enemy alleged to have received the communication, correspondence, etc.) was an enemy; and

(4) That the accused knew (he) (she) was (communicating) (corresponding) (holding intercourse) with an enemy.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

(Communication) (Correspondence) (Holding intercourse) with the enemy does not necessarily mean a mutual exchange of communication. The law requires absolute non-intercourse, and any unauthorized communication, no matter what its meaning or intent, is prohibited. This prohibition applies to any method of intercourse or communication. The offense is complete the moment the communication leaves the accused, whether or not it reaches its destination.

"Enemy" includes (not only) organized opposing forces in time of war, (but also any other hostile body that our forces may be opposing) (such

as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–29–1. MISCONDUCT AS A PRISONER (ARTICLE 105)

a. MAXIMUM PUNISHMENT: DD, TF, life without eligibility for parole, E-1.

b. MODEL SPECIFICATION:
In that _____, (personal jurisdiction data) while in the hands of the enemy, did, (at/on board—location), on or about _____, a time of war, without proper authority and for the purpose of securing favorable treatment by his/her captors, (report to the commander of Camp _____ the preparations by _____, a prisoner at said camp, to escape, as a result of which report the said _____ was placed in solitary confinement) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused acted without proper authority in a manner contrary to law, custom, or regulation by (state the act(s) alleged and the resulting detriment allegedly suffered).

(2) That the act was committed while the accused was in the hands of the enemy in time of war;

(3) That (this) (these) act(s) of the accused (was) (were) done with the intent of securing favorable treatment of the accused by (his) (her) captors; and

(4) That other prisoners, either military or civilian, held by the enemy suffered some detriment because of the accused's act(s).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and all the citizens of the other.))

"Detriment" means any type of harm, whether physical, psychological, or otherwise.

The act(s) must be on behalf of, related to, or directed toward the captors, and tend to have the probable result of gaining for the accused some favor with, or advantage from the captors. It is not important that the act(s) resulted in favorable treatment for a group of prisoners, one of whom is the accused, if it results in detriment to other prisoners, no matter how small a minority is affected.

NOTE 1: Time of war in issue. When it is clear as a matter of law that the offense was committed "in time of war," this should be resolved as an interlocutory question, and the members should be so advised. However, if there is a factual dispute involved, it should be resolved by the members in connection with their determination of guilt or innocence.

NOTE 2: Acting in a manner contrary to custom, law, or regulation. When it is clear as a matter of law that the accused acted in a manner contrary to law, custom, or regulation, this should be resolved as an interlocutory question and the members should be so advised. However, if there is a factual dispute involved, it should be resolved by the members in connection with their determination of guilt or innocence.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–29–2. MISCONDUCT AS A PRISONER—MALTREATMENT OF PRISONER (ARTICLE 105)

a. MAXIMUM PUNISHMENT: DD, TF, life without eligibility for parole, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, a time of war, while in the hands of the enemy and in a position of authority over _____, a prisoner at _____, as (officer in charge of prisoners at _____) (_____), maltreat the said _____ by (depriving him/her of _____) (_____) without justifiable cause.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused maltreated a prisoner held by the enemy by (state the manner of maltreatment alleged);

(2) That the act occurred while the accused was in the hands of the enemy in time of war;

(3) That the accused held a position of authority over the person maltreated; and

(4) That the act was without justifiable cause.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

"Maltreated" means the infliction of real abuse, although not necessarily physical abuse. It must be without justifiable cause. (To assault) (To strike) (To subject to improper punishment) (or) (To deprive of benefits) could constitute maltreatment. (Abuse of an inferior by derogatory words may cause mental anguish and amount to maltreatment.)

If the accused occupies a position of authority over the prisoner, the source of that authority is not important. The authority may arise (from the military rank of the accused) (through designation by the captor authorities) (from the voluntary selection or election of the accused by other prisoners for their own self-government) (or _____).

NOTE: Time of war in issue. When it is clear as a matter of law that the offense was committed "in time of war," this should be resolved as an interlocutory question and the members should be so advised. See RCM 103(19). However, if there is a factual dispute involved, it should be resolved by the members in connection with their determination of guilt or innocence.

3–30–1. SPYING (ARTICLE 106)

a. MAXIMUM PUNISHMENT: Mandatory punishment. Death.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), was, (at/on board—location), on or about _____, a time of war, found (lurking) (acting clandestinely) (acting under false pretenses) (acting) as a spy (in) (about) (in and about) _____, ((a (fortification) (port) (base) (vessel) (aircraft) (_____) within the (control) (jurisdiction) (control and jurisdiction) of an armed force of the United States, to wit: _____)) ((a (shipyard) (manufacturing plant) (industrial plant) (_____) engaged in work in aid of the prosecution of the war by the United States)) (_____), for the purpose of (collecting) (attempting to collect) information in regard to the ((numbers) (resources) (operations) (_____) of the armed forces of the United States)) ((military production) (_____) of the United States)) (_____), with intent to impart the same to the enemy.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was found (in) (about) (in and about) (_____):

(a) ((a) (an)) (fortification) (post) (base) (vessel) (aircraft) (_____) within the (control) (and) (jurisdiction) of an armed force of the United States, namely, _____; or

(b) ((a) (an)) (shipyard) (manufacturing plant) (industrial plant) (_____) engaged in work in aid of the prosecution of the war by the United States; or

(c) (_____);

(2) That (he) (she) was (lurking) (acting clandestinely) (acting under false pretenses) (acting) as a spy;

(3) That (he) (she) was (collecting) (attempting to collect) information in regard to the:

(a) (numbers) (resources) (operations) (_____) of the armed forces of the United States; or

(b) (military production) (_____) of the United States; or

(c) (_____);

(4) That (he) (she) did so with the intent to provide this information to the enemy; and

(5) That this was done in time of war.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Clandestinely" means in disguise, secretly, covertly, or under concealment.)

"Enemy" includes (not only) organized opposing forces in time of war (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). ("Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

It is not essential that the accused obtain the information sought or that (he) (she) actually communicate it. However, the offense requires some form of clandestine action, lurking about, or deception with the intent to provide the information to the enemy.

NOTE 1: Time of war in issue. When it is clear as a matter of law that the offense was committed "in time of war," this should be resolved as an interlocutory question, and the members should be so advised. See RCM 103(19). However, if there is a factual dispute involved, it should be resolved by the members in connection with their determination of guilt or innocence.

NOTE 2: Unanimous verdict required. A conviction of this offense requires the death penalty and therefore requires the concurrence of all members present at the time the vote is taken.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–30A–1. ESPIONAGE (ARTICLE 106a)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent or reason to believe it would be used to the injury of the United States or to the advantage of _____, a foreign nation, (communicate) (deliver) (transmit) _____ (description of item), (a document) (a writing) (a Code book) (a sketch) (a photograph) (a photographic negative) (a blueprint) (a plan) (a map) (a model) (a note) (an instrument) (an appliance) (information) relating to the national defense, ((which directly concerned (nuclear weaponry) (military spacecraft) (military satellites) (early warning systems) (_____, a means of defense or retaliation against a large scale attack) (war plans) communications intelligence) (cryptographic information) (_____, a major weapons system) (_____, a major element of defense strategy)) to _____, ((a representative of) (an officer of) (an agent of) (an employee of) (a subject of) (a citizen of)) ((a foreign government) (a faction within a foreign country) (a party within a foreign country) (a military force within a foreign country) (a naval force within a foreign country)) (indirectly by _____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (communicated) (delivered) (transmitted) a (document) (writing) (Code book) (signal book) (sketch) (photograph) (photographic negative) (blueprint) (plan) (map) (model) (note) (instrument) (appliance) (information) relating to the national defense;

(2) That this matter was (communicated) (delivered) (transmitted) to (state the party allegedly communicated with), a (foreign government) or to any (faction or party) or (military or naval force within a foreign country) (representative) (officer) (agent) (employee) (subject) (citizen thereof) (by (state the manner alleged)) (indirectly by (state the manner alleged)); and

(3) That the accused did so with intent or reason to believe that such matter would be used to the injury of the United States or to the advantage of a foreign nation.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: If attempted espionage raised. Use Instruction 3-30A-2 for attempted espionage; do not use the Article 80 attempts instruction.

"Intent or reason to believe" that the information "is to be used to the injury of the United States or to the advantage of a foreign nation" means that the accused acted in bad faith and without lawful authority with respect to information that is not lawfully accessible to the public.

NOTE 2: Modification of earlier espionage instruction. Earlier versions of this instruction contained the words "or without authority" after the words "bad faith." Instructing as to "without authority" in the alternative to "bad faith" was expressly rejected in United States v. Richardson, 33 MJ 127 (CMA 1991).

"Instrument, appliance, or information relating to the national defense" includes the full range of modern technology (and matter that may be developed in the future) (including chemical or biological agents) (computer technology) and other matter related to the national defense.

("Foreign country" includes those countries that have and have not been recognized by the United States.)

NOTE 3: Capital sentencing instructions and procedures. See RCM 1004, Article 106a, UCMJ, paragraphs (b) and (c), and Para 30a, MCM. See also Chapter 8.

e. REFERENCES: United States v. Richardson, 33 MJ 127 (CMA 1991).

3–30A–2. ATTEMPTED ESPIONAGE (ARTICLE 106a)

a. MAXIMUM PUNISHMENT: DD, TF, life without eligibility for parole, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent or reason to believe it would be used to the injury of the United States or to the advantage of _____, a foreign nation, attempt to (communicate) (deliver) (transmit) (_____) (description of item) (a document) (a writing) (a Code book) (a sketch) (a photograph) (a photographic negative) (a blueprint) (a plan) (a map) (a model) (a note) (an instrument) (an appliance) (information) relating to the national defense, ((which directly concerned (nuclear weaponry) (military spacecraft) (military satellites) (early warnings systems) (_____, a means of defense or retaliation against a large scale attack) (war plans) (communications intelligence) (cryptographic information) (_____, a major weapons system) (_____, a major element of defense strategy)) to _____ ((a representative of) (an officer of) (an agent of) (an employee of) (a subject of) (a citizen of)) ((a foreign government) (a faction within a foreign country) (a party within a foreign country) (a military force within a foreign country) (a naval force within a foreign country)) (indirectly by _____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused attempted to (communicate) (deliver) (transmit) a (document) (writing) (Code book) (signal book) (sketch) (photograph) (photographic negative) (blueprint) (plan) (map) (model) (note) (instrument) (appliance) (information) relating to the national defense;

(2) That the attempted (communication) (delivery) (transmittal) was to (state the party with whom the accused allegedly attempted to communicate), a (foreign government) or to any (faction or party) or (military or naval force within a foreign country,) (representative) (officer) (agent) (employee) (subject) (citizen thereof) (by (state the manner alleged) (indirectly by (state the manner alleged)); and

(3) That the attempted (communication) (delivery) (transmittal) was with intent or reason to believe that such matter would be used to the injury of the United States or to the advantage of a foreign nation.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

To constitute an attempt, there must be an act which amounts to more than mere preparation; that is, an act which is a substantial step and a direct movement toward the commission of the prohibited

(communication) (delivery) (transmittal). Moreover, the act must apparently tend to bring about the prohibited (communication) (delivery) (transmittal) and be done with the specific intent to bring about the (communication) (delivery) (transmission) of the matter to the (person(s)) (or) (entity) (entities) with the intent, or reason to believe, that the matter would be used to the injury of the United States or to the advantage of a foreign nation. For an act to apparently tend to bring about the commission of an offense means that the actual offense of espionage would have occurred except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (_____) which prevented completion of the offense.

"Intent or reason to believe" that the information is "to be used to the injury of the United States or to the advantage of a foreign nation" means that the accused acted in bad faith and without lawful authority with respect to information that is not lawfully accessible to the public. "Instrument, appliance, or information relating to the national defense" includes the full range of modern technology (and matter that may be developed in the future) (including chemical or biological agents) (computer technology), and other matter related to the national defense.

("Foreign country" includes those countries that have and have not been recognized by the United States.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence, is normally applicable.

e. REFERENCES: United States v. Richardson, 33 MJ 127 (CMA 1991).

3–31–1. FALSE OFFICIAL STATEMENT (ARTICLE 107)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent to deceive, [sign an official (record) (return) (_____), to wit: _____] [make to _____, an official statement, to wit: _____], which (record) (return) (statement) (_____) was (totally false) (false in that _____), and was then known by the said _____ to be so false.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (signed a certain official document) (made to (state the name of the person to whom the statement was allegedly made) a certain official statement), that is: (describe the document or statement as alleged);

(2) That such (document) (statement) was (totally false) (false in that (state the allegedly false matters);

(3) That the accused knew it to be false at the time (he) (she) (signed) (made) it; and

(4) That the false (document) (statement) was made with the intent to deceive.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Intent to deceive" means to purposely mislead, to cheat, to trick another, or to cause another to believe as true that which is false.

NOTE 1: Official nature of document. For a document to be regarded as official, it must concern a governmental function and must be made to a person who in receiving it is discharging the functions of his or her particular office, or to an office which in receiving the document or statement is discharging its functions. Further, a person conducting an interrogation or an office requesting submission of a document must, under the circumstances (including the application of Article 31, UCMJ), have the authority to require an answer or statement from the accused. Whether a statement or document is official is normally a matter of law to be determined as an interlocutory question. However, even though testimony concerning officiality may be uncontroverted, or even stipulated, when such testimony permits conflicting inferences to be drawn, the question should generally be regarded as an issue of fact for the members to resolve.

NOTE 2: Civilian investigations. There is no absolute rule that statements to civilian law enforcement officials can never be official within the meaning of Article 107. See United States v. Teffeau, 58 MJ 62 (CAAF 2003). However, the circumstances leading up to and surrounding the statements should bear a clear and direct relationship to the accused's military duties and reflect a substantial military interest in the investigation.

NOTE 3. Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

e. REFERENCES: "Exculpatory no" doctrine. Brogan v. United States, 522 U.S. 398 (1998); United States v. Solis, 46 MJ 31 (CAAF 1997); United States v. Black, 47 MJ 146 (CAAF 1997); United States v. Prater, 32 MJ 433 (CMA 1991); United States v. Jackson, 26 M.J 377 (CMA 1988).

3–32–1. SELLING OR DISPOSING OF MILITARY PROPERTY (ARTICLE 108)

a. MAXIMUM PUNISHMENT:

(1) $500.00 or less: BCD, TF, 1 year, E-1.

(2) More than $500.00: DD, TF, 10 years, E-1.

(3) Any firearm or explosive regardless of value: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location) on or about _____, without proper authority, [sell to _____] [dispose of by _____] _____, ((a firearm) (an explosive)) of a value of (about) $_____, military property of the United States.

NOTE 1: Alleging value. Though the model specification above indicates that pleading value is mandatory, value is not an element if the item allegedly sold or disposed of is a firearm or explosive. If the property involved is a firearm or explosive, no value is alleged, and the evidence raises an issue whether the property is of the nature alleged, enhanced punishment provisions for property of a value of over $500.00 are not available. See NOTE 9.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused:

(a) (sold to _____), or

(b) (disposed of by _____) certain property, that is: (state the property alleged);

(2) That the (sale) (disposition) was without proper authority;

(3) That the property was military property of the United States; and

(4) See NOTEs 2 and 3 below.

NOTE 2: Firearm or explosive alleged. Give element (4a) when it is alleged that a firearm or explosive was sold or disposed of. See NOTE 9 below or variance instructions if the nature of the property is in issue.

(4 a) That the (state the property alleged) was (a firearm) (an explosive).

NOTE 3: Item NOT a firearm or explosive. Give element (4b) when the item is not a firearm or explosive.

(4b) That the property was of the value of $ _____ (or some lesser amount, in which case the finding should be in the lesser amount).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Military property" is real or personal property owned, held, or used by one of the armed forces of the United States which either has a uniquely military nature or is used by an armed force in furtherance of its mission.

("Sell to," as used in this specification, means the transfer of possession of property for money or other valuable consideration which the buyer gives, pays or promises to give or pay for the property. The accused does not have to possess the property to sell it, but (he) (she) must transfer any apparent claim of right to possession to a purchaser.)

NOTE 4: Disposition alleged. When disposition is alleged, the first instruction below must be given. The other instruction may be given. See NOTE 5 below when abandonment of the property by the accused is raised by the evidence.

"Dispose of," as used in this specification, means an unauthorized transfer, relinquishment, getting rid of, or abandonment of the use of, control over, or ostensible title to the property.

(The disposition may be permanent, as in a sale or gift, or temporary, as in a loan or pledging the property as collateral.)

NOTE 5: Abandonment as disposition. An abandonment where the government is deprived of the benefit of the property is a wrongful disposition, such as where an accused leaves a jeep unattended after having wrongfully appropriated and wrecked it. United States v. Faylor, 24 CMR 18 (CMA 1957). When the location and circumstances of the "abandonment" raise the issue that the government never lost control or benefit of the property, the issue becomes more complex. Compare United States v. Schwabauer, 37 MJ 338 (CMA 1993) (unauthorized relinquishing possession of individual weapon in full view of NCOs in combat zone) with United States v. Holland, 25 MJ 127 (CMA 1987) (accused stored stolen engines in government warehouse and the government never totally lost or gave up control over the engines).

NOTE 6: Firearm and explosive defined. If the property is alleged to be a firearm or explosive, definitions may be appropriate. See RCM 103 (11) & (12). See also 18 USC sections 232(5) and 844(j) as to "explosives." The following definitions will usually be sufficient. In complex cases, the military judge should consult the rules and statutes cited in this NOTE and NOTE 7.

"Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive. "Explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device.

NOTE 7: Other definitions of explosive. The above definition of explosive is taken from RCM 103(11). The Manual definition also includes any other compound, mixture, or device within the meaning of 18 USC section 232(5) or 18 USC section 844(j). Title 18 USC section 232(5) includes the following definitions of explosive not included in NOTE 8 above: dynamite or other devices which (a) consist of or include a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (b) can be carried or thrown by one individual acting alone. 18 USC section 844(j) also includes the following: any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

NOTE 8: Explosive or firearm—variances. If the property is alleged to be an explosive or firearm and an issue as to its nature is raised by the evidence, give the instructions in the first three paragraphs below. Give the instruction in the fourth paragraph if a value in excess of $500.00 was alleged. If the value of the property was not alleged to have been greater than $500.00, the instruction in the fourth paragraph should NOT be given and enhanced punishment for property of a value in excess of $500.00 is unavailable.

The government has charged that the property (sold) (disposed of) was (a firearm) (an explosive). To convict the accused as charged, you must be convinced beyond a reasonable doubt of all the elements, including that the property was of the nature alleged.

If you are convinced of all the elements beyond a reasonable doubt except the element that the property was of the nature as alleged you may still convict the accused. In this event, you must make appropriate findings by excepting the words "(a firearm) (an explosive)."

You must also announce in your findings the value of the item or that it was of some value.

(If the value was more than $500.00, that must also be announced.)

NOTE 9: "Some" value. If there is an issue whether the item had value, the following may be appropriate:

> When property is alleged to have a value of $500.00 or less, the prosecution is required to prove only that the property has some value. (When, as here (you have evidence of the nature of the property) (the property has been admitted in evidence as an exhibit and can be examined by the members), you may infer that it has some value. The drawing of this inference is not required.)

NOTE 10: Other instructions. Instruction 7-3, Circumstantial Evidence, may be applicable. Instruction 7-15, Variance, may be applicable. An appropriately tailored "abandoned property" instruction (See NOTE 6, Instruction 3-46-1) may be applicable if an issue is raised that the property was abandoned by the government before the accused sold or disposed of it.

e. REFERENCES:

(1) Military property: United States v. Schelin, 15 MJ 218 (CMA 1983) and United States v. Simonds, 20 MJ 279 (CMA 1985).

(2) Disposition: United States v. Joyce, 22 MJ 942 (AFCMR 1986).

3–32–2. DAMAGING, DESTROYING, OR LOSING MILITARY PROPERTY (ARTICLE 108)

a. MAXIMUM PUNISHMENT:

(1) Willful damage, destruction or loss:

(a) $500 or less: BCD, TF, 1 year, E-1.

(b) More than $500: DD, TF, 10 years E-1.

(c) Any firearm or explosive regardless of value: DD, TF, 10 years, E-1.

(2) Through neglect damaging, destroying, or losing:

(a) $500 or less: 2/3 x 6 months, 6 months, E-1.

(b) More than $500: BCD, TF, 1 year, E-1.

NOTE 1: MCM elements, form specification, and maximum punishment in cases of willfully damaging, losing, or destroying a firearm or explosive. The elements in Para 32b(2), MCM, Part IV and the form specification in paragraph 32f(2), MCM, Part IV, make no provision for alleging that the item involved is an explosive or firearm. However, the maximum punishment in Para 32e(3) (b) provides for enhanced punishment when an explosive or firearm is willfully damaged, destroyed, or lost. Optional instructions have been included for use when an item is specifically alleged to be a firearm or explosive.

b. MODEL SPECIFICATION (MCM MODIFIED):
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, without proper authority, [(willfully) (through neglect)] [(damage by _____,) (destroy by _____) (lose)] _____, (of a value of (about) $ _____), military property of the United States, [the amount of said damage being in the sum of (about) $ _____].

NOTE 2: Willfully damaged, lost, or destroyed firearm or explosive. See NOTE 1 above. The MCM form specification set out above must be modified to plead the enhanced punishment provision of a willfully lost, damaged, or destroyed firearm or explosive.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused, without proper authority:

(a) damaged by _____, or

(b) destroyed by _____, or

(c) lost certain property, that is: (state the property alleged);

(2) That the property was military property of the United States;

(3) That the (damage) (destruction) (loss) was (willfully caused by the accused) (the result of neglect on the part of the accused); and

(4) See NOTEs 3 and 4 below.

NOTE 3: Firearm or explosive alleged to have been willfully lost, damaged or destroyed. Give element (4a) when it is alleged that a firearm or explosive has been willfully lost, damaged or destroyed. See NOTEs 11 and 13 below for variance instructions if the nature of the property and/or willfulness of the act is in issue.

(4a) That the (state the property alleged) was (a firearm) (an explosive).

NOTE 4: Item NOT a firearm or explosive, or firearm/explosive alleged to be lost, damaged or destroyed through neglect. Give element (4b) when the item is not a firearm or explosive; or if a firearm or explosive, that the item was lost, damaged, or destroyed through neglect.

(4b) That the (property was of the value of $_____) (damage amounted to $ _____) (or some lesser amount, in which case the finding should be in the lesser amount).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Military property" is real or personal property owned, held, or used by one of the armed forces of the United States which either has a uniquely military nature or is used by an armed force in furtherance of its mission.

NOTE 5: Damage alleged. When damage is alleged, the instruction below should be given. See United States v. Ortiz, 24 MJ 164 (CMA 1987) (CMA adopted definition of damage in Article 109 that encompasses physical injury to the property. Physical injury, in turn, encompasses rendering military property useless, even temporarily, for its intended purpose by means of disassembly, reprogramming, or removal of a component. Disconnecting a sensor in otherwise operational aircraft that prevented the aircraft from being flown until the sensor was reconnected was "damage.") and United States v. Peacock, 24 MJ 410 (CMA 1987) (Actual, physical damage is required. Placing foreign objects in aircraft fuel tanks that temporarily disabled the tanks was "damage.")

Property may be considered "damaged" if there is actual physical injury to it. ("Damage" also includes any change in the condition of the property which impairs, temporarily or permanently, its operational readiness, that is, the purpose for which it was intended.) ("Damage"

may include disassembly, reprogramming, or removing a component so long as that act, temporarily or permanently, renders the property useless for the purpose intended.)

NOTE 6: Destruction alleged. When destruction is alleged, the following instruction should be given:

Property may be considered "destroyed" if it has been sufficiently injured to be useless for the purpose for which it was intended, even if it has not been completely destroyed.

NOTE 7: Willfulness alleged. If the accused's act or omission is alleged to have been willful, the following instruction should be given. See also NOTE 13 to this instruction when willfulness has been charged and the evidence raises that causation may have only been negligent.

"Willfully" means intentionally or on purpose.

NOTE 8: Neglect alleged. If the accused's act or omission is alleged to have been negligent, the following instruction should be given. If neglect is raised as a lesser included offense, use the instruction following NOTE 13.

(Damage) (Destruction) (A loss) is the result of neglect when it is caused by the absence of due care, that is, (an act) (or) (a failure to act) by a person who is under a duty to use due care which demonstrates a lack of care for the property of others which a reasonably prudent person would have used under the same or similar circumstances.

NOTE 9: Firearm and explosive defined. If the property is alleged to be a firearm or explosive, definitions may be appropriate. See RCM 103 (11) & (12). See also 18 USC sections 232(5) and 844(j) as to "explosives." The following definitions will usually be sufficient. In complex cases, the military judge should consult the rules and statutes cited in this NOTE and NOTE 10.

"Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.
"Explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device.

NOTE 10: Other definitions of explosive. The above definition of explosive is taken from RCM 103(11). The Manual definition also includes any other compound, mixture, or device within the meaning of 18 USC section 232(5) or 18 USC section 844(j). Title 18 USC section 232(5) includes the following definitions of explosive not included in NOTE 9 above: dynamite or other devices which (a) consist of or include a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (b) can be carried or thrown by one individual acting alone. Title 18 USC section 844(j) also includes the following: any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

NOTE 11: Explosive or firearm—variances. If the property is alleged to be an explosive or firearm and an issue as to its nature is raised by the evidence, give the instructions in the first three paragraphs below. Give the instruction in the fourth paragraph if a value in excess of $500.00 was alleged. If the value of the property was not alleged to have been greater than $500.00, the instruction in the fourth paragraph below should NOT be given and an enhanced punishment for property of a value in excess of $500.00 is unavailable. If there is an issue whether the loss, damage or destruction was willful, the instructions following NOTE 13, should also be given.

The government has charged that the property was willfully (damaged) (lost) (destroyed) and was (a firearm) (an explosive). To convict the accused as charged, you must be convinced beyond a reasonable doubt of all the elements, including that the property was willfully (damaged) (lost) (destroyed) and is of the nature alleged.

If you are convinced of all the elements beyond a reasonable doubt except the element that the property was of the nature as alleged you may still convict the accused. In this event you must make appropriate findings by excepting the words "(a firearm) (an explosive)."

You must also announce in your findings (the value of the item or that it was of some value) (the amount of the damage in a dollar amount or that there was damage in some amount).

(If the (value) (damage) was more than $500.00, that must be also be announced.)

NOTE 12: "Some" value. If there is an issue whether the item had value, the following may be appropriate:

When property is alleged to have a value of $500.00 or less, the prosecution is required to prove only that the property has some value. (When, as here (you have evidence of the nature of the property) (the property has been admitted in evidence as an exhibit and can be examined by the members), you may infer that it has some value. The drawing of this inference is not required.)

NOTE 13: Lesser included offense. Damage, destruction or loss through neglect is a lesser included offense of willful damage, destruction or loss. When this lesser included offense is raised by the evidence, the following instructions should be given:

(Damage) (Destruction) (A loss) through neglect is a lesser included offense of willful (damage) (destruction) (loss). (Acts) (Omissions) of the accused, without proper authority, which result in (damage) (destruction) (loss), which are not willful, might constitute the lesser offense of (damage) (destruction) (loss) through neglect. (Damage) (Destruction) (A loss) is the result of neglect when it is caused by the absence of due care, that is, (an act) (or) (a failure to act) by a person who is under a duty to use due care which demonstrates a lack of care for the property of others which a reasonably prudent person would have used under the same or similar circumstances.

If you are not satisfied beyond a reasonable doubt that the accused is guilty of willful (damage) (destruction) (loss) but you are satisfied beyond a reasonable doubt of all the other elements of the offense and that the (damage) (destruction) (loss) was caused by the accused, without proper authority, through neglect, you may find (him) (her) guilty of the lesser offense of (damage) (destruction) (loss) through neglect.

NOTE 14: Causation in issue. If the evidence raises an issue whether the accused's neglect caused the loss, damage, destruction, sale, or disposition, use Instruction 5-19, Lack of Causation, Intervening Cause, or Contributory Negligence.

NOTE 15: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is normally applicable when willfulness is alleged. Instruction 7-16, Variance - Value, Damage, or Amount, may be applicable. Instruction 7-15, Variance, may be applicable. Instruction 5-17, Evidence Negating Mens Rea, may be applicable if there is evidence the accused had a mental state that may have affected his ability to act willfully. Instruction 5-12, Voluntary Intoxication, may be applicable if there is evidence the accused's intoxication may have affected his ability to act willfully. An appropriately tailored "abandoned property"

instruction (See NOTE 6, Instruction 3-46-1) may be applicable if an issue is raised that the property was abandoned by the government.

e. REFERENCES: Military property: United States v. Schelin, 15 MJ 218 (CMA 1983); United States v. Simonds, 20 MJ 279 (CMA 1985).

3–32–3. SUFFERING MILITARY PROPERTY TO BE LOST, DAMAGED, SOLD, OR WRONGFULLY DISPOSED OF (ARTICLE 108)

a. MAXIMUM PUNISHMENT:

(1) Willfully suffering property to be damaged, lost, destroyed, sold, or wrongfully disposed of:

(a) $500 or less: BCD, TF, 1 year, E-1.

(b) More than $500: DD, TF, 10 years, E-1.

(c) Any firearm or explosive regardless of value or amount of damage: DD, TF, 10 years, E-1.

(2) Through neglect suffering property to be damaged, lost, destroyed, sold, or wrongfully disposed of:

(a) $500 or less: 2/3 x 6 months, 6 months, E-1.

(b) More than $500: BCD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, without proper authority, [willfully] [through neglect] suffer _____, (a firearm) (an explosive) (of a value of (about) $ _____) military property of the United States, to be (lost) (damaged by _____) (destroyed by _____) (sold to _____) (wrongfully disposed of by _____) (the amount of said damage being in the sum of (about) $_____).

NOTE 1: MCM elements and "omission". The MCM specifies only an "omission" of duty, and not an "act or omission," in the third and fourth elements. Comparing the Article 108(1) and (2) offenses with Article 108(3), the use of only the word "omission" is significant because the prosecution must prove a duty and the failure to do the duty. In this regard, the military judge may have to tailor instructions when the accused performed an act that constituted an omission of duty. But see United States v. Fuller, 25 MJ 514 (ACMR 1987) (negligence in Article 108(3) may be an act or omission). This language in Fuller is probably dicta.

c. ELEMENTS:

(1) That (state the time and place alleged), certain property, that is: (state the property alleged) was:

(a) damaged by _____; or

(b) destroyed by _____; or

(c) lost; or

(d) sold to _____; or

(e) wrongfully disposed of by _____;

(2) That the property was military property of the United States;

(3) That the (damage) (destruction) (loss) (sale) (wrongful disposition) was suffered by the accused, without proper authority, through an omission of duty on the accused's part;

(4) That this omission was (willful) (negligent); and

(5) See NOTEs 2 and 3 below.

NOTE 2: Firearm or explosive, and willful suffering alleged. Give element (5a) when it is alleged that a firearm or explosive was willfully suffered to have been lost, damaged, destroyed, sold, or wrongfully disposed of. See NOTEs 12 and 14 below for variance instructions if the nature of the property and/or willfulness is in issue.

(5a) That the (_____) was (a firearm) (an explosive).

NOTE 3: Item NOT a firearm or explosive, or firearm/explosive and suffering through neglect alleged. Give element (5b) when the item is not a firearm or explosive, or if a firearm or explosive, that the accused suffered the item to be lost, damaged, sold, destroyed, or wrongfully disposed of through neglect.

(5b) That the (property was of the value of $_____) (damage amounted to $_____) (or some lesser amount, in which case the finding should be in the lesser amount).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Military property" is real or personal property owned, held, or used by one of the armed forces of the United States which either has a uniquely military nature or is used by an armed force in furtherance of its mission.

"Suffered" means to allow or permit. (Suffering includes deliberate violation or intentional disregard of some specific law, regulation, order, duty or customary practice of the service; reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; or loaning it to a person,

known to be irresponsible, by whom it is damaged, lost, destroyed, or wrongfully disposed of.)

("Sold to," as used in this specification, means the transfer of possession of property for money or other valuable consideration which the buyer gives, pays, or promises to give or pay for the property. The accused does not have to possess the property to sell it, but (he) (she) must transfer any apparent claim of right to possession to a purchaser.)

NOTE 4: Wrongful disposition alleged. When wrongful disposition is alleged, the first instruction below must be given. The other instruction may be given. See NOTE 5 below when abandonment of the property by the accused is raised by the evidence.

"Wrongfully disposed of," as used in this specification, means an unauthorized transfer, relinquishment, getting rid of, or abandonment of the use of, control over, or ostensible title to the property.

(The disposition may be permanent, as in a sale or gift, or temporary, as in a loan or pledging the property as collateral.)

NOTE 5: Abandonment as wrongful disposition. An abandonment where the government is deprived of the benefit of the property may be a wrongful disposition such as where an accused leaves a jeep unattended after having wrongfully appropriated and wrecked it. United States v. Faylor, 24 CMR 18 (CMA 1957). When the location and circumstances of the "abandonment" raises the issue that the government never lost control or benefit of the property, the issue becomes more complex. Compare United States v. Schwabauer, 37 MJ 338 (CMA 1993) (unauthorized relinquishing possession of individual weapon in full view of NCOs in combat zone) with United States v. Holland, 25 MJ 127 (CMA 1987) (accused stored stolen engines in government warehouse and the government never totally lost or gave up control over the engines). Faylor, Schwabauer, and Holland, all supra, involved intentional disposition and not suffering property to be wrongfully disposed of.

NOTE 6: Damage alleged. When damage is alleged, the instruction below should be given. See United States v. Ortiz, 24 MJ 164 (CMA 1987) (CMA adopted definition of damage in Article 109 that encompasses physical injury to the property. Physical injury, in turn, encompasses rendering military property useless, even temporarily, for its intended purpose by means of disassembly, reprogramming, or removal of a component. Disconnecting a sensor in otherwise operational aircraft that prevented the aircraft from being flown until the sensor was reconnected was "damage.") and United States v. Peacock, 24 MJ 410 (CMA 1987) (Actual, physical damage is required. Placing foreign objects in aircraft fuel tanks that temporarily disabled the tanks was "damage.").

Property may be considered "damaged" if there is actual physical injury to it. ("Damage" also includes any change in the condition of the

property which impairs, temporarily or permanently, its operational readiness, that is, the purpose for which it was intended.) ("Damage" may include disassembly, reprogramming, or removing a component so long as that act, temporarily or permanently, renders the property useless for the purpose intended.)

NOTE 7: Destruction alleged. When destruction is alleged, the following instruction should be given:

Property may be considered "destroyed" if it has been sufficiently injured to be useless for the purpose for which it was intended, even if it has not been completely destroyed.

NOTE 8: Willfulness alleged. If the accused's omission is alleged to have been willful, the following instruction should be given. See also NOTE 14 to this instruction when willfulness has been charged and the evidence raises that causation may have only been negligent.

"Willfully" means intentionally or on purpose.

NOTE 9: Neglect alleged. If the accused's omission is alleged to have been negligent, the following instruction should be given. If neglect is raised as a lesser included offense to willfulness, use the instruction following NOTE 14.

An omission is the result of neglect when it is caused by the absence of due care, that is, a failure to act by a person who is under a duty to use due care which demonstrates a lack of care for the property of others which a reasonably prudent person would have used under the same or similar circumstances.

NOTE 10: Firearm and explosive defined. If the property is alleged to be a firearm or explosive, definitions may be appropriate. See RCM 103 (11) & (12). See also 18 USC sections 232(5) and 844(j) as to "explosives." The following definitions will usually be sufficient. In complex cases, the military judge should consult the rules and statutes cited in this NOTE and NOTE 11.

"Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.

"Explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders,

any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device.

NOTE 11: Other definitions of explosive. The above definition of explosive is taken from RCM 103(11). The Manual definition also includes any other compound, mixture, or device within the meaning of 18 USC section 232(5) or 18 USC section 844(j). Title 18 USC section 232(5) includes the following definitions of explosive not included in NOTE 10 above: dynamite or other devices which (a) consist of or include a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (b) can be carried or thrown by one individual acting alone. Title 18 USC section 844(j) also includes the following: any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

NOTE 12: Explosive or firearm—variance. If the property is alleged to be an explosive or firearm and an issue as to its nature is raised by the evidence, give the instruction in the first three paragraphs below. Give the instruction in the fourth paragraph if a value in excess of $500.00 was alleged. If the value of the property was not alleged to have been greater than $500.00, the instruction in the fourth paragraph should NOT be given, and an enhanced punishment for property in excess of $500.00 is unavailable. If there is an issue whether suffering the loss, damage, destruction, sale or wrongful disposition was willful, the instructions following NOTE 14 should also be given.

The government has charged that the accused willfully suffered the property to be (damaged) (lost) (destroyed) (sold) (wrongfully disposed of) and that the property was (a firearm) (an explosive). To convict the accused as charged, you must be convinced beyond a reasonable doubt of all the elements, including that the accused's omission was willful and that the property is of the nature alleged.

If you are convinced of all the elements beyond a reasonable doubt except the element that the property was of the nature as alleged you may still convict the accused. In this event you must make appropriate findings by excepting the words "(a firearm) (an explosive)."

You must also announce in your findings (the value of the item or that it was of some value) (the amount of the damage in a dollar amount or that there was damage in some amount).

(If the (value) (damage) was more than $500.00, that must also be announced.)

NOTE 13: "Some" value. If there is an issue whether the item had value, the following may be appropriate:

When property is alleged to have a value of $500.00 or less, the prosecution is required to prove only that the property has some value. (When, as here (you have evidence of the nature of the property) (the property has been admitted in evidence as an exhibit and can be examined by the members), you may infer that it has some value. The drawing of this inference is not required.)

NOTE 14: Lesser included offense. Suffering damage, destruction, loss, sale, or wrongful disposition through neglect is a lesser included offense of willfully suffering damage, destruction, loss, sale, or wrongful disposition. When this lesser included offense is raised by the evidence, the following instructions should be given:

Suffering property to be (damaged) (destroyed) (lost) (sold) (wrongfully disposed of) through neglect is a lesser included offense of willfully suffering the property to be (damaged) (destroyed) (lost) (sold) (wrongfully disposed of). An omission of duty by the accused, without proper authority, which results in the accused's suffering the property to be (damaged) (destroyed) (lost) (sold) (or wrongfully disposed of), which is not willful, might constitute the lesser offense of suffering property to be (damaged) (destroyed) (lost) (sold) (wrongfully disposed of) through neglect. Suffering property to be (damaged) (destroyed) (lost) (sold) (wrongfully disposed of) is the result of neglect when it is caused by the absence of due care, that is, a failure to act by a person who is under a duty to use due care which demonstrates a lack of care for the property of others which a reasonably prudent person would have used under the same or similar circumstances.

If you are not satisfied beyond a reasonable doubt that the accused is guilty of willfully suffering the property to be (damaged) (destroyed) (lost) (sold) (wrongfully disposed of), but you are satisfied beyond a reasonable doubt of all the other elements of the offense and that the (damage) (destruction) (loss) (sale) (wrongful disposition) was caused by

the accused's sufferance, without proper authority, through neglect, you may find (him) (her) guilty of the lesser offense of suffering the property to be (damaged) (destroyed) (lost) (sold) (wrongfully disposed of) through neglect.

NOTE 15: Causation in issue. If the evidence raises an issue whether the accused's neglect caused the loss, damage, destruction, sale, or disposition, give Instruction 5-19, Lack of Causation, Intervening Cause, or Contributory Negligence.

NOTE 16: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is normally applicable when willfulness is alleged. Instruction 7-16, Damage and Amount, may be applicable. Instruction 7-15, Variance, may be applicable. Instruction 5-17, Evidence Negating Mens Rea, may be applicable if there is evidence the accused had a mental state that may have affected his ability to act willfully. Instruction 5-12, Voluntary Intoxication, may be applicable if there is evidence the accused's intoxication may have affected his ability to act willfully. An appropriately tailored "abandoned property" instruction (See NOTE 6, Instruction 3-46-1), may be applicable if an issue is raised that the property was abandoned by the government.

e. REFERENCES:

(1) Military property: United States v. Schelin, 15 MJ 218 (CMA 1983) and United States v. Simonds, 20 MJ 279 (CMA 1985).

(2) Disposition: United States v. Joyce, 22 MJ 942 (AFCMR 1986).

3–33–1. NONMILITARY PROPERTY—REAL PROPERTY—WASTING OR SPOILING (ARTICLE 109)

a. MAXIMUM PUNISHMENT:

(1) $500.00 or less: BCD, TF, 1 year, E-1.

(2) More than $500.00: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, [(willfully) (recklessly) waste] [(willfully) (recklessly) spoil] _____, of a value of (about) $_____, the property of _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused:

(a) (willfully) (recklessly) wasted, or

(b) (willfully) (recklessly) spoiled, certain real property, namely: (describe the property alleged) by (state the manner alleged);

(2) That the property (wasted) (spoiled) was the property of (state the name of the owner alleged); and

(3) That the property was of a value of (about) (state the value alleged) (or some lesser amount, in which case the finding should be in the lesser amount).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Waste") ("Spoil") means to wrongfully destroy or permanently damage real property (such as (buildings) (structures) (fences) (or) (trees)).

NOTE 1: If willfulness is alleged. If the act was alleged as willful, the following is ordinarily applicable:

"Willfully" means intentionally or on purpose.

NOTE 2: If recklessness is alleged. If recklessness is alleged, the following instruction should be given:

"Recklessly" as used in this specification means a degree of carelessness greater than simple negligence. Negligence is the absence of due care, that is, (an act) (failure to act) by a person who is under a duty to use due care which demonstrates a lack of care for the property of others which a reasonably prudent person would have used under the same or similar circumstances. Recklessness, on the other hand, is a negligent (act) (failure to act) with a gross, deliberate, or wanton disregard for the foreseeable results to the property of others.

NOTE 3: Lesser included offense. Recklessly wasting or spoiling is a lesser included offense of willfully wasting and spoiling.

NOTE 4: Other instructions. Instruction 7-16, Variance - Value, Damage, or Amount, is ordinarily applicable. Also, Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–33–2. NONMILITARY PROPERTY—PERSONAL PROPERTY— DESTROYING OR DAMAGING (ARTICLE 109)

a. MAXIMUM PUNISHMENT:

(1) $500.00 or less: BCD, TF, 1 year, E-1.

(2) More than $500.00: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, willfully and wrongfully (destroy) (damage) by _____, _____, [of a value of (about) $_____] [the amount of said damage being in the sum of (about) $ _____], the property of _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused willfully and wrongfully (damaged) (destroyed) certain personal property, that is (describe the property alleged) by (state the manner alleged);

(2) That the accused specifically intended to (destroy) (damage) (describe the property alleged);

(3) That the property (destroyed) (damaged) was the property of (state the name of the owner alleged); and

(4) [That the property was of the value of $_____ (or of some lesser value, in which case the finding should be in the lesser amount)] [That the damage was in the amount of $_____ (or of some lesser amount, in which case the finding should be in the lesser amount)].

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act is done “willfully” if it is done intentionally or on purpose.

NOTE 1: Destruction alleged. If destruction is alleged, define it as follows:

Property may be considered destroyed if it has been sufficiently injured to be useless for the purpose for which it was intended, even if it has not been completely destroyed.

NOTE 2: Damage alleged. If damage is alleged, give the following definition:

Property may be considered “damaged” if it has been physically injured in any way.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), and Instruction 7-16, Variance - Value, Damage, or Amount, are ordinarily applicable.

3–34–1. HAZARDING OF VESSEL—WILLFUL (ARTICLE 110)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, on or about _____, while serving as _____ aboard the _____ in the vicinity of _____, willfully and wrongfully (hazard the said vessel) (suffer the said vessel to be hazarded) by (causing the said vessel to collide with _____) (allowing the said vessel to run aground) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the (state the name of the vessel), a vessel of the armed forces, was hazarded by (state the manner of hazarding alleged); and

(2) That the accused by (his) (her) (act) (or failure to act) willfully and wrongfully (caused) (suffered) the vessel to be hazarded.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Hazard" means to put a vessel in danger of damage or loss. Loss or damage to the vessel is not required. All that is required is that the vessel be put in danger of loss or damage.

"Willfully" means intentionally or on purpose.

("Suffered" means allowed or permitted.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), should be used when appropriate.

3–34–2. HAZARDING OF VESSEL—THROUGH NEGLECT (ARTICLE 110)

a. MAXIMUM PUNISHMENT: DD, TF, 2 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), on _____, while serving in command of the _____, making entrance to (Boston Harbor), did negligently hazard the said vessel by failing and neglecting to maintain or cause to be maintained an accurate running plot of the true position of said vessel while making said approach, as a result of which neglect the said _____, at or about _____, hours on the day aforesaid, became stranded in the vicinity of (Channel Buoy Number Three).

NOTE 1: Other form specifications. Paragraph 34, Part IV, MCM includes three other examples of proper specifications based on different fact patterns.

c. ELEMENTS:

(1) That (state the time and place alleged), the (state the name of the vessel), a vessel of the armed forces, was hazarded by (state the manner of hazarding); and

(2) That the accused by (his) (her) (act) (or failure to act) negligently (caused) (suffered) the vessel to be hazarded.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Hazard" means to put the vessel in danger of damage or loss. Loss or damage to the vessel is not required. All that is required is that the vessel be put in danger of loss or damage.

Negligence is the absence of due care, that is, (an act) (or failure to act) by a person who is under a duty to use due care which demonstrates a lack of care for the property of others which a reasonably prudent person would have used under the same or similar circumstances.

NOTE 2: "Suffered" alleged. If the term "suffered" is alleged, the following instruction is ordinarily applicable:

"Suffered" means allowed or permitted.

3–35–1. DRUNKEN OR RECKLESS OPERATION OF A VEHICLE, AIRCRAFT, OR VESSEL (ARTICLE 111)

a. MAXIMUM PUNISHMENT:

(1) If resulting in personal injury: DD, TF, 18 months, E-1.

(2) No personal injury alleged: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

NOTE 1: The "model specification" provided below differs from the one found in the MCM, in that it adds certain words of criminality (i.e., "operates" and "is in actual physical control") found in the statute, but not in the MCM model specification.

In that _____ (personal jurisdiction data), (at/on board--location), on or about _____, (in the motor pool area) (near the Officer's Club) (at the intersection of _____ and _____) (_____) (while in the Gulf of Mexico) (while in flight over North America) (did operate) (did physically control) (was in actual physical control of) [a vehicle, to wit: (a truck) (a passenger car) (_____)] [an aircraft, to wit: (an AH-64 helicopter) (an F-14A fighter) (a KC-135 tanker) (_____)] [a vessel, to wit: (the aircraft carrier USS _____) (the Coast Guard Cutter _____) (_____)], [while drunk] [while impaired by _____] [while the alcohol concentration in his/her (blood) (breath) was, as shown by chemical analysis, equal to or exceeded (0.10) (____) grams of alcohol per (100 milliliters of blood) (210 liters of breath), which is the limit under (cite applicable State law) (cite applicable statute or regulation)] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (by ordering that the aircraft be flown below the authorized altitude) (_____)] [and did thereby cause said (vehicle) (aircraft) (vessel) to injure _____)].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was (operating) (physically controlling) (in actual physical control of) a (vehicle) (aircraft) (vessel), to wit: _____; (and)

(2) ***See NOTEs 2-5 below. More than one means of incapacity may be alleged. An accused may be charged with both drunken and reckless operation of a vehicle, and drunkenness may be alleged as a violation of the alcohol level, as well as otherwise.***

(3) ***See NOTE 6 below.***

NOTE 2: Reckless or wanton manner. If reckless or wanton manner is alleged, give the following element:

(2a) That the accused was (operating) (physically controlling) the said (vehicle) (aircraft) (vessel) in a (reckless) (or) (wanton) manner by (state the manner of operation or control alleged);

NOTE 3: While drunk. If operation or actual physical control while drunk is alleged, give the following element:

(2b) That the accused was (operating) (in actual physical control of) the said (vehicle) (aircraft) (vessel) while drunk;

NOTE 4: While impaired. If operation or physical control while impaired by a controlled substance is alleged, give the following element:

(2c) That the accused was (operating) (physically controlling) the said (vehicle) (aircraft) (vessel) while impaired by _____; [and]

NOTE 5: Prohibited alcohol level. If operation or actual physical control while equal to or in excess of an applicable alcohol concentration level is alleged, give the following element. In the United States, such level is the blood alcohol concentration prohibited under the law of the State in which the conduct occurred. However, if the conduct occurred on a military installation that is in more than one State, and if those States have different levels for defining their prohibited blood alcohol concentrations under their respective State laws, the Secretary concerned for the installation may select one such level to apply uniformly on that installation. Outside the United States, the level of alcohol concentration prohibited is 0.10 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath, unless the Secretary of Defense has prescribed a lower level. Judicial notice of the State law or Secretary prescribed level may be appropriate. See MRE 201A.

(2d) That the accused was (operating) (in actual physical control of) the said (vehicle) (aircraft) (vessel) when the alcohol concentration in (his) (her) (blood) (breath) was equal to or greater than (the applicable level prohibited under the law of the State in which the conduct occurred) (the level prescribed by the Secretary of _____) (0.10 grams or more of alcohol per (100 milliliters of blood) (210 liters of breath)), as shown by chemical analysis;

NOTE 6: Injury alleged. If an injury is alleged, give the following element:

[(3)] That the accused thereby caused the (vehicle) (aircraft) (vessel) to (strike a light pole) (veer into oncoming traffic and collide with another vehicle) (_____) causing injury to (state the name of the alleged victim).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 7: Vehicle, aircraft, and vessel defined. The following definitions should be given as applicable. See RCM 103. See also 1 USC section 4 as to "vehicle," 18 USC section 2311 and 49 USC section 1301 as to "aircraft," and 1 USC section 3 as to "vessel." The following definitions will usually be sufficient, but in complex cases, the military judge should consult the rules and statutes cited in this NOTE:

("Vehicle" includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land.)

("Aircraft" means any contrivance used or designed for transportation in the air.)

("Vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.)

NOTE 8: Operating. If the accused is charged with operating a vessel, aircraft, or vehicle, give the first instruction below. The second instruction may be helpful.

"Operating" includes not only driving or guiding a (vehicle) (aircraft) (vessel) while in motion, either in person or through the agency of another, but also the setting of its motive power in action or the manipulation of its controls so as to cause the particular (vehicle) (aircraft) (vessel) to move.

(Thus, one may operate a (vehicle) (aircraft) (vessel) by pushing it, setting its motive power in action by starting the engine or otherwise, or releasing the parking brake of a vehicle on a hill so the vehicle rolls downhill.)

NOTE 9: Controlling. If the specification alleges "control" of the vehicle, aircraft, or vessel, the instruction that follows should be given. The military judge should be alert to situations where the ability to control, although present, is so remote that extending criminal culpability to such conduct is outside the intent of the statute. The literal language of the instruction that follows is so broad that it seems to cover a person with the authority and practical means to direct the steering or movements of a vessel, vehicle, or aircraft, even where no attempt at control was made and no causal connection existed between the person's consumption of alcohol or drugs and the operation of the vessel, vehicle, or aircraft. For example, a ship's captain drunk in his cabin who made no effort to direct the

ship's course, despite his authority and capability (via intercom) to do so, seems to be covered by the "control" definition taken from the Manual. In such a situation, tailoring the example (taken directly from the MCM) may be necessary.

("Physically controlling") ("in actual physical control") mean(s) that the accused had the present capability and power to dominate, direct, or regulate the (vehicle) (aircraft) (vessel), (in person) (or) (through the agency of another) (regardless of whether such (vehicle) (aircraft) (vessel) was operated.

(For example, an intoxicated person seated behind the steering wheel of a vehicle with the keys of the vehicle in or near the ignition, but with the engine not turned on could be deemed in actual physical control of that vehicle. (However, a person asleep in the back seat with the keys in (his) (her) pocket would not be deemed in actual, physical control.))

NOTE 10: <u>Reckless or wanton</u>. If it is alleged that the accused operated or physically controlled the vehicle, aircraft, or vessel in a wanton or reckless manner, give the first instruction below. The second instruction may be helpful.

("Reckless") ("Wanton") means a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care, that is, (an act) (or failure to act) by a person who is under a duty to use due care which demonstrates a lack of care for the safety of others which a reasonably careful person would have used under the same or similar circumstances. ("Recklessness") ("Wantonness"), on the other hand, is a negligent (act) (failure to act) combined with a gross or deliberate disregard for the foreseeable results to others. "Reckless" means that the accused's manner of operation or control of the (vehicle) (aircraft) (vessel) was, under all the circumstances, of such a heedless nature that made it actually or imminently dangerous to the occupant(s) or to the rights or safety of (others) (another).

(Wantonness also includes willful conduct.)

(In deciding whether the accused (operated) (physically controlled) the (vehicle) (aircraft) (vessel) in a (reckless) (wanton) manner, you must consider all the relevant evidence, (including, but not limited to: the

(condition of the surface on which the vehicle was operated) (time of day or night) (traffic conditions) (condition of the (vehicle) (aircraft) (vessel) as known by the accused) (the degree that the (vehicle) (aircraft) (vessel) had or had not been maintained as known by the accused) (weather conditions) (speed) (the accused's physical condition) (and) (_____)).)

NOTE 11: Drunkenness or impairment. If drunkenness or impairment is alleged, give the instruction below. If impairment by a controlled substance is alleged, the military judge should examine paragraph 37, Part IV, MCM to ensure that the substance alleged is one prohibited. See NOTE 12 below.

("Drunk") ("Impaired") means any intoxication sufficient to impair the rational and full exercise of the mental or physical faculties. ("Drunk" relates to intoxication by alcohol.) ("Impaired" relates to intoxication by a controlled substance.)

NOTE 12: Nature of the substance causing impairment. Article 112a(b) specifically prohibits certain controlled substances. It also incorporates the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC section 801-971. The list of controlled substances in Schedules I through V is updated and republished annually in the Code of Federal Regulations. See 21 CFR 1308 et seq. Whether the substance alleged was among those covered by Article 112a is an interlocutory question for the military judge. To determine that issue, the military judge may take judicial notice that the alleged substance is a scheduled controlled substance. See United States v. Gould, 536 F.2d 216 (8th Cir. 1976). Whether the substance is the one alleged or that it caused an impairment are questions of fact.

NOTE 13: Regulatory defects in handling of blood, breath or urine samples. When the evidence reflects "technical" deviations from governing regulations that establish procedures for collecting, transmitting, or analyzing samples, the following instruction may be appropriate. See United States v. Pollard, 27 MJ 376 (CMA 1989). Blood, breath, or urinalysis test results should be excluded if there has been a substantial violation of regulations intended to assure reliability of the testing procedures. See United States v. Strozier, 31 MJ 283 (CMA 1990).

There is evidence raising the issue whether the government strictly complied with all aspects of (state rule, regulation, or policy) governing how (blood) (breath) (urine) samples are to be (collected) (transmitted) (and) (analyzed). In order to convict the accused, the evidence must establish the (blood) (breath) (urine) sample originated from the accused and (tested positive for the presence of (heroin) (cocaine) (_____))

(contained the alcohol concentration alleged) without adulteration by any intervening agent or cause. You may consider deviations from governing regulations, or any other discrepancy in the processing or handling of the accused's (blood) (breath) (urine) sample, in determining if the evidence is sufficiently reliable to support a vote for conviction.

NOTE 14: Sufficiency of evidence when blood or breath alcohol levels alleged. When Article 111(2), blood or breath alcohol concentration, is alleged, the following instruction may be given:

If you are convinced beyond a reasonable doubt that the accused was (operating) (in actual physical control of) the (vehicle) (aircraft) (vessel) when the alcohol concentration in (his) (her) (blood) (breath) was equal to or greater than (the applicable level prohibited under the law of the State in which the conduct occurred) (the level prescribed by the Secretary of _____) (0.10 grams or more of alcohol per (100 milliliters of blood) (210 liters of breath)), as shown by chemical analysis, no proof of drunkenness or impairment is required.

NOTE 15: Injury and proximate and intervening cause. If "causing injury" is alleged, an instruction that the accused's conduct was a proximate cause of the injury may be necessary. See United States v. Lingenfelter, 30 MJ 302 (CMA 1990). Both the first and third portions of the instruction below should be given whenever causation is in issue. The second portion of the instruction should also be given when the issue of intervening cause is raised. See United States v. Klatil, 28 CMR 582 (ABR 1959.)

To find the accused guilty of causing injury with the (vehicle) (aircraft) (vessel), you must be convinced beyond a reasonable doubt that the accused's conduct of (operating) (physically controlling) (being in actual physical control of) the (vehicle) (aircraft) (vessel) (while (impaired) (drunk)) (in a (reckless) (wanton) manner) (when the alcohol concentration in the accused's (blood) (breath) met or exceeded the level I previously mentioned) was a proximate cause of the injury. This means that the injury to (state the name of person allegedly injured) must have been the natural and probable result of the accused's conduct. A proximate cause does not have to be the only cause of the injury, nor must it be the immediate cause. However, it must be a direct or contributing cause that plays a material role, meaning an important role,

in bringing about the injury. If some other unforeseeable, independent, intervening event that did not involve the accused was the only cause that played any important part in bringing about the injury, then the accused's conduct was not the proximate cause of the alleged injury. In determining this issue, you must consider all relevant facts and circumstances, (including, but not limited to, (here the military judge may specify significant evidentiary factors bearing on the issues and indicate the respective contentions of counsel for both sides).)

(It is possible for the acts or omissions of two or more persons to contribute, each as a proximate cause, to the injury of another. If the accused's conduct was a proximate cause of the victim's injury, the accused will not be relieved of criminal responsibility because some other person's acts or omissions were also a proximate cause of the injury. (The burden is on the prosecution to establish beyond a reasonable doubt that there was no independent intervening cause.))

Unless you are satisfied beyond a reasonable doubt that the accused's conduct was the proximate cause of the injury, you may not find the accused guilty of the offense alleged. However, if you are satisfied beyond a reasonable doubt of all the elements except that of causing injury, then you may find the accused guilty of the offense by excepting the element of causing injury. I will provide you a Findings Worksheet later that contains language you may use to state such a finding.

NOTE 16: Contributory negligence. If the specification alleges injury to another and the victim's contributory negligence is raised by the evidence, the following instruction should be given:

There is evidence raising the issue of whether (state the name(s) of person(s) allegedly injured) failed to use reasonable care and caution for his/her/their own safety. If the accused's conduct as I earlier described it was a proximate cause of the injury, the accused is not relieved of criminal responsibility because the negligence of (state the name(s) of person(s) allegedly injured) may have contributed to his/her/their own injury. The conduct of the injured person(s) should be considered in

determining whether the accused's conduct was a proximate cause of the injury. Conduct is a proximate cause of injury, even if it is not the only cause, as long as it is a direct or contributing cause that plays a material role, meaning an important role, in bringing about the injury. Conduct is not a proximate cause of the injury if some other unforeseeable, independent, intervening event, which did not involve the accused's conduct, was the only cause that played any important part in bringing about the injury. The burden is upon the prosecution to prove beyond a reasonable doubt there was no independent, intervening cause.

3–36–1. DRUNK ON DUTY (ARTICLE 112)

a. MAXIMUM PUNISHMENT: BCD, TF, 9 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), was, (at/on board—location), on or about _____, found drunk while on duty as _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was on duty as (state the nature of the military duty); and

(2) That (he) (she) was found drunk while on this duty.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Drunk" means any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties.

NOTE: If further clarification is needed and if appropriate, add the following:

A person is "drunk" who is under the influence of an intoxicant so that the use of (his) (her) faculties is impaired. Such impairment did not exist unless the accused's conduct due to intoxicating (liquors) (drugs) was such as to create the impression within the minds of observers that (he) (she) was unable to act like a normal, rational person.

("Liquor" includes any alcoholic beverage.)

"On duty" means routine duties or details in garrison, at a station, or in the field. It does not mean those times when the accused is "off duty."

(In an area of active hostilities, the circumstances may be such that all members of a command may properly be considered as being continuously on duty within the meaning of this Article.)

(An officer of the day and members of the guard are on duty during their entire tour within the meaning of this Article.)

(Commanders are constantly on duty when in the actual exercise of command.)

3–37–1. DRUGS—WRONGFUL POSSESSION—WITH INTENT TO DISTRIBUTE (ARTICLE 112a)

a. MAXIMUM PUNISHMENT:

(1) Wrongful possession:

(a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: DD, TF, 5 years, E-1.

(b) Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances: DD, TF, 2 years, E-1.

(2) With intent to distribute:

(a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: DD, TF, 15 years, E-1.

(b) Phenobarbital and Schedule IV and V controlled substances: DD, TF, 10 years, E-1.

(3) When aggravating circumstances are alleged: Increase the maximum confinement by 5 years.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, wrongfully possess _____ (grams) (ounces) (pounds) (_____) of _____ (a Schedule (_____) controlled substance), (with the intent to distribute the said controlled substance) (while on duty as a sentinel or lookout) (while (on board a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit: _____) (while receiving special pay under 37 USC Section 310) (during time of war).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused possessed _____ (grams) (ounces) (pounds) (_____), more or less, of (_____) (a Schedule __ controlled substance);

(2) That the accused actually knew (he) (she) possessed the substance;

(3) That the accused actually knew that the substance (he) (she) possessed was (_____) (or of a contraband nature); (and)

(4) That the possession by the accused was wrongful; [and]

NOTE 1: Intent to distribute alleged. Give the 5th element below if intent to distribute was alleged:

[(5)] That the possession was with the intent to distribute [and]

NOTE 2: Aggravating circumstance alleged. If one of the aggravating factors in Article 112a is pled, the military judge must also instruct on that aggravating factor as an element:

[(5) or (6)] That at the time the accused possessed the substance as alleged, (it was a time of war) (the accused was (on duty as a sentinel or lookout) (on board a vessel or aircraft used by or under the control of the armed forces) (in or at a missile launch facility used by the armed forces or under the control of the armed forces) (receiving special pay under 37 U.S. Code section 310)).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Possess" means to exercise control of something. Possession may be direct physical custody, like holding an item in one's hand, or it may be constructive, as in the case of a person who hides an item in a locker or car to which that person may return to retrieve it. Possession inherently includes the power or authority to preclude control by others. It is possible, however, for more than one person to possess an item simultaneously, as when several people share control of an item.

To be punishable under Article 112a, possession of a controlled substance must be wrongful. Possession of a controlled substance is wrongful if it is without legal justification or authorization. (Possession of a controlled substance is not wrongful if such act or acts are: (a) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession), (or) (b) done by authorized personnel in the performance of medical duties.) Possession of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.

Knowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances (including, but not limited to _____). However, the drawing of this inference is not required.

NOTE 3: Knowledge of presence of the substance in issue. When the evidence raises the issue whether the accused knew of the presence of the substance, the following instruction is appropriate:

The accused must be aware of the presence of the substance at the time of possession. A person who possesses a (package) (suitcase) (container) (item of clothing) (_____) without knowing that it actually contains (_____) (a controlled substance) is not guilty of wrongful possession of (_____) (a controlled substance).

NOTE 4: Knowledge of the nature of the substance in issue. When the evidence raises the issue whether the accused knew the exact nature of the substance, the following instructions are appropriate:

It is not necessary that the accused was aware of the exact identity of the contraband substance. The knowledge requirement is satisfied if the accused knew the substance was prohibited. Similarly, if the accused believes the substance to be a contraband substance, such as (cocaine) (_____), when in fact it is (heroin) (_____), the accused had sufficient knowledge to satisfy that element of the offense.

(A contraband substance is one that is illegal to possess.)

However, a person who possesses (cocaine) (_____), but actually believes it to be (sugar) (_____), is not guilty of wrongful possession of (cocaine) (_____).

NOTE 5: Missile launch facility. If it is alleged that the substance was possessed at a "missile launch facility," the following instruction should be given:

A "missile launch facility" includes the place from which missiles are fired and launch control facilities from which the launch of a missile is initiated or controlled after launch.

NOTE 6: Intent to distribute alleged. If intent to distribute is alleged, give the following instruction concerning distribution:

"Distribute" means to deliver to the possession of another. "Deliver" means the actual, constructive, or attempted transfer of an item. While a transfer of a controlled substance may have been intended or made or

attempted in exchange for money or other property or a promise of payment, proof that a commercial transaction was intended is not required.

An intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: (possession of a quantity of substance in excess of that which one would be likely to have for personal use) (market value of the substance) (the manner in which the substance is packaged) (or) (that the accused is not a user of the substance). On the other hand, evidence that the accused is (addicted to) (or) (a heavy user of) the substance may tend to negate an inference of intent to distribute. The drawing of any inference is not required.

NOTE 7: "Deliberate avoidance" raised. The following instruction should be given when the issue of "deliberate avoidance" as discussed in United States v. Newman, 14 MJ 474 (CMA 1983) is raised:

I have instructed you that the accused must have known that the substance (he) (she) possessed was (_____) or of a contraband nature. You may not find the accused guilty of this offense unless you believe beyond a reasonable doubt that the accused actually knew (he) (she) possessed (_____) or a substance of a contraband nature, and that the accused actually knew of the substance's presence.

The accused may not, however, willfully and intentionally remain ignorant of a fact important and material to the accused's conduct in order to escape the consequences of criminal law. Therefore, if you have a reasonable doubt that the accused actually knew that the substance (he) (she) possessed was (_____) or of a contraband nature, or if you have a reasonable doubt that the accused actually knew that (_____) or a substance of a contraband nature was in (his) (her) (vehicle) (_____), but you are nevertheless satisfied beyond a reasonable doubt that:

a. The accused did not know for sure that the substance was not (_____) or of a contraband nature and that the accused did not

know for sure that the substance was not located in (his) (her) (vehicle) (_____);

b. The accused was aware that there was a high probability that the substance was (_____) or of a contraband nature and that it was located in (his/her) (vehicle) (_____); and

c. The accused deliberately and consciously tried to avoid learning that, in fact, the substance was (_____) or of a contraband nature and that it was located in (his) (her) (vehicle) (_____), then you may treat this as the deliberate avoidance of positive knowledge. Such deliberate avoidance of positive knowledge is the equivalent of knowledge.

In other words, you may find that the accused had the required knowledge if you find either (1) that the accused actually knew the substance (he) (she) possessed was _____) or of a contraband nature and the accused knew of its presence, or (2) deliberately avoided that knowledge as I have defined that term for you.

I emphasize that knowledge cannot be established by mere negligence, foolishness, or even stupidity on the part of the accused. The burden is on the prosecution to prove every element of this offense, including that the accused actually knew that the substance (he) (she) possessed was (_____) or of a contraband nature and that the substance was present. Consequently, unless you are satisfied beyond a reasonable doubt that the accused either (1) had actual knowledge that the substance was (_____) or of a contraband nature and that it was present, or (2) deliberately avoided that knowledge, as I have defined that term, then you must find the accused not guilty.

NOTE 8: Exceptions to wrongfulness. The burden of going forward with evidence with respect to any exception is upon the person claiming its benefit. If the evidence presented raises such an issue, then the burden of proof is upon the United States to establish beyond a reasonable doubt that the possession was wrongful. See United States v. Cuffee, 10 MJ 381 (CMA 1981). Therefore, a carefully tailored instruction substantially in the following terms should be given:

Evidence has been introduced raising an issue of whether the accused's possession of (heroin) (cocaine) (marijuana) (_____) was wrongful in light of the fact that (the substance had been duly prescribed for the accused by a physician and the prescription had not been obtained by fraud) (the accused possessed it in the performance of (his) (her) duty) (_____). In determining this issue, you must consider all relevant facts and circumstances, including, (but, not limited to _____). The burden is upon the prosecution to establish the accused's guilt beyond a reasonable doubt. Unless you are satisfied beyond a reasonable doubt that the accused's possession of the substance was not (as a result of a properly obtained prescription duly prescribed for (him) (her) by a physician) (in the performance of (his) (her) duties) (_____), you may not find the accused guilty.

NOTE 9: Judicial notice as to nature of the substance. When the alleged controlled substance is one not listed in Article 112a, the military judge should take judicial notice of the relevant statute or regulation which makes the substance a controlled substance. MRE 201 and 201A set out the requirements for taking judicial notice. When judicial notice that the alleged substance is a scheduled controlled substance under the laws of the United States is taken (See United States v. Gould, 536 F.2d 216 (8th Cir. 1976)), an instruction substantially as follows should be given:

(_____) is a controlled substance under the laws of the United States.

NOTE 10: Other scheduled drugs. The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC section 801 et seq., containing the original Schedules I through V is updated and republished annually in the Code of Federal Regulations. See 21 CFR section 1308 et seq.

NOTE 11: Quantity in issue. If an issue arises concerning the amount of the controlled substance, the following instruction is applicable:

If all the other elements are proved beyond a reasonable doubt, but you are not convinced that the accused possessed the amount of _____ described in the specification, but you are satisfied beyond a reasonable doubt that the accused possessed some lesser amount of _____, you may, nevertheless, reach a finding of guilty. However, you are required to modify the specification by exceptions and substitutions, so that it properly reflects your finding. You may eliminate

the quantity referred to in the specification and substitute for it the word "some" or any lesser quantity.

NOTE 12: Aggravating circumstances. If one of the aggravating factors is pled and there is an issue concerning the location or the conditions of the aggravating factor, an exceptions and substitutions instruction like the one in NOTE 11 above should be given. See United States v. Pitt, 35 MJ 478 (CMA 1992) when intent to distribute while on duty as a sentinel is alleged.

NOTE 1 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is normally applicable. The circumstantial evidence instruction on intent is normally applicable if intent to distribute is alleged. If an issue of innocent possession on the grounds of ignorance or mistake of fact concerning the presence or nature of the substance is raised, Instruction 5-11, Ignorance or Mistake of Fact or Law in Drug Offenses, should be given.

e. REFERENCES: 21 USC section 801-971; 21 CFR section 1308 (1 April 2000) (Caution: This CFR changes frequently.); MRE 201 and 201A; United States v. Newman, 14 MJ 474 (CMA 1983); United States v. Ratleff, 34 MJ 80 (CMA 1992); United States v. Mance, 26 MJ 244 (CMA 1988), *cert. denied*, 488 U.S. 942 (1988); United States v. Pitt, 35 MJ 478 (CMA 1992).

3–37–2. DRUGS—WRONGFUL USE (ARTICLE 112a)

a. MAXIMUM PUNISHMENT:

(1) Amphetamine, cocaine, heroin, lysergic acid diethylamide, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: DD, TF, 5 years, E-1.

(2) Marijuana, phenobarbital, and Schedule IV and V controlled substances: DD, TF, 2 years, E-1.

(3) When aggravating circumstances are alleged: Increase maximum confinement by 5 years.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully use _____, (a schedule _____) (controlled substance) (while on duty as a sentinel or lookout) (while (on board a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit: _____) (while receiving special pay under 37 U.S.C. Section 310) (during time of war).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused used _____ (a Schedule ___ controlled substance);

(2) That the accused actually knew (he) (she) used the substance;

(3) That the accused actually knew that the substance (he) (she) used was (_____) (or of a contraband nature); (and)

(4) That the use by the accused was wrongful; [and]

NOTE 1: Aggravating circumstance alleged. If one of the aggravating factors in Article 112a is pled, the military judge must also instruct on that aggravating factor as an element:

[(5)] That at the time the accused used the substance as alleged, (it was a time of war) (the accused was (on duty as a sentinel or lookout) (on board a vessel or aircraft used by or under the control of the armed forces) (in or at a missile launch facility used by the armed forces or under the control of the armed forces) (receiving special pay under 37 U.S. Code section 310).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Use" means the administration, ingestion, or physical assimilation of a drug into one's body or system. "Use" includes such acts as smoking,

sniffing, eating, drinking, or injecting. To be punishable under Article 112a, use of a controlled substance must be wrongful. Use of a controlled substance is wrongful if it is without legal justification or authorization. (Use of a controlled substance is not wrongful if such act or acts are: (a) done pursuant to legitimate law enforcement activities (for example, an informant who is forced to use drugs as part of an undercover operation to keep from being discovered is not guilty of wrongful use); (or) (b) done by authorized personnel in the performance of medical duties or experiments.) Use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.

Knowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances (including but not limited to _____). (You may infer from the presence of (_____) in the accused's urine that the accused knew (he) (she) used (_____).) However, the drawing of any inference is not required.

NOTE 2: Knowledge of the presence of the substance in issue. When the evidence raises the issue whether the accused knew of the presence of the substance allegedly used, the following instruction is appropriate:

The accused may not be convicted of the use of a controlled substance if the accused did not know (he) (she) was actually using the substance. The accused's use of the controlled substance must be knowing and conscious. For example, if a person places a controlled substance into the accused's (drink) (food) (cigarette) (_____) without the accused's becoming aware of the substance's presence, then the accused's use was not knowing and conscious.

NOTE 3: Knowledge of the nature of the substance in issue. When the evidence raises the issue whether the accused knew the exact nature of the substance, the following instructions are appropriate:

It is not necessary that the accused was aware of the exact identity of the contraband substance. The knowledge requirement is satisfied if the accused knew the substance was prohibited. Similarly, if the accused

believes the substance to be a contraband substance, such as (cocaine) (_____), when in fact it is (heroin) (_____), the accused had sufficient knowledge to satisfy that element of the offense.

(A contraband substance is one that is illegal to use.)

However, a person who uses (cocaine) (_____), but actually believes it to be (sugar) (_____), is not guilty of wrongful use of (cocaine) (_____).

NOTE 4: Missile launch facility. If it is alleged that the substance was used at a "missile launch facility," the following instruction should be given:

A "missile launch facility" includes the place from which missiles are fired and launch control facilities from which the launch of a missile is initiated or controlled after launch.

NOTE 5: "Deliberate avoidance" raised. The following instruction should be given when the issue of "deliberate avoidance" as discussed in United States v. Newman, 14 MJ 474 (CMA 1983) is raised:

I have instructed you that the accused must have known that the substance (he) (she) used was (_____) or of a contraband nature. You may not find the accused guilty of this offense unless you believe beyond a reasonable doubt that the accused actually knew that (he) (she) used (_____) or a substance of a contraband nature.

The accused may not, however, willfully and intentionally remain ignorant of a fact important and material to the accused's conduct in order to escape the consequences of criminal law. Therefore, if you have a reasonable doubt that the accused actually knew that the substance (he) (she) used was (_____) or of a contraband nature, but you are nevertheless satisfied beyond a reasonable doubt that:

a. The accused did not know for sure that the substance was not (_____) or of a contraband nature;

b. The accused was aware that there was a high probability that the substance was (_____) or of a contraband nature; and

c. The accused deliberately and consciously tried to avoid learning that, in fact, the substance was (_____) or of a contraband nature, then you may treat this as the deliberate avoidance of positive knowledge. Such deliberate avoidance of positive knowledge is the equivalent of knowledge.

In other words, you may find that the accused had the required knowledge if you find either that the accused actually knew the substance (he) (she) used was (_____) or of a contraband nature, or deliberately avoided that knowledge as I have just defined that term for you.

I emphasize that knowledge cannot be established by mere negligence, foolishness, or even stupidity on the part of the accused. The burden is on the prosecution to prove every element of this offense, including that the accused actually knew that the substance (he) (she) used was (_____) or of a contraband nature. Consequently, unless you are satisfied beyond a reasonable doubt that the accused either had actual knowledge that the substance was (_____) or of a contraband nature, or that the accused deliberately avoided that knowledge, as I have defined that term, then you must find the accused not guilty.

NOTE 6: Exceptions to wrongfulness. The burden of going forward with evidence with respect to any exception is upon the person claiming its benefit. If the evidence presented raises such an issue, then the burden of proof is upon the United States to establish beyond a reasonable doubt that the use was wrongful. See United States v. Cuffee, 10 MJ 381 (CMA 1981). Therefore, a carefully tailored instruction substantially in the following terms should be given:

Evidence has been introduced raising an issue of whether the accused's use of (heroin) (cocaine) (marijuana) (_____) was wrongful in light of the fact that (the accused used it in the performance of (his/her) duty) (the substance had been duly prescribed by a physician and the prescription had not been obtained by fraud (_____). This raises the issue of innocent use. In determining this issue, you must consider all relevant facts and circumstances, (including, but not limited to _____). The burden is on the prosecution to establish the

accused's guilt beyond a reasonable doubt. Unless you are satisfied beyond a reasonable doubt that the accused's use of the substance was not (in the performance of (his) (her) duties) (as a result of a properly obtained prescription duly prescribed for the accused by a physician) (_____), you may not find the accused guilty.

NOTE 7: Judicial notice as to nature of the substance. When the alleged controlled substance is one not listed in Article 112a, the military judge should take judicial notice of the relevant statute or regulation which makes the substance a controlled substance. MRE 201 and 201A set out the requirements for taking judicial notice. When judicial notice that the alleged substance is a scheduled controlled substance under the laws of the United States is taken (See United States v. Gould, 536 F.2d 216 (8th Cir. 1976)), an instruction substantially as follows should be given:

(_____) is a controlled substance under the laws of the United States.

NOTE 8: Regulatory defects in collection of urinalysis samples. When the evidence reflects "technical" deviations from governing regulations which establish procedures for collecting, transmitting, or testing urine samples, the following instruction may be appropriate. United States v. Pollard, 27 MJ 376 (CMA 1989). Military Judges, however, should exclude drug test results if there has been a substantial violation of regulations intended to assure reliability of the testing procedures. See United States v. Strozier, 31 MJ 283 (CMA 1990).

Evidence has been introduced that the government did not strictly comply with all aspects of (Army Regulation 600-85) (_____) governing how urine samples are to be (collected) (transmitted) (and) (tested). In order to convict the accused, the evidence must establish the urine sample originated from the accused and tested positive for the presence of (_____) without adulteration by any intervening agent or cause. Deviations from governing regulations, or any other discrepancy in the processing or handling of the accused's urine sample, may be considered by you in determining if the evidence is sufficiently reliable to support a vote for conviction.

NOTE 9: Other scheduled drugs. The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC section 801-971, containing the original Schedules I through V is updated and republished annually in the Code of Federal Regulations. See 21 CFR section 1308.

NOTE 10: Aggravating circumstances. If one of the aggravating factors is pled and there is an issue concerning the location or the conditions of the aggravating factor, a tailored exceptions and substitutions instruction similar to the one contained in NOTE 11 for the offense of Wrongful Possession (Instruction 3-37-1) should be given.

NOTE 11: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is normally applicable. If an issue of innocent use on the grounds of ignorance or mistake of fact concerning the presence or nature of the substance is raised, Instruction 5-11-4, Ignorance or Mistake of Fact - Drug Offenses, should be given.

e. REFERENCES: 21 USC section 801-971; 21 CFR section 1308 (1 April 2000) (Caution: This CFR changes frequently.); MRE 201 and 201A; United States v. Harper, 22 MJ 157, 161 (CMA 1986); compare United States v. Murphy, 23 MJ 310, 312 (CMA 1987) (distinguishing Harper) with United States v. Mance, 26 MJ 244 (CMA 1988), *cert. denied* 488 U.S. 942 (1988); United States v. Newman, 14 MJ 474 (CMA 1983); United States v. Pollard, 27 MJ 376 (CMA 1989); United States v. Strozier, 31 MJ 283 (CMA 1990).

3–37–3. DRUGS, WRONGFUL DISTRIBUTION (ARTICLE 112a)

a. MAXIMUM PUNISHMENT:

(1) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: DD, TF, 15 years, E-1.

(2) Phenobarbital and Schedule IV and V controlled substances: DD, TF, 10 years, E-1.

(3) When aggravating circumstances are alleged: Increase maximum confinement by 5 years.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, wrongfully distribute _____ (grams) (ounces) (pounds) (_____) of _____ (a schedule (_____) controlled substance) (while on duty as a sentinel or lookout) (while (on board a vessel/ aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit: _____) (while receiving special pay under 37 USC Section 310) (during time of war).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused distributed _____ (grams) (ounces) (pounds) (_____), more or less of (_____) (a Schedule ___ controlled substance);

(2) That the accused actually knew (he) (she) distributed the substance;

(3) That the accused actually knew that the substance (he) (she) distributed was (_____) (or of a contraband nature); (and)

(4) That the distribution by the accused was wrongful; [and]

NOTE 1: Aggravating circumstance alleged. If one of the aggravating factors in Article 112a is pled, the military judge must also instruct on that aggravating factor as an element:

[(5)] That at the time the accused distributed the substance as alleged, (it was a time of war) (the accused was (on duty as a sentinel or lookout) (on board a vessel or aircraft used by or under the control of the armed forces) (in or at a missile launch facility used by the armed forces or under the control of the armed forces) (receiving special pay under 37 U.S. Code section 310)).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Distribute" means to deliver to the possession of another. " "Deliver" means the actual, constructive, or attempted transfer of an item. While a transfer of (_____) (a controlled substance) may have been made or attempted in exchange for money or other property or a promise of payment, proof of a commercial transaction is not required.

To be punishable under Article 112a, distribution of a controlled substance must be wrongful. Distribution of a controlled substance is wrongful if it is without legal justification or authorization. (Distribution of a controlled substance is not wrongful if such act or acts are: (a) done pursuant to legitimate law enforcement activities (for example, an informant who delivers drugs as part of an undercover operation is not guilty of wrongful distribution); (or) (b) done by authorized personnel in the performance of medical duties.) Distribution of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.

Knowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances including, but not limited to _____. However, the drawing of any inference is not required.

NOTE 2: <u>Knowledge of the presence of the substance in issue</u>. When the evidence raises the issue whether the accused knew of the presence of the substance allegedly distributed, the following instruction is appropriate:

The accused must be aware of the presence of the substance at the time of the distribution. A person who delivers a (package) (suitcase) (container) (item of clothing) (_____) without knowing that it actually contains (_____) (a controlled substance) is not guilty of wrongful distribution of (_____) (a controlled substance).

NOTE 3: <u>Knowledge of the nature of the substance in issue</u>. When the evidence raises the issue whether the accused knew the exact nature of the substance, the following instructions are appropriate:

It is not necessary that the accused was aware of the exact identity of the contraband substance. The knowledge requirement is satisfied if the accused knew the substance was prohibited. Similarly, if the accused believes the substance to be a contraband substance, such as (cocaine) (_____), when in fact it is (heroin) (_____), the accused had sufficient knowledge to satisfy that element of the offense.

(A contraband substance is one that is illegal to distribute.)

However, a person who distributes (cocaine) (_____), but actually believes it to be (sugar) (_____), is not guilty of wrongful distribution of (cocaine) (_____).

NOTE 4: Missile launch facility. If it is alleged that the substance was distributed at a "missile launch facility," the following instruction should be given:

A "missile launch facility" includes the place from which missiles are fired and launch control facilities from which the launch of a missile is initiated or controlled after launch.

NOTE 5: "Deliberate avoidance" raised. The following instruction should be given when the issue of "deliberate avoidance" as discussed in United States v. Newman, 14 MJ 474 (CMA 1983) is raised:

I have instructed you that the accused must have known that the substance (he) (she) distributed was (_____) or of a contraband nature. You may not find the accused guilty of this offense unless you believe beyond a reasonable doubt that the accused actually knew that (he) (she) distributed (_____) or a substance of a contraband nature.

The accused may not, however, willfully and intentionally remain ignorant of a fact important and material to the accused's conduct in order to escape the consequences of criminal law. Therefore, if you have a reasonable doubt that the accused actually knew that the substance (he) (she) distributed was (_____) or of a contraband nature, but you are nevertheless satisfied beyond a reasonable doubt that:

a. The accused did not know for sure that the substance was not (_____) or of a contraband nature;

b. The accused was aware that there was a high probability that the substance was (_____) or of a contraband nature; and

c. The accused deliberately and consciously tried to avoid learning that, in fact, the substance was (_____) or of a contraband nature, then you may treat this as the deliberate avoidance of positive knowledge. Such deliberate avoidance of positive knowledge is the equivalent of knowledge.

In other words, you may find that the accused had the required knowledge if you find either that the accused actually knew the substance (he) (she) distributed was (_____) or of a contraband nature, or deliberately avoided that knowledge as I have just defined that term for you.

I emphasize that knowledge cannot be established by mere negligence, foolishness, or even stupidity on the part of the accused. The burden is on the prosecution to prove every element of this offense, including that the accused actually knew that the substance (he) (she) distributed was (_____) or of a contraband nature. Consequently, unless you are satisfied beyond a reasonable doubt that the accused either had actual knowledge that the substance was (_____) or of a contraband nature, or that the accused deliberately avoided that knowledge, as I have defined that term, then you must find the accused not guilty.

NOTE 6: Exceptions to wrongfulness. The burden of going forward with evidence with respect to any exception is upon the person claiming its benefit. If the evidence presented raises such an issue, then the burden of proof is upon the United States to establish beyond a reasonable doubt that the distribution was wrongful. See United States v. Cuffee, 10 MJ 381 (CMA 1981). Therefore, a carefully tailored instruction substantially in the following terms should be given:

Evidence has been introduced raising an issue of whether the accused's distribution of (heroin) (cocaine) (marijuana) (_____) was wrongful in light of the fact that (the accused distributed it in the performance of

(his) (her) duty) (_____). In determining this issue, you must consider all relevant facts and circumstances, including, but not limited to (_____). The burden is on the prosecution to establish the accused's guilt beyond a reasonable doubt. Unless you are satisfied beyond a reasonable doubt that the accused's distribution of the substance was not (in the performance of (his) (her) duties) (_____), you may not find the accused guilty.

NOTE 7: Judicial notice as to nature of the substance. When the alleged controlled substance is one not listed in Article 112a, the military judge should take judicial notice of the relevant statute or regulation which makes the substance a controlled substance. MRE 201 and 201A set out the requirements for taking judicial notice. When judicial notice that the alleged substance is a scheduled controlled substance under the laws of the United States is taken (See United States v. Gould, 536 F.2d 216 (8th Cir. 1976)), an instruction substantially as follows should be given:

(_____) is a controlled substance under the laws of the United States.

NOTE 8: Other scheduled drugs. The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC section 801-971, containing the original Schedules I through V is updated and republished annually in the Code of Federal Regulations. See 21 CFR section 1308 (28 Sep 06).

NOTE 9: Quantity in issue. If an issue arises concerning the amount of the controlled substance, the following instruction is applicable:

If all the other elements are proved beyond a reasonable doubt, but you are not convinced that the accused distributed the amount of _____ described in the specification, but you are satisfied beyond a reasonable doubt that the accused distributed some lesser amount of _____, you may, nevertheless, reach a finding of guilty. However, you are required to modify the specification by exceptions and substitutions, so that it properly reflects your finding. You may eliminate the quantity referred to in the specification and substitute for it the word "some" or any lesser quantity.

NOTE 10: Aggravating circumstances. If one of the aggravating factors is pled and there is an issue concerning the location or the conditions of the aggravating factor, an exceptions and substitutions instruction like the one in NOTE 9 above should be given.

NOTE 11: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is normally applicable. If an issue of innocent distribution on the grounds of ignorance or mistake of fact concerning the presence or nature of the substance is raised, Instruction 5-11-4, Ignorance or Mistake of Fact - Drug Offenses, should be given.

e. REFERENCES: 21 USC section 801-971; 21 CFR section 1308 (1 April 2000). (Caution: This CFR changes frequently.); MRE 201 and 201A; United States v. Mance, 26 MJ 244 (CMA 1988), *cert. denied* 488 U.S. 942 (1988); United States v. Crumley, 31 MJ 21 (CMA 1990); United States v. Newman, 14 MJ 474 (CMA 1983); United States v. Ratleff, 34 MJ 80 (CMA 1992).

3–37–4. DRUGS—WRONGFUL INTRODUCTION—WITH INTENT TO DISTRIBUTE (ARTICLE 112a)

a. MAXIMUM PUNISHMENT:

(1) Wrongful introduction.

(a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: DD, TF, 5 years, E-1.

(b) Phenobarbital, and Schedule IV and V controlled substances: DD, TF, 2 years, E-1.

(2) Wrongful introduction with intent to distribute.

(a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: DD, TF, 15 years, E-1.

(b) Phenobarbital and Schedule IV and V controlled substances: DD, TF, 10 years, E-1.

(3) When aggravating circumstances are alleged: Increase maximum confinement by 5 years.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location) on or about _____, wrongfully introduce _____ (grams) (ounces) (pounds) (_____) of _____ (a schedule (_____) controlled substance) onto a vessel, aircraft, vehicle, or installation used by the armed forces or under control of the armed forces, to wit: _____ (with the intent to distribute the said controlled substance) (while on duty as a sentinel or lookout) (while receiving special pay under 37 USC Section 310) (during a time of war).

NOTE 1: Completeness of MCM form specification. The maximum punishment for this offense is set out in Para 37e, Part IV, MCM. The form specification in the MCM provides for neither a ""missile launch facility" nor "on board a vessel or aircraft" as an aggravating factor. Notwithstanding these omissions in the MCM form specification, when any Para 37e aggravating factor is pled, the military judge should instruct upon it. Appropriate instructions are contained elsewhere in this instruction. See NOTEs 3 and 5 infra and the instructions following those NOTEs.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused introduced _____ (grams) (ounces) (pounds) (_____), more or less, of (_____) (a Schedule ___ controlled substance) onto (an aircraft) (a vessel) (a vehicle) (an installation) (used by) (or) (under the control of) the armed forces, to wit: _____;

(2) That the accused actually knew (he) (she) introduced the substance;

(3) That the accused actually knew that the substance (he) (she) introduced was (_____) (or of a contraband nature); (and)

(4) That the introduction by the accused was wrongful; [and]

NOTE 2: <u>Intent to distribute alleged</u>. Give the 5th element below if intent to distribute was alleged:

[(5)] That the introduction was with the intent to distribute; [and]

NOTE 3: <u>Aggravating circumstance alleged</u>. If one of the aggravating factors in Article 112a is pled, the military judge must also instruct on that aggravating factor as an element.

[(5) or (6)] That at the time the accused introduced the substance as alleged, (it was a time of war) (the accused was (on duty as a sentinel or lookout) (on board a vessel or aircraft used by or under the control of the armed forces) (in or at a missile launch facility used by the armed forces or under the control of the armed forces) (receiving special pay under 37 U.S. Code section 310)).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Introduction" means to bring into or onto a military (unit) (base) (station) (post) (installation) (vessel) (vehicle) (aircraft).

To be punishable under Article 112a, introduction of a controlled substance must be wrongful. Introduction of a controlled substance is wrongful if it is without legal justification or authorization. (Introduction of a controlled substance is not wrongful if such act or acts are: (a) done pursuant to legitimate law enforcement activities (for example, when an informant introduces drugs as part of an undercover operation, that introduction is not wrongful) (or) (b) done by authorized personnel in the performance of medical duties.) Introduction of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.

Knowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding

circumstances including, but not limited to _____. However, you are not required to draw these inferences.

NOTE 4: Knowledge of the presence of the substance in issue. When the evidence raises the issue whether the accused knew of the introduction of the substance, the following instruction is appropriate:

The accused must be aware of the presence of the substance at the time of the introduction. A person who delivers a (package) (suitcase) (container) (item of clothing) (_____) onto ((an aircraft) (a vessel) (an installation)) ((used by) (or) (under the control of)) the armed forces without knowing that it actually contains (_____) (a controlled substance) is not guilty of wrongful introduction of (_____) (a controlled substance).

NOTE 5: Knowledge of the nature of the substance in issue. When the evidence raises the issue whether the accused knew the exact nature of the substance, the following instructions are appropriate:

It is not necessary that the accused was aware of the exact identity of the contraband substance. The knowledge requirement is satisfied if the accused knew the substance was prohibited. Similarly, if the accused believes the substance to be a contraband substance, such as (cocaine) (_____), when in fact it is (heroin) (_____), the accused had sufficient knowledge to satisfy that element of the offense.

(A contraband substance is one that is illegal to introduce.)

However, a person who introduces (cocaine) (_____), but actually believes it to be (sugar) (_____), is not guilty of wrongful introduction of (cocaine) (_____).

NOTE 6: Missile launch facility. If it is alleged that the offense occurred at a "missile launch facility," the following instruction should be given:

A "missile launch facility" includes the place from which missiles are fired and launch control facilities from which the launch of a missile is initiated or controlled after launch.

NOTE 7: Intent to distribute alleged. If intent to distribute is alleged, give the following instruction concerning distribution:

"Distribute" means to deliver to the possession of another. "Deliver" means the actual, constructive, or attempted transfer of an item. While a transfer of a controlled substance may have been intended or made or attempted in exchange for money or other property or a promise of payment, proof that a commercial transaction was intended is not required.

An intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: (introduction of a quantity of substance in excess of that which one would be likely to have for personal use) (market value of the substance) (the manner in which the substance is packaged) (or) (that the accused is not a user of the substance.) On the other hand, evidence that the accused is (addicted to) (or) (a heavy user of the substance) may tend to negate an inference of intent to distribute. The drawing of any inference is not required.

NOTE 8: "Deliberate avoidance" raised. The following instruction should be given when the issue of "deliberate avoidance" as discussed in United States v. Newman, 14 MJ 474 (CMA 1983) is raised:

I have instructed you that the accused must have known that the substance (he) (she) introduced was (_____) or of a contraband nature. You may not find the accused guilty of this offense unless you believe beyond a reasonable doubt that the accused actually knew that (he) (she) introduced (_____) or a substance of a contraband nature.

The accused may not, however, willfully and intentionally remain ignorant of a fact important and material to the accused's conduct in order to escape the consequences of criminal law. Therefore, if you have a reasonable doubt that the accused actually knew that the substance (he) (she) introduced was (_____) or of a contraband nature, but you are nevertheless satisfied beyond a reasonable doubt that:

a. The accused did not know for sure that the substance was not (_____) or of a contraband nature;

b. The accused was aware that there was a high probability that the substance was (_____) or of a contraband nature; and

c. The accused deliberately and consciously tried to avoid learning that, in fact, the substance was (_____) or of a contraband nature, then you may treat this as the deliberate avoidance of positive knowledge. Such deliberate avoidance of positive knowledge is the equivalent of knowledge.

In other words, you may find that the accused had the required knowledge if you find either that the accused actually knew the substance (he) (she) introduced was (_____) or of a contraband nature, or deliberately avoided that knowledge as I have just defined that term for you.

I emphasize that knowledge cannot be established by mere negligence, foolishness, or even stupidity on the part of the accused. The burden is on the prosecution to prove every element of this offense, including that the accused actually knew that the substance (he) (she) introduced was (_____) or of a contraband nature. Consequently, unless you are satisfied beyond a reasonable doubt that the accused either had actual knowledge that the substance was (_____) or of a contraband nature, or that the accused deliberately avoided that knowledge, as I have defined that term, then you must find the accused not guilty.

NOTE 9: Exceptions to wrongfulness. The burden of going forward with evidence with respect to any exception is upon the person claiming its benefit. If the evidence presented raises such an issue, then the burden of proof is upon the United States to establish beyond a reasonable doubt that the introduction was wrongful. See United States v. Cuffee, 10 MJ 381 (CMA 1981). Therefore, a carefully tailored instruction substantially in the following terms should be given:

Evidence has been introduced raising an issue of whether the accused's introduction of (heroin) (cocaine) (marijuana) (_____) was wrongful in light of the fact that (the substance had been duly prescribed for the

accused by a physician and the prescription had not been obtained by fraud) (the accused introduced it in the performance of (his) (her) duty) (_____). In determining this issue, you must consider all relevant facts and circumstances, (including, but not limited to _____). The burden is upon the prosecution to establish the accused's guilt beyond a reasonable doubt. Unless you are satisfied beyond a reasonable doubt that the accused's introduction of the substance was not (as a result of a properly obtained prescription duly prescribed for (him) (her) by a physician) (in the performance of (his) (her) duties) (_____), you may not find the accused guilty.

NOTE 10: Judicial notice as to nature of the substance. When the alleged controlled substance is one not listed in Article 112a, the military judge should take judicial notice of the relevant statute or regulation which makes the substance a controlled substance. MRE 201 and 201A set out the requirements for taking judicial notice. When judicial notice that the alleged substance is a scheduled controlled substance under the laws of the United States is taken (See United States v. Gould, 536 F.2d 216 (8th Cir. 1976)), an instruction substantially as follows should be given:

(_____) is a controlled substance under the laws of the United States.

NOTE 11: Other Scheduled drugs: Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC section 801-971, containing the original Schedules I through V is updated and republished annually in the Code of Federal Regulations. See 21 CFR section 1308 (1 April 2000).

NOTE 12: Quantity in issue. If an issue arises concerning the amount of the controlled substance, the following instruction is applicable:

If all the other elements are proved beyond a reasonable doubt, but you are not convinced that the accused introduced the amount of _____ described in the specification, but you are satisfied beyond a reasonable doubt that the accused introduced some lesser amount of _____, you may, nevertheless, reach a finding of guilty. However, you are required to modify the specification by exceptions and substitutions, so that it properly reflects your finding. You may eliminate the quantity referred to in the specification and substitute for it the word "some" or any lesser quantity.

NOTE 13: Aggravating circumstances. If one of the aggravating factors is pled and there is an issue concerning the location or the conditions of the aggravating factor, an exceptions and substitutions instruction like the one in NOTE 12 above should be given.

NOTE 14: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is normally applicable. A tailored circumstantial evidence instruction on intent is normally applicable if intent to distribute is alleged. If there is evidence the accused may have been ignorant of or mistaken about his/her presence on a military installation, or an issue of ignorance or mistake of fact concerning the presence or nature of the substance is raised, Instruction 5-11-4, Ignorance or Mistake—Drug Offenses, should be given.

e. REFERENCES: 21 USC section 801-971; 21 CFR section 1308 (1 April 2000). (Caution: This CFR changes frequently.); MRE 201 and 201A; United States v. Mance, 26 MJ 244 (CMA 1988), *cert. denied*, 488 U.S. 942 (1988); United States v. Ratleff, 34 MJ 80 (CMA 1992); United States v. Pitt, 35 MJ 478 (CMA 1992); United States v. Newman, 14 MJ 474 (CMA 1983); United States v. Thomas, 65 MJ 132 (CAAF 2007) (in order to be convicted of introduction of drugs onto a military installation under Article 112a, the accused must have actual knowledge that he/she was entering onto the installation).

3–37–5. DRUGS—WRONGFUL MANUFACTURE—WITH INTENT TO DISTRIBUTE (ARTICLE 112a)

a. MAXIMUM PUNISHMENT:

(1) Wrongful manufacture.

(a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: DD, TF, 5 years, E-1.

(b) Phenobarbital, and Schedule IV and V controlled substances: DD, TF, 2 years, E-1.

(2) With intent to distribute.

(a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: DD, TF, 15 years, E-1.

(b) Phenobarbital and Schedule IV and V controlled substances: DD, TF, 10 years, E-1.

(3) When aggravating circumstances are alleged. Increase maximum punishment by 5 years.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, wrongfully manufacture _____ (grams) (ounces) (pounds) (_____) of _____ (a schedule (_____) controlled substance), (with the intent to distribute the said controlled substance) (while on duty as a sentinel or lookout) (while (on board a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit: _____) (while receiving special pay under 37 USC Section 310) (during time of war).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused manufactured _____ (grams) (ounces) (pounds) (_____), more or less of (_____) (a Schedule _____ controlled substance);

(2) That the accused actually knew (he) (she) manufactured the substance;

(3) That the accused actually knew that the substance (he) (she) manufactured was (_____) (or of a contraband nature); (and)

(4) That the manufacture by the accused was wrongful; [and]

NOTE 1: Intent to distribute alleged. Give the 5th element below if intent to distribute was alleged:

[(5)] That the manufacture was with the intent to distribute.

NOTE 2: <u>Aggravating circumstance alleged</u>. If one of the aggravating factors in Article 112a is pled, the military judge must also instruct on that aggravating factor as an element:

[(5) or (6)] That at the time the accused manufactured the substance as alleged, (it was a time of war) (the accused was (on duty as a sentinel or lookout) (on board a vessel or aircraft used by or under the control of the armed forces) (in or at a missile launch facility used by the armed forces or under the control of the armed forces) (receiving special pay under 37 U.S. Code section 310)).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance, or labeling or relabeling of its container. The term "production," as used above, includes the planting, cultivating, growing, or harvesting of a drug or other substance.

To be punishable under Article 112a, manufacture of a controlled substance must be wrongful. Manufacture of a controlled substance is wrongful if it is without legal justification or authorization. (Manufacture of a controlled substance is not wrongful if such act or acts are: (a) done pursuant to legitimate law enforcement activities (or) (b) done by authorized personnel in the performance of medical duties.) Manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.

Knowledge by the accused of the manufacture of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances (including, but not limited to _____). However, the drawing of this inference is not required.

NOTE 3: Knowledge of presence of the substance in issue. When the evidence raises the issue whether the accused knew of the presence of the substance allegedly manufactured, the following instruction is appropriate:

The accused may not be convicted of the manufacture of a controlled substance if (he) (she) did not know (he) (she) was manufacturing the substance. The accused's manufacture must be knowing and conscious. For example, if a person ((produces) (prepares) (processes) (propagates) (compounds)) ((a controlled substance) (_____)) without actually becoming aware of the substance's presence, then the manufacture is not knowing and conscious.

NOTE 4: Knowledge of the nature of the substance in issue. When the evidence raises the issue whether the accused knew the exact nature of the substance, the following instructions are appropriate:

It is not necessary that the accused was aware of the exact identity of the contraband substance. The knowledge requirement is satisfied if the accused knew the substance was prohibited. Similarly, if the accused believes the substance to be a contraband substance, such as (cocaine) (_____), when in fact it is (heroin) (_____), the accused had sufficient knowledge to satisfy that element of the offense.

(A contraband substance is one that is illegal to manufacture.)

However, a person who manufactures (cocaine) (_____), but actually believes it to be (sugar) (_____), is not guilty of wrongful manufacture of (cocaine) (_____).

NOTE 5: Missile launch facility. If it is alleged that the substance was manufactured at a "missile launch facility," the following instruction should be given:

A "missile launch facility" includes the place from which missiles are fired and launch control facilities from which the launch of a missile is initiated or controlled after launch.

NOTE 6: Intent to distribute alleged. If intent to distribute is alleged, give the following instructions concerning distribution:

"Distribute" means to deliver to the possession of another. "Deliver" means the actual, constructive, or attempted transfer of an item. While a transfer of a controlled substance may have been intended or made or attempted in exchange for money or other property or a promise of payment, proof that a commercial transaction was intended is not required.

An intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: (manufacture of a quantity of substance in excess of that which one would be likely to have for personal use) (market value of the substance) (the manner in which the substance is packaged) (or) (that the accused is not a user of the substance.) On the other hand, evidence that the accused is (addicted to) (or) (a heavy user of) the substance may tend to negate an inference of intent to distribute. The drawing of any inference is not required.

NOTE 7: "Deliberate avoidance" raised. The following instruction should be given when the issue of "deliberate avoidance" as discussed in United States v. Newman, 14 MJ 474 (CMA 1983) is raised:

I have instructed you that the accused must have known that the substance (he) (she) manufactured was (_____) or of a contraband nature. You may not find the accused guilty of this offense unless you believe beyond a reasonable doubt that the accused actually knew that (he) (she) manufactured (_____) or a substance of a contraband nature.

The accused may not, however, willfully and intentionally remain ignorant of a fact important and material to the accused's conduct in order to escape the consequences of criminal law. Therefore, if you have a reasonable doubt that the accused actually knew that the substance (he) (she) manufactured was (_____) or of a contraband nature, but you are nevertheless satisfied beyond a reasonable doubt that:

a. The accused did not know for sure that the substance was not (_____) or of a contraband nature;

b. The accused was aware that there was a high probability that the substance was (_____) or of a contraband nature; and

c. The accused deliberately and consciously tried to avoid learning that, in fact, the substance was (_____) or of a contraband nature, then you may treat this as the deliberate avoidance of positive knowledge. Such deliberate avoidance of positive knowledge is the equivalent of knowledge. In other words, you may find that the accused had the required knowledge if you find either that the accused actually knew the substance (he) (she) manufactured was (_____) or of a contraband nature, or deliberately avoided that knowledge as I have just defined that term for you.

I emphasize that knowledge cannot be established by mere negligence, foolishness, or even stupidity on the part of the accused. The burden is on the prosecution to prove every element of this offense, including that the accused actually knew that the substance (he) (she) manufactured was (_____) or of a contraband nature. Consequently, unless you are satisfied beyond a reasonable doubt that the accused either had actual knowledge that the substance was (_____) or of a contraband nature, or that the accused deliberately avoided that knowledge, as I have defined that term, then you must find the accused not guilty.

NOTE 8: Exceptions to wrongfulness. The burden of going forward with evidence with respect to any exception is upon the person claiming its benefit. If the evidence presented raises such an issue, then the burden of proof is upon the United States to establish beyond a reasonable doubt that the manufacture was wrongful. See United States v. Cuffee, 10 MJ 381 (CMA 1981). Therefore, a carefully tailored instruction substantially in the following terms should be given:

Evidence has been introduced raising an issue of whether the accused's manufacture of (heroin) (cocaine) (marijuana) (_____) was wrongful in light of the fact that (the accused manufactured it in the performance of (his) (her) duty) (_____). In determining this issue, you must consider all relevant facts and circumstances, including, but not limited to (_____). The burden is on the prosecution to establish

the accused's guilt beyond a reasonable doubt. Unless you are satisfied beyond a reasonable doubt that the accused's manufacture of the substance was not (in the performance of (his) (her) duties) (_____), you may not find the accused guilty.

NOTE 9: Judicial notice as to nature of the substance. When the alleged controlled substance is one not listed in Article 112a, the military judge should take judicial notice of the relevant statute or regulation which makes the substance a controlled substance. MRE 201 and 201A set out the requirements for taking judicial notice. When judicial notice that the alleged substance is a scheduled controlled substance under the laws of the United States is taken (See United States v. Gould, 536 F.2d 216 (8th Cir. 1976)), an instruction substantially as follows should be given:

(_____) is a controlled substance under the laws of the United States.

NOTE 10: Other scheduled drugs. The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC section 801-971, containing the original Schedules I through V is updated and republished annually in the Code of Federal Regulations. See 21 CFR section 1308 (1 April 2000).

NOTE 11: Quantity in issue. If an issue arises concerning the amount of the controlled substance, the following instruction is applicable:

If all the other elements are proved beyond a reasonable doubt, but you are not convinced that the accused manufactured the amount of _____ described in the specification, but you are satisfied beyond a reasonable doubt that the accused manufactured some lesser amount of _____, you may, nevertheless, reach a finding of guilty. However, you are required to modify the specification by exceptions and substitutions, so that it properly reflects your finding. You may eliminate the quantity referred to in the specification and substitute for it the word "some" or any lesser quantity.

NOTE 12: Aggravating circumstances. If one of the aggravating factors is pled and there is an issue concerning the location or the conditions of the aggravating factor, an exceptions and substitutions instruction like the one in NOTE 11 above should be given.

NOTE 13: Other instructions. If an issue of innocent manufacture on the grounds of ignorance or mistake of fact concerning the presence or nature of the substance is raised, Instruction 5-11-4, Ignorance or Mistake of Fact or Law in Drug Offenses, should be given. Instruction 7-3, Circumstantial Evidence (Knowledge), is normally applicable. A tailored

circumstantial evidence instruction on intent is normally applicable if intent to distribute is alleged.

e. REFERENCES: 21 USC section 801-971; 21 CFR section 1308 (1 April 2000). (Caution: This CFR changes frequently.); MRE 201 and 201A; United States v. Newman, 14 MJ 474 (CMA 1983); United States v. Mance, 26 MJ 244 (CMA 1983), *cert. denied*, 488 U.S. (1988); United States v. Pitt, 35 MJ 478 (CMA 1992).

3–37–6. DRUGS—WRONGFUL IMPORTATION OR EXPORTATION (ARTICLE 112a)

a. MAXIMUM PUNISHMENT:

(1) Wrongful importation or exportation.

(a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: DD, TF, 15 years, E-1.

(b) Phenobarbital and Schedule IV and V controlled substances: DD, TF, 10 years, E-1.

(2) When aggravating circumstances are alleged: Increase maximum confinement by 5 years.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location) on or about _____, wrongfully (import) (export) _____ (grams) (ounces) (pounds) (_____) of _____ (a schedule (_____) controlled substance) (into the customs territory of) (from) the United States (while on board a vessel/aircraft used by the armed forces or under the control of the armed forces, to wit: _____) (during time of war).

NOTE 1: Completeness of MCM form specification. The maximum punishment for this offense is set out in Para 37e, Part IV, MCM. The MCM form specification provides for neither a "missile launch facility" nor "receiving special pay" as an aggravating factor. Notwithstanding these omissions in the MCM form specification, when any Para 37e aggravating factor is pled, the military judge should instruct upon it. Appropriate instructions are contained elsewhere in this instruction. See NOTEs 2 and 4 infra and the instructions following those NOTEs.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (imported into the customs territory of) (exported from) the United States _____ (grams) (ounces) (pounds) (_____), more or less, of (_____) (a Schedule ___ controlled substance);

(2) That the accused actually knew (he) (she) (imported) (exported) the substance;

(3) That the accused actually knew that the substance (he) (she) (imported) (exported) was (_____), (or a substance of a contraband nature); (and)

(4) That the (importation) (exportation) by the accused was wrongful; [and]

NOTE 2: <u>Aggravating circumstance alleged</u>. If one of the aggravating factors in Article 112a is pled, the military judge must also instruct on that aggravating factor as an element.

[(5)] That at the time the accused (imported) (exported) the substance as alleged, (it was a time of war) (the accused was (on duty as a sentinel or lookout) (on board a vessel or aircraft used by or under the control of the armed forces) (in or at a missile launch facility used by the armed forces or under the control of the armed forces) (receiving special pay under 37 U.S. Code section 310)).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Customs territory of the United States" includes only the States, the District of Columbia, and Puerto Rico.) To be punishable under Article 112a, (importation) (exportation) of a controlled substance must be wrongful. (Importation) (Exportation) of a controlled substance is wrongful if it is without legal justification or authorization. (Importation) (Exportation) of a controlled substance is not wrongful if such act or acts are: (a) done pursuant to legitimate law enforcement activities (for example, an informant who (imports) (exports) drugs as part of an undercover operation is not guilty of wrongful distribution); (or) (b) done by authorized personnel in the performance of medical duties.) (Importation) (Exportation) of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.

Knowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances (including, but not limited to _____). However, the drawing of this inference is not required.

NOTE 3: <u>Knowledge of the substance in issue</u>. When evidence raises the issue whether the accused knew of the importation or exportation of the substance, the following instruction is appropriate:

The accused must be aware of the presence of the substance at the time of the (importation) (exportation). A person who ((imports) (exports)) ((a package) (a suitcase) (a container) (an item of clothing) (_____))

without knowing that it actually contains (_____) (a controlled substance) is not guilty of wrongful (importation) (exportation) of (_____) (a controlled substance).

NOTE 4: Knowledge of the nature of the substance in issue. When the evidence raises the issue whether the accused knew the exact nature of the substance, the following instructions are appropriate:

It is not necessary that the accused was aware of the exact identity of the contraband substance. The knowledge requirement is satisfied if the accused knew the substance was prohibited. Similarly, if the accused believes the substance to be a contraband substance such as (cocaine) (_____) when in fact it is (heroin) (_____) the accused had sufficient knowledge to satisfy that element of the offense.

(A contraband substance is one that is illegal to (import) (export.))

However, a person who (imports) (exports) (cocaine) (_____), but actually believes it to be (sugar) (_____), is not guilty of wrongful (importation) (exportation) of (cocaine) (_____).

NOTE 5: Missile launch facility. If it is alleged that the offense occurred at a "missile launch facility," the following instruction should be given:

A "missile launch facility" includes the place from which missiles are fired and launch control facilities from which the launch of a missile is initiated or controlled after launch.

NOTE 6: "Deliberate avoidance" raised. The following instruction should be given when the issue of "deliberate avoidance" as discussed in United States v. Newman, 14 MJ 474 (CMA 1983) is raised:

I have instructed you that the accused must have known that the substance (he) (she) (imported) (exported) was (_____) or of a contraband nature. You may not find the accused guilty of this offense unless you believe beyond a reasonable doubt that the accused actually knew that (he) (she) (imported) (exported) (_____) or a substance of a contraband nature.

The accused may not, however, willfully and intentionally remain ignorant of a fact important and material to the accused's conduct in order to escape the consequences of criminal law. Therefore, if you have a reasonable doubt that the accused actually knew that the substance (he) (she) (imported) (exported) was (_____) or of a contraband nature, but you are nevertheless satisfied beyond a reasonable doubt that:

(a) The accused did not know for sure that the substance was not (_____) or of a contraband nature;

(b) The accused was aware that there was a high probability that the substance was (_____) or of a contraband nature; and

(c) The accused deliberately and consciously tried to avoid learning that, in fact, the substance was (_____) or of a contraband nature, then you may treat this as the deliberate avoidance of positive knowledge. Such deliberate avoidance of positive knowledge is the equivalent of knowledge.

In other words, you may find that the accused had the required knowledge if you find either that the accused actually knew the substance (he) (she) (imported) (exported) was (_____) or of a contraband nature, or deliberately avoided that knowledge as I have just defined that term for you.

I emphasize that knowledge cannot be established by mere negligence, foolishness, or even stupidity on the part of the accused. The burden is on the prosecution to prove every element of this offense, including that the accused actually knew that the substance (he) (she) (imported) (exported) was (_____) or of a contraband nature. Consequently, unless you are satisfied beyond a reasonable doubt that the accused either had actual knowledge that the substance was (_____) or of a contraband nature, or that the accused deliberately avoided that knowledge, as I have defined that term, then you must find the accused not guilty.

NOTE 7: Exceptions to wrongfulness. The burden of going forward with evidence with respect to any exception is upon the person claiming its benefit. If the evidence presented raises such an issue, then the burden of proof is upon the United States to establish beyond a reasonable doubt that the importation or exportation was wrongful. See United States v. Cuffee, 10 MJ 381 (CMA 1981). Therefore, a carefully tailored instruction substantially in the following terms should be given:

Evidence has been introduced raising an issue of whether the accused's (importation) (exportation) of (heroin) (cocaine) (marijuana) (_____) was wrongful in light of the fact that (the accused (imported) (exported) it in the performance of (his) (her) duty) (_____). In determining this issue, you must consider all relevant facts and circumstances, including, but not limited to (_____). The burden is upon the prosecution to establish the accused's guilt beyond a reasonable doubt. Unless you are satisfied beyond a reasonable doubt that the accused's (importation) (exportation) of the substance was not (in the performance of (his) (her) duties) (_____), you may not find the accused guilty.

NOTE 8: Judicial notice as to nature of the substance. When the alleged controlled substance is one not listed in Article 112a, the military judge should take judicial notice of the relevant statute or regulation which makes the substance a controlled substance. MRE 201 and 201A set out the requirements for taking judicial notice. When judicial notice that the alleged substance is a scheduled controlled substance under the laws of the United States is taken (See United States v. Gould, 536 F.2d 216 (8th Cir. 1976)), an instruction substantially as follows should be given:

(_____) is a controlled substance under the laws of the United States.

NOTE 9: Other scheduled drugs. The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC section 801-971, containing the original Schedules I through V is updated and republished annually in the Code of Federal Regulations. See 21 CFR section 1308 (1 April 2000).

NOTE 10: Quantity in issue. If an issue arises concerning the amount of the controlled substance, the following instruction is applicable:

If all the other elements are proved beyond a reasonable doubt, but you are not convinced that the accused (imported) (exported) the amount of _____ described in the specification, but you are satisfied beyond a reasonable doubt that the accused (imported) (exported) some lesser

amount of _____, you may, nevertheless, reach a finding of guilty. However, you are required to modify the specification by exceptions and substitutions, so that it properly reflects your finding. You may eliminate the quantity referred to in the specification and substitute for it the word "some" or any lesser quantity.

NOTE 11: Aggravating circumstances. If one of the aggravating factors is pled and there is an issue concerning the location or the conditions of the aggravating factor, an exceptions and substitutions instruction like the one in NOTE 10 above should be given.

NOTE 12: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is normally applicable. If an issue of innocent importation or exportation on the grounds of ignorance or mistake of fact concerning the presence or nature of the substance is raised, Instruction 5-11-4, Ignorance or Mistake of Fact or Law in Drug Offenses, should be given.

e. REFERENCES: 21 USC section 801-971; 21 CFR section 1308 (1 April 2000). (Caution: This CFR changes frequently.); MRE 201 and 201A; United States v. Mance, 26 MJ 244 (CMA 1988), *cert. denied*, 488 U.S. 942 (1988); United States v. Newman, 14 MJ 474 (CMA 1983).

3–38–1. MISBEHAVIOR OF SENTINEL OR LOOKOUT (ARTICLE 113)

a. MAXIMUM PUNISHMENT:

(1) In time of war: Death or other lawful punishment.

(2) While receiving special pay under 37 USC Section 310: DD, TF, 10 years, E-1.

(3) In all other circumstances: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), on or about _____ (a time of war) (at/on board—location), (while receiving special pay under 37 USC Section 310), being (posted) (on post) as a (sentinel) (lookout) (at warehouse no. 7) (on post no. 11) (for radar observation) (_____) [was found (drunk) (sleeping) upon his/her post] [did leave his/her post before he/she was regularly relieved].

c. ELEMENTS:

(1) That the accused was (posted) (on post) as a (sentinel) (lookout) (at) (on) (state the post alleged); (and)

(2) That (state the time and place alleged), (he) (she):

(a) (was found (drunk) (sleeping) while on (his) (her) post); or

(b) (left (his) (her) post before being regularly relieved), [and]

NOTE 1: Aggravating condition alleged. Add element (3) only if it is alleged that the accused was receiving special pay under 37 USC section 310:

[(3)] That the accused was receiving special pay under 37 USC section 310 at the time of alleged offense.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 2: Drunkenness alleged. If drunkenness is alleged, the following instruction is ordinarily applicable:

"Drunkenness" means any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties.

A person is drunk who is under the influence of an intoxicant so that the use of (his) (her) faculties is impaired. Such impairment did not exist unless the accused's conduct due to intoxicating (liquors) (drugs) was

such as to create the impression within the minds of observers that (he) (she) was unable to act like a normal, rational person.

NOTE 3: Sleeping on post alleged. If sleeping on post is alleged, the following instruction is ordinarily applicable:

Proof that the accused was in a deep sleep is not required. However, there must have been a condition of unconsciousness which is sufficient sensibly to impair the full exercise of the accused's mental and physical faculties. You must be convinced that the accused was actually asleep. Sleep is defined as a period of rest for the body and mind during which volition and consciousness are in partial or complete suspension and the bodily functions are partially allowed or suspended.

NOTE 4: Leaving post before relief alleged. The applicable portion of the following instruction may be given when the specification alleges that the accused left his or her post before being relieved, and when otherwise appropriate:

A (sentinel) (lookout) is posted if (he) (she) has taken (his) (her) post in accordance with proper instructions (whether or not formally given). A post is not limited by an imaginary line, but includes surrounding areas that may be necessary for the proper performance of the duties for which the accused was posted. (Not every absence from the prescribed area of the post establishes that a (sentinel) (lookout) is off post. The circumstances may show that, although outside the physical limits of the post, the accused was still so close to its designated limits that (he) (she) was still fully capable of performing (his) (her) duties and, therefore, regarded as being on post.)

NOTE 5: Other instructions. Instruction 5-9-1, Physical Impossibility, may be applicable.

3–39–1. DUELING (ARTICLE 114)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

_____ (personal jurisdiction data), (and _____) did, (at/onboard—location), on or about _____, fight a duel (with _____), using as weapons therefor (pistols) (swords) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused fought (state the name of the person alleged) with deadly weapons, that is: (state the weapons alleged);

(2) That the combat was for private reasons; and

(3) That the combat was by prior agreement.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A "deadly weapon" is one which is used in a manner likely to produce death or grievous bodily harm. A weapon is "likely" to produce death or grievous bodily harm when the probable results of its use would be death or serious bodily injury (although this may not be the use to which the instrument is ordinarily put). It is not necessary that death or serious bodily harm actually occur.

3–39–2. PROMOTING A DUEL (ARTICLE 114)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, promote a duel between _____ and _____ by (telling said _____ he/she would be a coward if he/she failed to challenge said _____ to a duel) (knowingly carrying from said _____ to said _____ a challenge to fight a duel) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused promoted a duel between (state the names of the alleged duelers); and

(2) That the accused did so by (state the manner alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Duel" means combat between two persons for private reasons fought with deadly weapons by prior agreement. A "deadly weapon" is one which is "likely" to produce death or grievous bodily harm when the probable results of its use would be death or serious bodily injury (although this may not be the use to which the instrument is ordinarily put). It is not necessary that death or serious bodily injury actually occur. "Promote" means to further or actively contribute to the fighting of a duel.

3–39–3. CONNIVING AT FIGHTING A DUEL (ARTICLE 114)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), (being officer of the (day) (check)) (at/on board—location) (_____) (and) having knowledge that _____ and _____ intended and were about to engage in a duel (near _____), did (at/on board—location), on or about _____, connive at the fighting of said duel by (knowingly permitting _____, one of the parties to said proposed duel, to leave _____ and go toward the place appointed for said duel at the time which he/she, _____, knew had been appointed therefor) (failing to take reasonable preventive action) (_____).

c. ELEMENTS:

(1) That (state the names of the alleged duelers) intended to and were about to engage in a duel at or near (state the place alleged);

(2) That the accused had knowledge of the planned duel; and

(3) That (state the time and place alleged), the accused connived at the fighting of the duel by (state the manner alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Anyone who knows that steps are being or have been taken toward arranging or fighting a duel and who fails to notify appropriate authorities and to take other reasonable preventive action has committed this offense.

"Duel" means combat between two persons for private reasons fought with deadly weapons by prior agreement. A "deadly weapon" is one which is used in a manner likely to produce death or grievous bodily harm. A weapon is "likely" to produce death or grievous bodily harm when the probable results of its use would be death or serious bodily injury (although this may not be the use to which the instrument is ordinarily put). It is not necessary that death or serious bodily injury actually occur.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–39–4. FAILURE TO REPORT A DUEL (ARTICLE 114)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), having knowledge that a challenge to fight a duel (had been sent) (was about to be sent) by _____ to _____, did _____, (at/on board—location) on or about _____, fail to report that fact promptly to the proper authority.

c. ELEMENTS:

(1) That a challenge to fight a duel (had been sent) (was about to be sent) by _____ to _____;

(2) That the accused had knowledge of this challenge; and

(3) That (state the time and place alleged), the accused failed to report this fact promptly to the proper authority.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Challenge," as used in this specification, means an invitation, summons, or request to fight a duel. "Duel" means combat between two persons for private reasons with deadly weapons by prior agreement.

A "deadly weapon" is one which is used in a manner likely to produce death or grievous bodily harm. A weapon is "likely" to produce death or grievous bodily harm when the probable results of its use would be death or serious bodily injury (although this may not be the use to which the instrument is ordinarily put). It is not necessary that death or serious bodily injury actually occur.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–40–1. MALINGERING, SELF–INFLICTED INJURY (ARTICLE 115)

a. MAXIMUM PUNISHMENT:

(1) Feigning: DD, TF, 1 year, E-1.

(2) Feigning in a hostile fire pay zone or in time of war: DD, TF, 3 years, E-1.

(3) Intentional injury: DD, TF, 5 years, E-1.

(4) Intentional injury in a hostile fire pay zone or in time of war: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location) (in a hostile fire pay zone) [on or about _____] [from about _____ to about _____], (a time of war) for the purpose of avoiding (his/her duty as officer of the day) (his/her duty as aircraft mechanic) (work in the mess hall) (service as an enlisted person) (_____) [feign (a headache) (a sore back) (illness) (mental lapse) (mental derangement) (_____)] [intentionally injure himself/herself by _____].

c. ELEMENTS:

(1) That the accused had knowledge of (his) (her) (assignment to) (prospective assignment to) (availability for) the performance of (work) (duty) (service), that is: (state the type of work, duty, or service alleged);

(2) That (state the time and place alleged), the accused

(a) feigned (illness) (physical disablement) (mental lapse) (mental derangement), or

(b) intentionally inflicted injury upon (himself) (herself) by (state the manner alleged); (and)

(3) That the accused's purpose or intent in doing so was to avoid the (work) (duty) (service) alleged; [and]

NOTE 1: In time of war or hostile fire zone. If the offense was committed in time of war or in a hostile fire pay zone, add the following element:

[(4)] That the offense was committed in (time of war) (in a hostile fire pay zone).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Feign" means to misrepresent by a false appearance or statement, to pretend, to simulate, or to falsify.)

("Inflict" means to cause, allow, or impose. The injury may be inflicted by nonviolent as well as violent means and may be accomplished by any act or omission that produces, prolongs, or aggravates a sickness or disability. (Thus voluntary starvation that results in a disability is a self-inflicted injury.) (Similarly, the injury may be inflicted by another at the accused's request.))

("Intentionally" means the act was done willfully or on purpose.)

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge and Intent), are ordinarily applicable.

3–41–1. RIOT (ARTICLE 116)

a. MAXIMUM PUNISHMENT: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:
In that (_____) (personal jurisdiction data), did, (at/on board—location), on or about (_____), (cause) (participate in) a riot by unlawfully assembling with (_____ and _____) (and others to the number of about _____ whose names are unknown) for the purpose of (resisting the police of _____) (assaulting passers-by) (_____), and in furtherance of said purpose did (fight with said police) (assault certain persons, to wit: _____), to the terror and disturbance of _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was a member of a group of three or more persons, that is: (state the group alleged);

(2) That the accused and at least two other members of this group mutually intended to assist one another against anyone who might oppose them in doing an act for some private purpose, that is: (state the purpose alleged);

(3) That the group or some of its members, in furtherance of such purpose, unlawfully committed a tumultuous disturbance of the peace in a violent or turbulent manner by (state the act(s) alleged); and

(4) That these acts terrorized the public in general in that they caused or were designed to cause public alarm or terror.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The gist of the offense of riot is the terror it creates. A brief disturbance, even if violent, is not a riot without terrorization of the public in general. Additionally, there must be a mutual intent on the part of the accused and at least two other participants to assist one another in their common design or plan against anyone who might oppose them.

“Tumultuous” means a noisy, boisterous, or violent disturbance of the public peace.

(“Public” includes a military organization, post, camp, ship, aircraft, or station.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–41–2. BREACH OF THE PEACE (ARTICLE 116)

a. MAXIMUM PUNISHMENT: 2/3 x 6 months, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (cause) (participate in) a breach of the peace by [wrongfully engaging in a fist fight in the dayroom with _____] [using the following (provoking) (profane) (indecent) language (toward _____), to wit: "_____, "or words to that effect] [wrongfully shouting and singing in a public place, to wit: _____] [_____].

c. ELEMENTS:

(1) That (state the time and place alleged, the accused (caused) (participated in) an act of a violent or turbulent nature by (state the manner alleged); and

(2) That the peace was thereby unlawfully disturbed.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A breach of the peace is any unlawful disturbance of the peace caused by observable acts of a violent or turbulent nature. It consists of acts or conduct that disturb the public tranquility or adversely affect the peace and good order to which the community is entitled. The word "community" includes within its meaning a (military organization) (post) (camp) (ship) (station) (_____).

"Turbulent" means noisy, boisterous, or violent disturbances.

NOTE: Self-defense raised. Self-defense would constitute a defense to a charge of breach of the peace when the sole basis of the charge consists of an assault.

3–42–1. PROVOKING SPEECHES OR GESTURES (ARTICLE 117)

a. MAXIMUM PUNISHMENT: 2/3 x 6 months, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully use (provoking) (reproachful) (words, to wit: "_____"or words to that effect) (and) (gestures, to wit: _____) towards (Sergeant _____, U.S. Air Force) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully used certain (words) (and) (gestures) that is: (state the words or gestures allegedly used) toward (state the name of the person alleged);

(2) That the (words) (and) (gestures) used were provoking or reproachful; and

(3) That the person toward whom the (words) (and) (gestures) were used was a person subject to the Uniform Code of Military Justice.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

It is not necessary that the accused have knowledge that the person toward whom the words are directed is a person subject to the Uniform Code of Military Justice.

"Provoking" and "Reproachful" describes only those (words) (and) (gestures) which are used in the presence of the person to whom they are directed and which, by their very (utterance) (use) have the tendency to cause that person to respond with acts of violence or turbulence. (These words are sometimes referred to as "fighting words.")

The test to apply is whether, under the facts and circumstances of this case, the (words) (and) (gestures) described in the specification would have caused an average person to react by immediately committing a violent or turbulent act in retaliation. Proof that a retaliatory act actually occurred is not required. (Provoking or reproachful words or gestures do not include reprimands, censures, or criticism which are properly

administered in the furtherance of training, efficiency, or discipline in the armed forces.)

NOTE: Declarations made in jest. A declaration is not wrongful if made in jest in a manner which would not provoke a reasonable person. A gesture made for an innocent or legitimate purpose is not provoking or reproachful. Consequently, if the evidence indicates any such defense, the military judge must, sua sponte, instruct carefully and comprehensively on the issue.

3–43–1. PREMEDITATED MURDER (ARTICLE 118)

a. MAXIMUM PUNISHMENT: Death or mandatory minimum of confinement for life with eligibility for parole.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with premeditation, murder _____ by means of (shooting him/her with a rifle) (_____).

c. ELEMENTS:

(1) That (state the name of the alleged victim) is dead;

(2) That his/her death resulted from the (act) (failure to act) of the accused in (state the act or failure to act alleged) at (state the time and place alleged);

(3) That the killing of (state the name or description of the alleged victim) by the accused was unlawful; and

(4) That, at the time of the killing, the accused had a premeditated design to kill (state the name or description of the alleged victim).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The killing of a human being is unlawful when done without legal justification or excuse. "Premeditated design to kill" means the formation of a specific intent to kill and consideration of the act intended to bring about death. The "premeditated design to kill" does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the killing.

NOTE 1: Premeditation and lesser included offenses. If the evidence raises an issue as to the accused's capacity to premeditate, Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and/or Instruction 5-12, Voluntary Intoxication, may be applicable. If so, instruct on the elements of unpremeditated murder and any other lesser included offenses that may be raised by the evidence.

NOTE 2: Lesser included offenses otherwise raised. When the accused denies premeditated design to kill, or other evidence in the case tends to negate such design, an instruction on unpremeditated murder (Instruction 3-43-2) will ordinarily be necessary. If the denial extends to any intent to kill or inflict great bodily harm, or other evidence tends to

negate such intent, an instruction on involuntary manslaughter (Instruction 3-44-2) must ordinarily be given.

NOTE 3: Causation. If an issue is raised at trial regarding whether the death resulted from the act of the accused, it may be necessary to instruct on lesser included offenses that do not include the death of the victim.

NOTE 4: Transferred intent. When an issue of transferred intent is raised by the evidence, the court may be instructed substantially as follows:

> When a person with a premeditated design to kill attempts unlawfully to kill a certain person, but by mistake or inadvertence, kills another person, the individual is still criminally responsible for a premeditated killing, because the premeditated design to kill is transferred from the intended victim of (his) (her) action to the actual victim. If you are satisfied beyond a reasonable doubt that the victim named in the specification is dead and that his/her death resulted from the unlawful (act) (failure to act) of the accused in (state the act or failure to act alleged) with the premeditated design to kill (state the name or description of the individual other than the alleged victim), you may still find the accused guilty of the premeditated killing of (state the name or description of the alleged victim).

NOTE 5: Passion and ability to premeditate. When the evidence indicates that the passion of the accused may have affected his or her capacity to premeditate, as in the case where there was a lapse of time between adequate provocation and the act, but the passion of the accused persists, the court may be instructed substantially as follows:

> An issue has been raised by the evidence as to whether the accused acted in the heat of sudden "passion." "Passion" means a degree of rage, pain, or fear which prevents cool reflection. If sufficient cooling off time passes between the provocation and the time of the killing which would allow a reasonable person to regain self-control and refrain from killing, the provocation will not reduce murder to the lesser offense of voluntary manslaughter. However, you may consider evidence of the accused's passion in determining whether (he) (she) possessed sufficient mental capacity to have "the premeditated design to kill." An accused cannot be found guilty of premeditated murder if, at the time of the killing, (his) (her) mind was so confused by (anger) (rage) (pain)

(sudden resentment) (fear) (or) (_____) that (he) (she) could not or did not premeditate. On the other hand, the fact that the accused's passion may have continued at the time of the killing does not necessarily demonstrate that (he) (she) was deprived of the ability to premeditate or that (he) (she) did not premeditate. Thus, (if you are convinced beyond a reasonable doubt that sufficient cooling off time had passed between the provocation and the time of the killing which would allow a reasonable person to regain (his/her) self-control and refrain from killing), you must decide whether the accused in fact had the premeditated design to kill. If you are not convinced beyond a reasonable doubt that the accused killed with premeditation, you may still find (him) (her) guilty of unpremeditated murder, if you are convinced beyond a reasonable doubt that the death of (state the name of the alleged victim) was caused, without justification or excuse, by an (act) (failure to act) of the accused and (the accused intended to kill or inflict great bodily harm on the victim) (the act of the accused was inherently dangerous to others and showed a wanton disregard for human life).

NOTE 6: Issue of sudden passion caused by adequate provocation raised. When killing in the heat of sudden passion caused by adequate provocation is placed in issue, the military judge should instruct on the lesser included offense of voluntary manslaughter as well as unpremeditated murder.

NOTE 7: Brain death instruction. The military standard for death includes brain death. An individual is dead who has sustained either: (1) irreversible cessation of spontaneous respiration and circulatory functions, or (2) irreversible cessation of all functions of the brain, including the brain stem. See United States v. Gomez, 15 MJ 954 (ACMR 1983); United States v. Jefferson, 22 MJ 315 (CMA 1986); and United States v. Taylor, 44 MJ 254 (CAAF 1996). Instruction 7-24, Brain Death, may be adapted for this circumstance.

NOTE 8: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is normally applicable.

3–43–2. UNPREMEDITATED MURDER (ARTICLE 118)

a. MAXIMUM PUNISHMENT: DD, TF, life without eligibility for parole, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, murder _____ by means of (shooting him/her with a rifle) (_____).

c. ELEMENTS:

(1) That (state the name or description of the alleged victim) is dead;

(2) That his/her death resulted from the (act) (failure to act) of the accused in (state the act or failure to act alleged) at (state the time and place alleged);

(3) That the killing of (state the name or description of the alleged victim) by the accused was unlawful; and

(4) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon (state the name or description of the alleged victim).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The killing of a human being is unlawful when done without legal justification or excuse.

The intent to kill or inflict great bodily harm may be proved by circumstantial evidence, that is, by facts or circumstances from which you may reasonably infer the existence of such an intent. Thus, it may be inferred that a person intends the natural and probable results of an act (he) (she) purposely does. Therefore, if a person does an intentional act which is likely to result in death or great bodily harm, it may be inferred that (he) (she) intended to inflict death or great bodily harm. The drawing of this inference is not required.

"Great bodily harm" means serious bodily injury. "Great bodily harm" does not mean minor injuries, such as a black eye or bloody nose, but does mean fractured or dislocated bones, deep cuts, torn parts of the

body, serious damage to internal organs, and other serious bodily injuries.

NOTE 1: Intent to kill or inflict great bodily harm in issue. When the accused denies the intent to kill or inflict great bodily harm, an instruction on involuntary manslaughter must ordinarily be given.

NOTE 2: Sudden passion caused by adequate provocation in issue. When killing in the heat of sudden passion caused by adequate provocation is placed in issue, the military judge must instruct substantially as below. Do not use Instruction 3-44-1 to instruct on the lesser included offense of voluntary manslaughter; use the instruction below:

The lesser offense of voluntary manslaughter is included in the crime of unpremeditated murder. "Voluntary manslaughter" is the unlawful killing of a human being, with an intent to kill or inflict great bodily harm, done in the heat of sudden passion caused by adequate provocation. Acts of the accused which might otherwise amount to murder constitute only the lesser offense of voluntary manslaughter if those acts were done in the heat of sudden passion caused by adequate provocation. "Passion" means a degree of anger, rage, pain, or fear which prevents cool reflection. The law recognizes that a person may be provoked to such an extent that in the heat of sudden passion caused by adequate provocation, (he) (she) strikes a fatal blow before (he) (she) has had time to control (himself) (herself). A person who kills because of passion caused by adequate provocation is not guilty of murder. Provocation is adequate if it would cause uncontrollable passion in the mind of a reasonable person. The provocation must not be sought or induced as an excuse for killing or doing harm.

If you are not satisfied beyond a reasonable doubt that the accused is guilty of murder, but you are satisfied beyond a reasonable doubt that the killing, although done in the heat of sudden passion caused by adequate provocation, was done with the intent to kill or inflict great bodily harm, you may still find (him) (her) guilty of voluntary manslaughter.

NOTE 3: Defenses. When an issue of self-defense, accident, or other legal justification or excuse is raised, tailored instructions must be given.

NOTE 4: Transferred intent. When the issue of transferred intent is raised by the evidence, the military judge should instruct substantially as follows:

When a person with intent to kill or inflict great bodily harm attempts unlawfully to kill or inflict great bodily harm upon a certain person, but, by mistake or inadvertence, kills another person, the individual is still criminally responsible for a killing with intent to kill or inflict great bodily harm because the intent to kill or inflict great bodily harm is transferred from the intended victim of (his) (her) action to the actual victim. If you are satisfied beyond a reasonable doubt that the victim named in the specification is dead and that his/her death resulted from the unlawful (act) (failure to act) of the accused in (state the act or failure to act alleged) with intent to kill or inflict great bodily harm upon (state the name or description of the individual other than the alleged victim), you may still find the accused guilty of the unpremeditated murder of (state the name of the alleged victim).

NOTE 5: Timing of the formulation of intent. If an issue is raised with respect to the time of the formulation of the intent to kill or inflict great bodily harm, the military judge may instruct as follows:

The intent to kill or inflict great bodily harm does not have to exist for any measurable or particular time before the (act) (failure to act) which causes the death. All that is required is that it exist at the time of the (act) (failure to act) which caused the death.

NOTE 6: Voluntary intoxication raised. If there is some evidence of voluntary intoxication, but no issue of insanity, the following instruction may be appropriate, provided there were no other factors that may have combined with the accused's alcohol consumption to affect his/her mental capacity to form the requisite intent:

Although the accused must have had the intent to kill or inflict great bodily harm, voluntary intoxication, by itself, is not a defense to unpremeditated murder. Voluntary intoxication, standing alone, will not reduce unpremeditated murder to a lesser degree of unlawful killing.

NOTE 7: Brain death instruction. The military standard for death includes brain death. An individual is dead who has sustained either: (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of brain function. See United States v.

***Gomez*, 15 MJ 954 (ACMR 1983) and *United States v. Jefferson*, 22 MJ 315 (CMA 1986). Instruction 7-24, *Brain Death*, may be adapted for this circumstance.**

3–43–3. MURDER WHILE ENGAGING IN AN ACT INHERENTLY DANGEROUS TO ANOTHER (ARTICLE 118)

a. MAXIMUM PUNISHMENT: DD, TF, life without eligibility for parole, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, murder _____ by means of (shooting him/her with a rifle) (_____).

c. ELEMENTS:

(1) That (state the name or description of the alleged victim) is dead;

(2) That his/her death resulted from the act of the accused in (state the act alleged), at (state the time and place alleged);

(3) That this act was inherently dangerous to another, that is, one or more persons, and evinced a wanton disregard for human life;

(4) That the accused knew that death or great bodily harm was a probable consequence of the act; and

(5) That the killing of (state the name or description of the alleged victim) by the accused was unlawful.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The killing of a human being is unlawful when done without legal justification or excuse.

The act must be intentional, but death or great bodily harm does not have to be the intended result.

(The act may even be accompanied by a wish that death will not be caused.)

An act evinces a wanton disregard for human life when it is characterized by heedlessness of the probable consequences of the act and indifference to the likelihood of death or great bodily harm, and demonstrates a total disregard for the known probable results of death or great bodily harm. "Evince" means to "clearly demonstrate."

NOTE 1: Voluntary intoxication. If there is some evidence of voluntary intoxication, but no issue of insanity, the following instruction may be appropriate, provided there were no other factors which may have combined with the accused's alcohol consumption to affect the accused's mental capacity to intend the act and know its probable consequences:

> Although the accused must have intended the act and known its probable results, voluntary intoxication, by itself, is not a defense to this offense. Furthermore, voluntary intoxication, standing alone, will not reduce this offense to a lesser degree of unlawful killing.

NOTE 2: Findings Worksheet and announcement of findings when Article 118(3) is a lesser included offense. When a violation of Article 118(3) is a lesser included offense or in issue as an alternate theory to murder under Article 118 (1) or (2), the Findings Worksheet should clearly indicate this theory of culpability.

NOTE 3: Brain death instruction. The military standard for death includes brain death. An individual is dead who has sustained either: (1) irreversible cessation of spontaneous respiration and circulatory functions, or (2) irreversible cessation of all functions of the brain, including the brain stem. See United States v. Gomez, 15 MJ 954 (ACMR 1983); United States v. Jefferson, 22 MJ 315 (CMA 1986); and United States v. Taylor, 44 MJ 254 (CAAF 1996). Instruction 7-24, Brain Death, may be adapted for this circumstance.

NOTE 4: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is usually appropriate. Instruction 5-11-1, Ignorance or Mistake – Where Specific Intent or Actual Knowledge is an Issue, may be applicable to the accused's knowledge of the conditions under which he/she acted.

e. REFERENCES: United States v. Stokes, 19 CMR 191(CMA 1955), United States v. Berg, 31 MJ 38 (CMA 1990); United States v. McMonagle, 34 MJ 852 (ACMR 1992), *rev'd in part*, 38 MJ 53 (CMA 1993).

3–43–4. FELONY MURDER (ARTICLE 118)

a. MAXIMUM PUNISHMENT: Death or mandatory minimum of confinement for life with eligibility for parole.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, while (perpetrating) (attempting to perpetrate) _____, murder _____ by means of (shooting him/her with a rifle) (_____).

c. ELEMENTS:

(1) That (state the name or description of the alleged victim) is dead;

(2) That his/her death resulted from the (act) (failure to act) of the accused in (state the act or failure to act alleged) at (state the time and place alleged);

(3) That the killing of (state the name or description of the alleged victim) by the accused was unlawful; and

(4) That, at the time of the killing, the accused was participating in the (attempted) commission of (burglary) (sodomy) (rape) (rape of a child) (aggravated sexual assault) (aggravated sexual assault of a child) (aggravated sexual contact) (aggravated sexual abuse of a child) (aggravated sexual contact with a child) (robbery) (aggravated arson).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The killing of a human being is unlawful when done without legal justification or excuse.

To find that the accused was participating in the (attempted) commission of the offense of (burglary) (sodomy) (rape) (rape of a child) (aggravated sexual assault) (aggravated sexual assault of a child) (aggravated sexual contact) (aggravated sexual abuse of a child) (aggravated sexual contact with a child) (robbery) (aggravated arson), you must be satisfied beyond a reasonable doubt:

NOTE 1: Elements of the felony offense. The military judge should state here the elements of the offense alleged to have been perpetrated or attempted. This statement should be

based upon the pertinent instruction that lists the elements of that offense, but should be tailored to serve the purpose for which the statement is intended. When the offense committed is an attempted perpetration of the above stated crimes, the military judge should refer to Instruction 3-4-1, Attempts - Other than Murder and Voluntary Manslaughter, which will prove helpful in drafting necessary instructions.

NOTE 2: Causation. Should an issue arise with regard to the lack of a relationship between the felony and the death, use the following:

> In order to find that the killing, if any, was committed while the accused was participating in the (attempted) commission of (burglary) (sodomy) (rape) (rape of a child) (aggravated sexual assault) (aggravated sexual assault of a child) (aggravated sexual contact) (aggravated sexual abuse of a child) (aggravated sexual contact with a child) (robbery) (aggravated arson), you must find beyond a reasonable doubt that an act of the accused which caused the victim's death and the (attempted) (burglary) (sodomy) (rape) (rape of a child) (aggravated sexual assault) (aggravated sexual assault of a child) (aggravated sexual contact) (aggravated sexual abuse of a child) (aggravated sexual contact with a child) (robbery) (aggravated arson) occurred at substantially the same time and place. Additionally, you must find a causal connection between the commission of the (attempted) (burglary) (sodomy) (rape) (rape of a child) (aggravated sexual assault) (aggravated sexual assault of a child) (aggravated sexual contact) (aggravated sexual abuse of a child) (aggravated sexual contact with a child) (robbery) (aggravated arson) and the act which caused the victim's death.

NOTE 3: Lesser included offenses. Unpremeditated murder and involuntary manslaughter may be lesser included offenses of felony murder.

NOTE 4: Specific intent as an element of the felony offense. While felony murder, as such, does not involve premeditation or specific intent, the crimes of burglary, attempted burglary, attempted robbery, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child and aggravated arson do involve a specific intent. Also, the crime of aggravated arson involves an element of knowledge. Thus, when appropriate, you should consult Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, or Instruction 5-12, Voluntary Intoxication, for instructions bearing on specific intent or knowledge.

NOTE 5: Brain death instruction. The military standard for death includes brain death. An individual is dead who has sustained either: (1) irreversible cessation of spontaneous

respiration and circulatory functions, or (2) irreversible cessation of all functions of the brain, including the brain stem. See United States v. Gomez, 15 MJ 954 (ACMR 1983); United States v. Jefferson, 22 MJ 315 (CMA 1986); and United States v. Taylor, 44 MJ 254 (CAAF 1996). Instruction 7-24 Brain Death, may be adapted for this circumstance.

NOTE 6: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), may also be applicable.

3–44–1. VOLUNTARY MANSLAUGHTER (ARTICLE 119)

NOTE 1: About this instruction. The following instruction should not be given when instructing on voluntary manslaughter as a lesser included offense. For the proper instruction in that case, see NOTE 2 in Instruction 3-43-2.

a. MAXIMUM PUNISHMENT:

(1) When committed upon a child under 16 years of age: DD, TF, 20 yrs, E-1.

(2) All other cases: DD, TF, 15 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board--location), on or about _____, willfully and unlawfully kill _____ (a child under 16 years of age) by _____ him/her (in) (on) the _____ with a _____.

c. ELEMENTS:

(1) That (state the name or description of the alleged victim) is dead;

(2) That his/her death resulted from the (act) (failure to act) of the accused in (state the act or failure to act alleged) at (state the time and place alleged);

(3) That the killing of (state the name or description of the alleged victim) by the accused was unlawful; (and)

(4) That, at the time of the killing, the accused had an intent to kill or inflict great bodily harm upon (state the name or description of the alleged victim); [and].

[(5)] That (state the name or description of the alleged victim) was a child under the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Killing a human being is unlawful when done without legal justification or excuse.

NOTE 2: Sudden passion not an element. When voluntary manslaughter is the charged offense, the existence of sudden passion caused by adequate provocation is not an element. The following instruction may be appropriate:

The offense of voluntary manslaughter is committed when a person, with intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation.

"Passion" means anger, rage, pain, or fear. Proof that the accused was acting in the heat of passion caused by adequate provocation is not required. It is essential, however, that the four elements I have listed for you be proved beyond a reasonable doubt before the accused can be convicted of voluntary manslaughter.

NOTE 3: Capacity to form the specific intent. Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be applicable as bearing upon the capacity of the accused to formulate the specific intent required for voluntary manslaughter. If such capacity is in issue, instructions must be given on involuntary manslaughter and other lesser included offenses that may be raised by the entire evidence in the case.

NOTE 4: Transferred intent. When the issue of transferred intent is raised by the evidence, the following instruction should be given:

When an individual with intent to kill or inflict great bodily harm attempts unlawfully to kill or to inflict great bodily harm upon a person (while in the heat of sudden passion caused by adequate provocation), but, by mistake or inadvertence, kills another person, the individual is still criminally responsible for the killing with the intent to kill or inflict great bodily harm because the intent is transferred from the intended victim of (his) (her) action to the actual victim. If you are satisfied beyond a reasonable doubt that the victim is dead and that his/her death resulted from the unlawful (act) (failure to act) of the accused in (state the act or failure to act alleged) with intent to kill or inflict great bodily harm upon (state the name or description of the individual other than the victim) you may still find the accused guilty of the voluntary manslaughter of (state the name or description of the alleged victim).

NOTE 5: Accused's knowledge of child's age. When the alleged victim is a child under the age of 16 years, provide the following instruction:

Knowledge that (state the name or description of the alleged victim) was under the age of 16 years is not an element of the offense.

Accordingly, if you are convinced beyond a reasonable doubt that (state the name of the alleged victim) was under the age of 16 years at the time of the alleged offense, you are advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) was under the age of 16 years at the time of the alleged offense, and it is not a defense to voluntary manslaughter upon a child even if the accused reasonably believed that (state the name of the alleged victim) was at least 16 years old.

NOTE 6: Causation. If an issue is raised regarding whether the act or failure to act on the part of the accused caused the death of the victim, it would be necessary to instruct on lesser included offenses not involving death of the victim, e.g., aggravated assault.

NOTE 7: Brain death instruction. The military standard for death includes brain death. An individual is dead who has sustained either: (1) irreversible cessation of spontaneous respiration and circulatory functions, or (2) irreversible cessation of all functions of the brain, including the brain stem. See United States v. Gomez, 15 MJ 954 (ACMR 1983); United States v. Jefferson, 22 MJ 315 (CMA 1986); and United States v. Taylor, 44 MJ 254 (CAAF 1996). Instruction 7-24, Brain Death, may be adapted for this circumstance.

NOTE 8: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–44–2. INVOLUNTARY MANSLAUGHTER—CULPABLE NEGLIGENCE (ARTICLE 119)

a. MAXIMUM PUNISHMENT:

(1) When committed upon a child under 16 years of age: DD, TF, 15 yrs, E-1.

(2) All other cases: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board--location), on or about _____, by culpable negligence, unlawfully kill _____ (a child under 16 years of age) by _____ him/her (in) (on) the _____ with a _____.

c. ELEMENTS:

(1) That (state the name or description of the alleged victim) is dead;

(2) That his/her death resulted from the (act) (failure to act) of the accused in (state the act or failure to act alleged) at (state the time and place alleged);

(3) That this (act) (failure to act) amounted to culpable negligence; (and)

(4) That the killing of (state the name or description of the alleged victim) by the accused was unlawful; [and]

[(5)] That (state the name or description of the alleged victim) was a child under the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Killing a human being is unlawful when done without legal justification or excuse.

"Culpable negligence" is a degree of carelessness greater than simple negligence. 'Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; this is what "due care" means. "Culpable negligence" is a negligent act or failure to act accompanied by a gross,

reckless, wanton, or deliberate disregard for the foreseeable results to others.

You may find the accused guilty of involuntary manslaughter, only if you are satisfied beyond a reasonable doubt that the (act) (failure to act) of the accused which caused the death amounted to "culpable negligence."

NOTE 1: Proximate cause in issue. In an appropriate case, the following instruction relating to proximate cause should be given:

The (act) (failure to act) must not only amount to culpable negligence, but must also be a proximate cause of death. "Proximate cause" means that the death must have been the natural and probable result of the accused's culpably negligent (act) (failure to act). The proximate cause does not have to be the only cause, but it must be a contributory cause which plays an important part in bringing about the death. (It is possible for the conduct of two or more persons to contribute each as a proximate cause to the death of another. If the accused's conduct was the proximate cause of the victim's death, the accused will not be relieved of criminal responsibility just because some other person's conduct was also a proximate cause of the death.) (If the death occurred only because of some unforeseeable, independent, intervening cause which did not involve the accused, then the accused may not be convicted of involuntary manslaughter.) The burden is on the prosecution to prove beyond a reasonable doubt (that there was no independent, intervening cause) (and) (that the accused's culpable negligence was a proximate cause of the victim's death).

NOTE 2: Contributory negligence of victim. In an appropriate case, the following instruction on contributory negligence of the victim should be given:

There is evidence in this case raising the issue of whether the deceased failed to use reasonable care and caution for his/her own safety. If the accused's culpable negligence was a proximate cause of the death, the accused is not relieved of criminal responsibility just because the negligence of the deceased may also have contributed to his/her death. The conduct of the deceased is, however, important on the issue of

whether the accused's culpable negligence, if any, was a proximate cause of death. Accordingly, a certain (act) (failure to act) may be a proximate cause of death even if it is not the only cause, as long as it is a direct or contributing cause and plays an important role in causing the death. An (act) (failure to act) is not a proximate cause of the death if some other force independent of the accused's (act) (failure to act) intervened as a cause of death.

NOTE 3: Accused's knowledge of child's age. When the alleged victim is a child under the age of 16 years, provide the following instruction:

Knowledge that (state the name or description of the alleged victim) was under the age of 16 years is not an element of the offense.

Accordingly, if you are convinced beyond a reasonable doubt that (state the name of the alleged victim) was under the age of 16 years at the time of the alleged offense, you are advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) was under the age of 16 years at the time of the alleged offense, and it is not a defense to involuntary manslaughter upon a child even if the accused reasonably believed that (state the name of the alleged victim) was at least 16 years old.

NOTE 4: Lesser included offense commonly raised. When an issue is raised regarding the degree of negligence, an instruction on negligent homicide must normally be given. See Instruction 3-85-1.

NOTE 5: Brain death instruction. The military standard for death includes brain death. An individual is dead who has sustained either: (1) irreversible cessation of spontaneous respiration and circulatory functions, or (2) irreversible cessation of all functions of the brain, including the brain stem. See United States v. Gomez, 15 MJ 954 (ACMR 1983); United States v. Jefferson, 22 MJ 315 (CMA 1986); and United States v. Taylor, 44 MJ 254 (CAAF 1996). Instruction 7-24, Brain Death, may be adapted for this circumstance.

3–44–3. INVOLUNTARY MANSLAUGHTER—WHILE PERPETRATING OR ATTEMPTING TO PERPETRATE CERTAIN OFFENSES (ARTICLE 119)

a. MAXIMUM PUNISHMENT:

(1) When committed upon a child under 16 years of age: DD, TF, 15 yrs, E-1.

(2) All other cases: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board--location), on or about _____, while (perpetrating) (attempting to perpetrate) an offense directly affecting the person of _____, to wit: (maiming) (a battery) (_____) unlawfully kill _____ (a child under 16 years of age) by _____ him/her (in) (on) the _____ with a _____.

c. ELEMENTS:

(1) That (state the name or description of the alleged victim) is dead;

(2) That his/her death resulted from the (act) (failure to act) of the accused in (state the act or failure to act alleged) at (state the time and place alleged);

(3) That the killing of (state the name or description of the alleged victim) by the accused was unlawful; (and)

(4) That, at the time of the killing, the accused was participating in the (attempted) commission of the offense of (assault) (battery) (false imprisonment) (maiming) (_____) directly affecting the person of (state the name or description of the alleged victim); [and].

[(5)] That (state the name or description of the alleged victim) was a child under the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The killing of a human being is unlawful when done without legal justification or excuse.

To find that the accused was participating in the (attempted) commission of the offense of (assault) (battery) (false imprisonment) (maiming)

(_____), you must be satisfied by legal and competent evidence beyond a reasonable doubt:

NOTE 1: Elements of offense directly affecting the person. The military judge should list the elements of the offense alleged to have been perpetrated or attempted. The statement should be based upon the pertinent instruction that lists the elements of the offense, but should be tailored to serve the purpose for which the statement is intended. When the offense committed is an attempted perpetration, the military judge should refer to Instruction 3-4-1, Attempts, which will prove helpful in drafting the instructions at hand. Note that the phrase "directly affecting the person" does not include burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson.

NOTE 2: Causation. If an issue arises as to the lack of a relationship between the offense directly affecting the person and the death, the members may be instructed substantially as follows:

To find whether the killing, if any, was committed while the accused (was participating in) (attempted) (state the offense directly affecting the victim), you must find beyond a reasonable doubt that an act of the accused which caused the victim's death and the (state the offense alleged to have been perpetrated or attempted) occurred at substantially the same time and place. Additionally, you must find a causal connection between the commission of the (attempted) offense of (state the offense alleged to have been perpetrated or attempted) and the act which caused the victim's death.

NOTE 3: Accused's knowledge of child's age. When the alleged victim is a child under the age of 16 years, provide the following instruction:

Knowledge that (state the name or description of the alleged victim) was under the age of 16 years is not an element of the offense.

Accordingly, if you are convinced beyond a reasonable doubt that (state the name of the alleged victim) was under the age of 16 years at the time of the alleged offense, you are advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) was under the age of 16 years at the time of the alleged offense, and it is not a defense to involuntary manslaughter upon a child

even if the accused reasonably believed that (state the name of the alleged victim) was at least 16 years old.

NOTE 4: Brain death instruction. The military standard for death includes brain death. An individual is dead who has sustained either: (1) irreversible cessation of spontaneous respiration and circulatory functions, or (2) irreversible cessation of all functions of the brain, including the brain stem. See United States v. Gomez, 15 MJ 954 (ACMR 1983); United States v. Jefferson, 22 MJ 315 (CMA 1986); and United States v. Taylor, 44 MJ 254 (CAAF 1996). Instruction 7-24, Brain Death, may be adapted for this circumstance.

3–44A–1. INJURING AN UNBORN CHILD (ARTICLE 119a)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:
In that _____(personal jurisdiction data), did (at/on board--location), (subject matter jurisdiction data, if required), on or about _____ 20___, cause bodily injury to the unborn child of (state the name of the alleged pregnant woman), a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was engaged in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault), of (state the name of the alleged pregnant woman)] [arson of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belong to) (state the name of the alleged pregnant woman)];

(2) That (state the name of the alleged pregnant woman) was then a pregnant woman; and

(3) That the accused thereby caused bodily injury to the unborn child of (state the name of the alleged pregnant woman).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “pregnant woman” is a female of any age who is carrying within her body an unborn child.

The term ‘unborn child’ means a child in utero (or a member of the species Homo Sapiens who is carried in the womb), at any stage of development, from conception to birth.

For the purpose of this offense, the term “bodily injury” to the unborn child is a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.

NOTE 1: The members must be instructed on the elements of the alleged enumerated offense listed in Article 119a(b) (i.e., murder, voluntary or involuntary manslaughter, rape, robbery, maiming, assault, or arson) the accused was engaged in, which was the proximate cause of the bodily injury to the unborn child. If the evidence of the alleged enumerated offense also raises a lesser included enumerated offense, the panel must also be advised accordingly (using the optional instruction below) and the Findings Worksheet must permit findings by exceptions and substitutions.

The accused may be found guilty of injuring an unborn child only if, in addition to all the other elements of the offense, you are convinced beyond a reasonable doubt that the accused engaged in the offense of (state the offense alleged), which has the following elements: (state here the elements of the underlying offense alleged).

Proof that the accused had an intent to injure the unborn child, or even had actual knowledge that (state the name of the alleged pregnant woman) was, at the time pregnant when the offense was committed, is not required.

(The government has charged that the accused injured the unborn child of (state the name of the alleged pregnant woman) while engaged in the offense of (state the offense alleged). If you are convinced beyond a reasonable doubt of all the elements of the charged offense, except that the accused was engaged in the offense of (state the offense alleged), you may still find the accused guilty, if you are convinced beyond a reasonable doubt that the accused injured the unborn child while engaged in the offense of (state the lesser included offense raised that is also an enumerated offense) a lesser included offense of (state the offense alleged). (State the lesser included enumerated offense raised) has the following elements: (state here the elements of the lesser included enumerated offense). In this event you must make appropriate findings by excepting the word(s)"(state the offense alleged)"and substituting the word(s)"(state the lesser included enumerated offense)."

NOTE 2: Causation. When the issue of causation between the alleged enumerated offense and the bodily injury to the unborn child is an issue, give the following general instruction, followed by Instruction 5-19, tailored as appropriate.

The specification in this case alleges that the bodily injury to the unborn child occurred as a result of the accused committing the offense of (state the offense alleged). You may find the accused guilty of injuring the unborn child only if you find that the acts of the accused while engaging in that offense (or any lesser included offense as I have described for you) were the proximate cause of the injury to the unborn child.

NOTE 3: Special defense. A special defense of consent to an abortion, or death/injury occurring in the course of medical treatment, may reasonably be raised. If applicable, the following instruction should be given.

(An accused may not be convicted of this offense for (his) (her) conduct relating to an abortion for which the consent of (state the name of the alleged pregnant woman), or a person authorized by law to act on her behalf, had been obtained or for which the law implies such consent.) ((Likewise,) An accused may not be convicted of this offense for (his) (her) conduct relating to any medical treatment of (state the name of the alleged pregnant woman) or her unborn child.) (You have heard evidence that (here the military judge may summarize evidence related to an abortion of the unborn child allegedly consented to by the pregnant woman or other authorized person acting on her behalf, or evidence related to medical treatment for the pregnant woman or the unborn child.)) Unless you are convinced beyond a reasonable doubt that the injury to the unborn child (did not result from an abortion consented to by (state the name of the pregnant woman) or by someone legally authorized to act on her behalf,) ((and) did not result from the accused's conduct in the course of any medical treatment of (state the name of the alleged pregnant woman) (or) (the unborn child), you may not convict the accused of this offense.)

3–44A–2. KILLING AN UNBORN CHILD (ARTICLE 119a)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____(personal jurisdiction data), did (at/on board--location), (subject matter jurisdiction data, if required), on or about _____ 20___, cause the death of the unborn child of (state the name of the alleged pregnant woman), a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of (state the name of the alleged pregnant woman)] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was engaged in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault), of (state name of the alleged pregnant woman)] [arson of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belong to) (state the name of the alleged pregnant woman)];

(2) That (state the name of the alleged pregnant woman) was then a pregnant woman; and

(3) That the accused thereby caused the death of the unborn child of (state the name of the alleged pregnant woman).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “pregnant woman” is a female of any age who is carrying within her body an unborn child.

The term “unborn child” means a child in utero (or a member of the species Homo Sapiens who is carried in the womb), at any stage of development, from conception to birth.

NOTE 1: The members must be instructed on the elements of the alleged enumerated offense listed in Article 119a(b) (i.e., murder, voluntary or involuntary manslaughter, rape, robbery, maiming, assault, or arson) the accused was engaged in, which was the proximate cause of the death of the unborn child. If the evidence of the alleged enumerated offense also raises a lesser included enumerated offense, the panel must also be advised

accordingly (using the optional instruction below) and the Findings Worksheet must permit findings by exceptions and substitutions.

The accused may be found guilty of killing an unborn child only if, in addition to all the other elements of the offense, you are convinced beyond a reasonable doubt that the accused engaged in the offense of (state the offense alleged), which has the following elements: (state here the elements of the underlying offense alleged).

Proof that the accused had an intent to injure or kill the unborn child, or even had actual knowledge that (state the name of the alleged pregnant woman) was, at the time pregnant when the offense was committed, is not required.

(The government has charged that the accused killed the unborn child of (state the name of the alleged pregnant woman) while engaged in the offense of (state the offense alleged). If you are convinced beyond a reasonable doubt of all the elements of the charged offense, except that the accused was engaged in the offense of (state the offense alleged), you may still find the accused guilty, if you are convinced beyond a reasonable doubt that the accused killed the unborn child while engaged in the offense of (state the lesser included offense raised that is also an enumerated offense) a lesser included offense of (state the offense alleged). (State the lesser included enumerated offense raised) has the following elements: (state here the elements of the lesser included enumerated offense). In this event you must make appropriate findings by excepting the word(s) "(state the offense alleged)" and substituting the word(s) "(state the lesser included enumerated offense)."")

NOTE 2: Causation. When the issue of causation between the alleged enumerated offense and death of the unborn child is an issue, give the following general instruction, followed by Instruction 5-19, tailored as appropriate.

The specification in this case alleges that the death of the unborn child occurred as a result of the accused committing the offense of (state the offense alleged). You may find the accused guilty of killing the unborn child only if you find that the acts of the accused while engaging in that

offense (or any lesser included offense as I have described for you) were the proximate cause of the death of the unborn child.

NOTE 3: Special defense. A special defense of consent to an abortion, or death/injury occurring in the course of medical treatment, may reasonably be raised. If applicable, the following instruction should be given.

(An accused may not be convicted of this offense for (his) (her) conduct relating to an abortion for which the consent of (state the name of the alleged pregnant woman), or a person authorized by law to act on her behalf, had been obtained or for which the law implies such consent.) ((Likewise,) An accused may not be convicted of this offense for (his) (her) conduct relating to any medical treatment of (state the name of the alleged pregnant woman) or her unborn child.) (You have heard evidence that (here the military judge may summarize evidence related to an abortion of the unborn child allegedly consented to by the pregnant woman or other authorized person acting on her behalf, or evidence related to medical treatment for the pregnant woman or the unborn child.)) Unless you are convinced beyond a reasonable doubt that the death of the unborn child (did not result from a lawful abortion consented to by (state the name of the alleged pregnant woman) or by someone legally authorized to act on her behalf, ((and) did not result from the accused's conduct in the course of any medical treatment of (state the name of the alleged pregnant woman) (or) (the unborn child), you may not convict the accused of this offense.)

3–44A–3. ATTEMPTED KILLING OF AN UNBORN CHILD (ARTICLE 119a)

a. MAXIMUM PUNISHMENT: DD, TF, 15 years, E-1.

b. MODEL SPECIFICATION:

In that _____(personal jurisdiction data), did (at/on board--location), (subject matter jurisdiction data, if required), on or about _____ 20___, attempt to kill the unborn child of (state the name of the alleged pregnant woman), a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to)] that woman.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was engaged in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of (state the name of the alleged pregnant woman)] [arson of (a dwelling inhabited by) (a structure or property) known to (be occupied by) (belong to) (state the name of the alleged pregnant woman)];

(2) That (state the name of the alleged pregnant woman) was then a pregnant woman;

(3) That the accused thereby attempted to kill the unborn child of (state the name of the alleged pregnant woman);

(4) That such act(s) amounted to more than mere preparation, that is, (it was) (they were) a substantial step and a direct movement toward the unlawful killing of the unborn child;

(5) That such act(s) apparently tended to bring about the intentional killing of the unborn child; that is, the act(s) apparently would have resulted in the intended death of the unborn child except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (_____) which prevented the killing of the unborn child; and

(6) That at the time the accused committed the act(s) alleged, the accused had the intent to kill the unborn child.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The killing of an unborn child is unlawful when done without legal justification or excuse.

"Pregnant woman" is a female of any age who is carrying within her body an unborn child.

The term "unborn child" means a child in utero (or a member of the species Homo Sapiens who is carried in the womb), at any stage of development, from conception to birth.

Preparation consists of devising or arranging the means or measures necessary for the killing of the unborn child. To find the accused guilty of this offense, you must find beyond a reasonable doubt that the accused went beyond preparatory steps, and (his) (her) act(s) amounted to a substantial step and a direct movement toward killing the unborn child. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of (his) (her) resolve to unlawfully kill the unborn child.

Proof that the unborn child was actually killed is not required. However, it must be proved beyond a reasonable doubt that the accused specifically intended to kill the unborn child of (state the name of the alleged pregnant woman) without legal justification or excuse.

The intent to kill does not have to exist for any measurable or particular length of time before the act(s) of the accused that constitute(s) the attempt. However, the intent to kill must exist at the time of the act(s) that constitute(s) the attempt.

The intent to kill may be proved by circumstantial evidence, that is, by facts or circumstances from which you may reasonably infer the existence of such an intent. Thus, you may infer that a person intends the natural and probable results of an act (he) (she) purposely does. Therefore, if a person does an intentional act which is likely to result in

death, it may be inferred that (he) (she) intended to inflict death. The drawing of this inference, however, is not required.

NOTE 1: The members must be instructed on the elements of the alleged enumerated offense listed in Article 119a(b) (i.e., murder, voluntary or involuntary manslaughter, rape, robbery, maiming, assault, or arson) the accused was engaged in, thereby attempting to kill the unborn child. If the evidence of the alleged enumerated offense also raises a lesser included enumerated offense, the panel must also be advised accordingly (using the optional instruction below) and the Findings Worksheet must permit findings by exceptions and substitutions.

The accused may be found guilty of attempting to kill an unborn child only if, in addition to all the other elements of the offense, you are convinced beyond a reasonable doubt that the accused engaged in the offense of (state the offense alleged), which has the following elements: (state here the elements of the underlying offense alleged).

(The government has charged that the accused attempted to kill the unborn child of (state the name of the alleged pregnant woman) while engaged in the offense of (state the offense alleged). If you are convinced beyond a reasonable doubt of all the elements of the charged offense, except that the accused was engaged in the offense of (state the offense alleged), you may still find the accused guilty, if you are convinced beyond a reasonable doubt that the accused attempted to kill the unborn child while engaged in the offense of (state the lesser included offense raised that is also an enumerated offense) a lesser included offense of (state the offense alleged). (State the lesser included enumerated offense raised) has the following elements: (state here the elements of the lesser included enumerated offense). In this event you must make appropriate findings by excepting the word(s) "(state the offense alleged)" and substituting the word(s) "(state the lesser included enumerated offense).")

NOTE 2: Special defense. A special defense of consent to an abortion, or death/injury occurring in the course of medical treatment, may reasonably be raised. If applicable, the following instruction should be given.

(An accused may not be convicted of this offense for (his) (her) conduct relating to an abortion for which the consent of (state the name of the

alleged pregnant woman), or a person authorized by law to act on her behalf, had been obtained or for which such consent is implied by law.) ((Likewise,) An accused may not be convicted of this offense for (his) (her) conduct relating to any medical treatment of (state the name of the alleged pregnant woman) or her unborn child.) (You have heard evidence that (here the military judge may summarize evidence related to an abortion of the unborn child allegedly consented to by the pregnant woman or other authorized person acting on her behalf, or evidence related to medical treatment for the pregnant woman or the unborn child.)) Unless you are convinced beyond a reasonable doubt that the attempted killing of the unborn child (did not result from an abortion consented to by (state the name of the alleged pregnant woman) or by someone legally authorized to act on her behalf,) ((and) did not result from the accused's conduct in the course of any medical treatment of (state the name of the alleged pregnant woman) (or) the unborn child), you may not convict the accused of this offense.)

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), will ordinarily be applicable.

3–44A–4. INTENTIONALLY KILLING AN UNBORN CHILD (ARTICLE 119a)

a. MAXIMUM PUNISHMENT: DD, TF, 15 years, E-1.

b. MODEL SPECIFICATION:

In that _____(personal jurisdiction data), did (at/on board--location), (subject matter jurisdiction data, if required), on or about _____ 20___, intentionally kill the unborn child of (state the name of the alleged pregnant woman), a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was engaged in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of (state the name of the alleged pregnant woman)] [arson of (a dwelling inhabited by (state the name of the alleged pregnant woman) (a structure or property known to (be occupied by) (belong to) (state the name of the alleged pregnant woman)];

(2) That (state the name of the alleged pregnant woman) was then a pregnant woman; and

(3) That the accused thereby intentionally killed the unborn child of (state the name of the alleged pregnant woman).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The killing of an unborn child is unlawful when done without legal justification or excuse.

"Pregnant woman" is a female of any age who is carrying within her body an unborn child.

The term "unborn child" means a child in utero (or a member of the species Homo Sapiens who is carried in the womb), at any stage of development, from conception to birth.

An "intentional" killing means the accused specifically intended the death of the unborn child. The intent to kill may be proved by circumstantial evidence, that is, by facts or circumstances from which you may

reasonably infer the existence of such an intent. Thus, you may infer that a person intends the natural and probable results of an act (he) (she) purposely does. Therefore, if a person does an intentional act which is likely to result in death, it may be inferred that (he) (she) intended to inflict death. The drawing of this inference, however, is not required.

NOTE 1: The members must be instructed on the elements of the alleged enumerated offense listed in Article 119a(b) (i.e., murder, voluntary manslaughter, involuntary manslaughter, rape, robbery, maiming, assault, or arson) the accused was engaged in, which was the proximate cause of the death of the unborn child. If the evidence of the alleged enumerated offense also raises a lesser included enumerated offense, the panel must also be advised accordingly (using the optional instruction below) and the Findings Worksheet must permit findings by exceptions and substitutions.

The accused may be found guilty of killing an unborn child if, in addition to all the other elements of the offense, you are convinced beyond a reasonable doubt that the accused engaged in the alleged offense of (state the offense alleged), which has the following elements: (state the elements of the enumerated offense alleged).

(The government has charged that the accused intentionally killed the unborn child of (state the name of the alleged pregnant woman) while engaged in the offense of (state the offense alleged). If you are convinced beyond a reasonable doubt of all the elements of the charged offense, except that the accused was engaged in the offense of (state the offense alleged), you may still find the accused guilty, if you are convinced beyond a reasonable doubt that the accused intentionally killed the unborn child while engaged in the offense of (state the lesser included offense raised that is also an enumerated offense) a lesser included offense of (state the offense alleged). (State the lesser included enumerated offense raised) has the following elements: (state here the elements of the lesser included enumerated offense). In this event you must make appropriate findings by excepting the word(s) "(state the offense alleged)" and substituting the word(s) "(state the lesser included enumerated offense)."")

NOTE 2: Special defense. A special defense of consent to an abortion, or death/injury occurring in the course of medical treatment, may reasonably be raised. If applicable, the following instruction should be given.

(An accused may not be convicted of this offense for (his) (her) conduct relating to an abortion for which the consent of (state the name of the alleged pregnant woman), or a person authorized by law to act on her behalf, had been obtained or for which such consent is implied by law.) ((Likewise,) An accused may not be convicted of this offense for (his) (her) conduct relating to any medical treatment of (state the name of the alleged pregnant woman) or her unborn child.) (You have heard evidence that (here the military judge may summarize evidence related to an abortion of the unborn child allegedly consented to by the pregnant woman or other authorized person acting on her behalf, or evidence related to medical treatment for the pregnant woman or the unborn child.)) Unless you are convinced beyond a reasonable doubt that the death of the unborn child (did not result from an abortion consented to by (state the name of the alleged pregnant woman) or by someone legally authorized to act on her behalf,) ((and) did not result from the accused's conduct in the course of any medical treatment of (state the name of the alleged pregnant woman) (or) the unborn child), you may not convict the accused of this offense.)

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), will ordinarily be applicable.

3–45. PREFACE TO ARTICLE 120 INSTRUCTIONS

The National Defense Authorization Act for Fiscal Year 2006 (109 Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006)) enacted sweeping changes to the Uniform Code of Military Justice regarding sexual misconduct occurring on and after 1 October 2007. Article 120 now encompasses what previously were offenses under a number of different UCMJ provisions, including Article 134. This preface seeks to conceptualize these changes to make them easier to understand.

Article 120 now uses several common definitions, which are not the same as those which applied to the offenses the new Article 120 replaces. Understanding these definitions is crucial to understanding how Article 120 is now constructed.

"Sexual act" means:

(A) contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

"Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

"Grievous bodily harm" means serious bodily injury. It does not include minor injuries such as a black eye or a bloody nose, but it does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It is the same level of injury as in Article 128, UCMJ, and a lesser degree of bodily injury than that involving a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

"Force" means action to compel submission of another or to overcome or prevent another's resistance by:

(A) the use or display of a dangerous weapon or object;

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or

(C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

"Dangerous weapon or object" means:

(A) any firearm, loaded or not, and whether operable or not;

(B) any other weapon, device, instrument, material, or substance, whether animate or inanimate, that in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm; or

(C) any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.

"Threatening or placing that other person in fear" (for rape and aggravated sexual contact) means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to death, grievous bodily harm, or kidnapping.

"Threatening or placing that other person in fear" (for aggravated sexual assault and abusive sexual contact) means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping. Such lesser degree of harm includes:

(A) physical injury to another person or to another person's property; or

(B) a threat:

(i) to accuse any person of a crime;

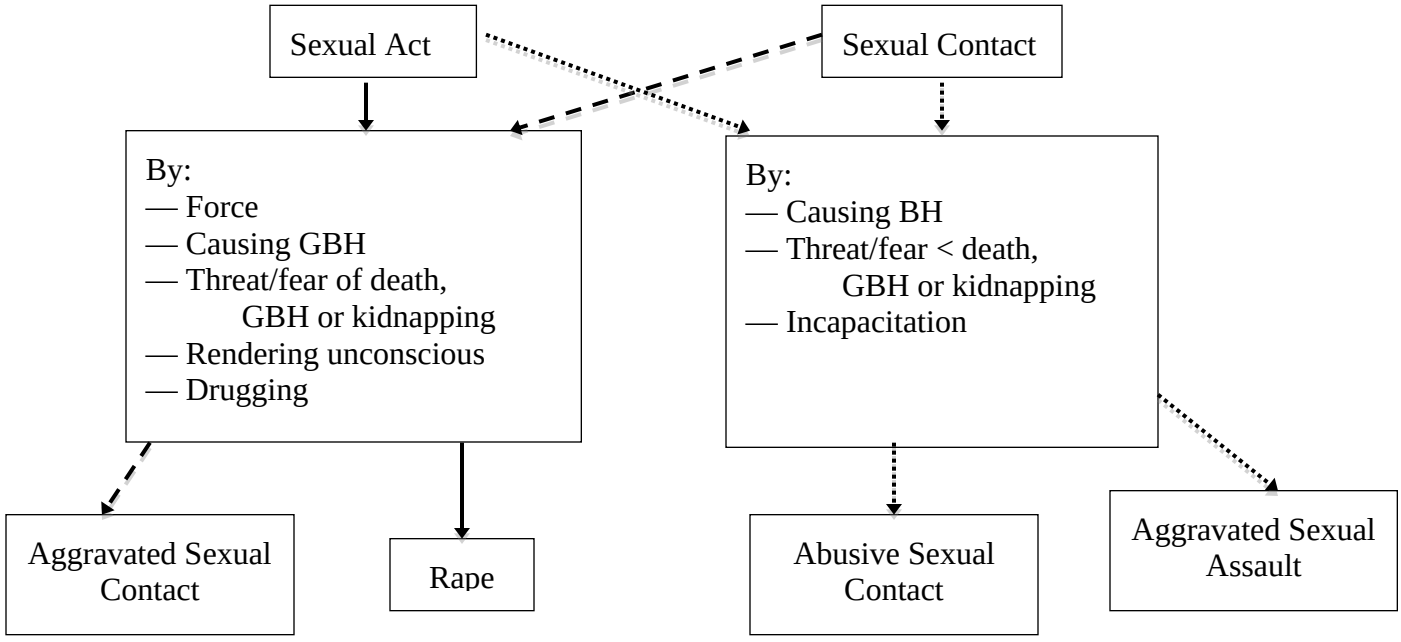
(ii) to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or

(iii) through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

"Bodily harm" means any offensive touching of another, however slight.

Article 120 defines some offenses by whether the accused engaged in a "sexual act" or "sexual contact," and then the means by which the accused accomplished the sexual act or sexual contact. The chart below graphically represents the definitions of certain new Article 120 offenses. For example, "rape" is a "sexual act" committed by certain means or in a certain manner. "Sexual contact" committed by the same means/in the same manner as the sexual act in rape would be" aggravated sexual contact." Likewise, "aggravated sexual assault" is a "sexual act" committed by different means/in a different manner than rape. "Sexual contact" committed by the same means/in the same manner as aggravated sexual assault would be "abusive sexual contact."

Neither this explanation, nor the chart below, should be relied upon for the elements of any offense. They do not cover all Article 120 offenses. Careful review of the elements of each offense in the instructions that follow this preface is recommended. Until additional clarification is available, it is the responsibility of each trial judge to understand and correctly implement the new provisions.



3–45–1. RAPE (ARTICLE 120)

a. MAXIMUM PUNISHMENT:

(1) Rape: Death or other lawful punishment.

(2) Carnal knowledge with a child 12 or older and under 16: DD, TF, 20 years, E-1.

(3) Carnal knowledge with a child under 12: DD, TF, life without eligibility for parole, E-1.

NOTE 1: Death sentence. The military judge should always ascertain on the record whether a rape charge was referred as capital when Section V of the charge sheet does not address the matter. The plurality opinion in Coker v. Georgia, 433 U.S. 584 (1977), held that the death penalty for the rape of an adult woman is unconstitutional, at least where the woman is not otherwise harmed. RCM 1004(c)(6) indicates that the death penalty for rape is authorized when the offense was committed in time of war and in territory in which the United States or its ally was an occupying power or in which the United States armed forces were engaged in active hostilities. RCM 1004(c)(9) indicates that the death penalty for rape is authorized where the victim is under the age of 12 or the accused maimed or attempted to kill the victim.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, rape _____, (a person who had not attained the age of (12) (16) years).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed an act of sexual intercourse with (state the name of the alleged victim); and

(2) That the act of sexual intercourse was done by force and without the consent of (state the name of the alleged victim);

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Sexual intercourse" is any penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.

NOTE 2: Lack of penetration in issue. If lack of penetration is in issue, the military judge should further define what is meant by the female sex organ. The instruction below may be helpful. See also United States v. Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CAAF 1988) and United States v. Tu, 30 MJ 587 (ACMR 1990):

The "female sex organ" includes not only the vagina. which is the canal that connects the uterus to the external opening of the genital canal, but

also the external genital organs including the labia majora and the labia minora. "Labia" is the Latin and medically correct term for "lips."

NOTE 3: Using this instruction. NOTEs 4 through 11 and the instructions that follow address common scenarios involving potential force and consent issues. The military judge must identify those issues raised by the evidence and select the appropriate instruction. Although the Code permits the prosecution of a female for this offense, the gender choices in these instructions assume a female victim, as that is the most common case. Many of the instructions following a note contain identical language found in instructions following other NOTEs. This repetitiveness is necessary to ensure all issues addressed by the note are instructed upon and in the correct order. Below is a guide to the instructions. Where multiple issues of constructive force or ability to consent are raised (sleeping child-victim, for example), the military judge may have to combine the instructions. In such cases, the military judge should give the common portions of the instructions only once; the order of the instructions must be preserved.

a. Actual, physical force (and none of the issues listed below are raised): NOTE 4.

b. Constructive force by intimidation and threats: NOTE 5.

c. Constructive force - abuse of military power: NOTE 6.

d. Constructive force (parental or analogous compulsion) and consent of a child of tender years NOT in issue: NOTE 7.

e. Victim incapable of giving consent (children of tender years) and parental or analogous compulsion NOT in issue: NOTE 8.

f. BOTH constructive force (parental or analogous compulsion) AND consent of a child of tender years in issue: NOTE 9.

g. Victim incapable of giving consent due to mental infirmity: NOTE 10.

h. Victim incapable of giving consent due to sleep, unconsciousness, or intoxication: NOTE 11.

NOTE 4: Actual, physical force. Where the force involved is actual, physical force and constructive force and special situations involving lack of consent are not raised, give the following instructions:

Both force and lack of consent are necessary to the offense. "Force" is physical violence or power applied by the accused to the victim. An act of sexual intercourse occurs "by force" when the accused uses physical violence or power to compel the victim to submit against her will.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of

acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented. Consent, however may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

NOTE 5: Constructive force by intimidation or threats. Where the evidence raises the issue of constructive force by threat or intimidation, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of

acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

NOTE 6: Constructive force—abuse of military power. When there is some evidence the accused employed constructive force based upon his military position, rank, or authority, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

There is evidence which, if believed, indicates that the accused (used) (abused) his (military) (_____) (position) (and) (or) (rank) (and) (or) (authority) (_____) in order to (coerce) (and) (or) (force) (state the name of the alleged victim) to have sexual intercourse. Specifically, I draw your attention to (summarize the evidence concerning the accused's possible use or abuse of his position, rank, or authority). You may consider this evidence in deciding whether (state the name of the alleged victim) had a reasonable belief that death or great bodily harm would be inflicted on her and that (further) resistance would be futile. This evidence is also part of the surrounding circumstances you may consider in deciding whether (state the name of the alleged victim) consented to the act of sexual intercourse.

NOTE 7: Constructive force—parental, or analogous compulsion. When the evidence raises the issue of constructive force based upon a child's acquiescence because of duress or a coercive atmosphere created by a parent or one acting in loco parentis, give the following instructions. If parental, or analogous compulsion AND consent issues involving

a child of tender years are also involved, give the instructions following NOTE 9 instead of the instructions below:

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent's) (step parent's) (_____) position of authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you must consider all of the facts and circumstances, including but not limited to (the age of the child when the alleged abuse started) (the child's ability to fully comprehend the nature of the acts involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (state any other evidence surrounding the parent-child, or similar, relationship from which constructive force could reasonably be inferred). If (state the name of the alleged victim) (did not resist) (or) (ceased resistance) due to the (compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sexual intercourse was done by force and without consent.

NOTE 8: Victims incapable of giving consent—children of tender years. If parental, or analogous, compulsion is not in issue, but the victim is of tender years and may not have, as a matter of fact, the requisite mental maturity to consent, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding

circumstances, create a reasonable belief in a child's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, an act of sexual intercourse has been accomplished by force.

When a victim is incapable of consenting because she lacks the mental capacity to understand the nature of the act, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent. If (state the name of the alleged victim) was incapable, due to her (tender age) (and) (lack of) mental development, of giving consent, then the act was done by force and without consent. A child (of tender years) is not capable of consenting to an act of sexual intercourse until she understands the act, its motive, and its possible consequences. In deciding whether (state the name of the alleged victim) had, at the time of the sexual intercourse, the requisite knowledge and mental (development) (capacity) (ability) to consent you should consider all the

evidence in the case, including but not limited to: (state any lay or expert testimony relevant to the child's development) (state any other information about the alleged victim, such as the level and extent of education, and prior sex education and experiences, if any).

If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent, the act of sexual intercourse was done by force and without consent.

NOTE 9: Constructive force (parental, or analogous compulsion) AND consent issues involving children of tender years. When the evidence raises the issue of constructive force based upon a child's acquiescence because of duress or a coercive atmosphere created by a parent or one acting in loco parentis, AND also the issue of consent by children of tender years, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent's) (stepparent's) (_____) position of authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether

the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you must consider all of the facts and circumstances, including but not limited to (the age of the child when the alleged abuse started) (the child's ability to fully comprehend the nature of the acts involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (state any other evidence surrounding the parent-child, or similar relationship, from which constructive force could reasonably be inferred). If (state the name of the alleged victim) (did not resist) (or) (ceased resistance) due to the (compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sexual intercourse was done by force and without consent.

When a victim is incapable of consenting because she lacks the mental capacity to understand the nature of the act, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great

bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

If (state the name of the alleged victim) was incapable, due to her (tender age) (and) (lack of) mental development, of giving consent, then the act was done by force and without consent. A child (of tender years) is not capable of consenting to an act of sexual intercourse until she understands the act, its motive, and its possible consequences. In deciding whether (state the name of the alleged victim) had, at the time of the sexual intercourse, the requisite knowledge and mental (development) (capacity) (ability) to consent you should consider all the evidence in the case, including but not limited to: (state any lay or expert testimony relevant to the child's development) (state any other information about the alleged victim, such as the level and extent of education, and prior sex education and experiences, if any).

If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent, the act of sexual intercourse was done by force and without consent.

NOTE 10: Victims incapable of giving consent—due to mental infirmity. Where there is some evidence that the victim may be incapable of giving consent because of a mental handicap or disease, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus the requirement of force is satisfied. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance

would be futile, the act of sexual intercourse has been accomplished by force.

When a victim is incapable of consenting because she lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

If (state the name of the alleged victim) was incapable, due to mental infirmity, of giving consent, then the act was done by force and without her consent. A person is capable of consenting to an act of sexual intercourse unless her mental infirmity is so severe that she is incapable of understanding the act, its motive, and its possible consequences. In deciding whether (state the name of the alleged victim) had, at the time of the sexual intercourse, the requisite mental capacity to consent you should consider all the evidence in the case, including but not limited to: (state any expert testimony relevant to the alleged victim's mental

infirmity) (state any other information about the alleged victim, such as the level and extent of education; ability, or inability, to hold a job or manage finances; and prior sex education and experiences, if any). You may also consider her demeanor in court and her general intelligence as indicated by her answers to questions propounded to her in court.

If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent, the act of sexual intercourse was done by force and without consent.

NOTE 11: Victims incapable of giving consent—due to sleep, unconsciousness, or intoxication. Where there is some evidence that the victim may have been asleep, unconscious, or intoxicated and, therefore, incapable of giving consent at the time of the intercourse, give the following instructions:

Both force and lack of consent are necessary to the offense. "Force" is physical violence or power applied by the accused to the victim. An act of sexual intercourse occurs "by force" when the accused uses physical violence or power to compel the victim to submit against her will.

When a victim is incapable of consenting, because she is asleep, unconscious, or intoxicated to the extent that she lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties.

You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

If (state the name of the alleged victim) was incapable, due to lack of mental or physical faculties, of giving consent, then the act was done by force and without consent. A person is capable of consenting to an act of sexual intercourse unless she is incapable of understanding the act, its motive, and its possible consequences. In deciding whether (state the name of the alleged victim) had consented to the sexual intercourse you should consider all the evidence in the case, including but not limited to: ((the degree of the alleged victim's) (intoxication, if any,) (and) (or) (consciousness or unconsciousness) (and) (or) (mental alertness)); ((the ability or inability of the alleged victim) (to walk) (and) (or) (to communicate coherently)); ((whether the alleged victim may have consented to the act of sexual intercourse prior) (to lapsing into unconsciousness) (and) (or) (falling asleep)); (and) (or) (state any other evidence tending to show the alleged victim may have been acquiescing to the intercourse rather than actually being asleep, unconscious, or otherwise unable to consent).

If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent because she was (asleep) (unconscious) (intoxicated), the act of sexual intercourse was done by force and without consent.

NOTE 12: Mistake of fact to consent—completed rapes. An honest and reasonable mistake of fact as to the victim's consent is a defense to rape. United States v. Carr, 18 MJ 297 (CMA 1984), United States v. Taylor, 26 MJ 127 (CMA 1988), and United States v. Peel, 29 MJ 235 (CMA 1989), cert denied, 493 U.S. 1025 (1990). If mistake of fact is in issue, give the following instructions. If mistake of fact as to consent is raised in relation to attempts and

other offenses requiring the specific intent to commit rape, use the instructions following NOTE 14 instead of the instructions below.

The evidence has raised the issue of mistake on the part of the accused concerning whether (state the name of the alleged victim) consented to sexual intercourse in relation to the offense of rape.

If the accused had an honest and mistaken belief that (state the name of the alleged victim) consented to the act of sexual intercourse, he is not guilty of rape if the accused's belief was reasonable.

To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the alleged victim) was consenting to the sexual intercourse. In deciding whether the accused was under the mistaken belief that (state the name of the alleged victim) consented, you should consider the probability or improbability of the evidence presented on the matter.

You should also consider the accused's (age) (education) (experience) (prior contact with (state the name of the alleged victim)) (the nature of any conversations between the accused and (state the name of the alleged victim)) (_____) along with the other evidence on this issue (including but not limited to (here the military judge may summarize other evidence that may bear on the accused's mistake of fact)).

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged rape, the accused was not under the mistaken belief that (state the name of the alleged victim) consented to the sexual intercourse, the defense of mistake does not exist. Even if you conclude that the accused was under the honest and mistaken belief that (state the name of the alleged victim) consented to the sexual intercourse, if you are convinced beyond a reasonable doubt that, at the time of the charged offense, the accused's mistake was unreasonable, the defense of mistake does not exist.

NOTE 13: Voluntary intoxication and mistake of fact as to consent. If there is evidence the accused may have been under the influence of an intoxicant and the evidence raises mistake of fact as to consent to a completed rape, give the following instruction:

There is evidence in this case that indicates that at the time of the alleged rape, the accused may have been under the influence of (alcohol) (drugs).

The accused's voluntary intoxication may not be considered in deciding whether the accused reasonably believed that (state the name of the alleged victim) consented to sexual intercourse. A reasonable belief is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 14: Mistake of fact to consent—attempts and other offenses requiring intent to commit rape. To be a defense, mistake of fact as to consent in attempted rape, or offenses where rape is the intended offense (assault, burglary, conspiracy etc.), need only be honest. United States v. Langley, 33 MJ 278 (CMA 1991). When mistake of fact to consent is in issue with respect to these offenses, give the following instruction:

The evidence has raised the issue of mistake on the part of the accused concerning whether (state the name of the alleged victim) ((consented) (would consent)) to sexual intercourse in relation to the offense of (state the alleged offense).

I advised you earlier that to find the accused guilty of the offense of (attempted rape) (assault with intent to commit rape) (burglary with intent to commit rape) (conspiracy to commit rape) (_____), you must find beyond a reasonable doubt that the accused had the specific intent to commit rape, that is, sexual intercourse by force and without consent.

If the accused at the time of the offense was under the honest and mistaken belief that (state the name of the alleged victim) ((would consent) (consented)) to sexual intercourse, then he cannot be found guilty of the offense of (attempted rape) (assault with intent to commit rape) (burglary with intent to commit rape) (conspiracy to commit rape) (_____).

The mistake, no matter how unreasonable it might have been, is a defense. In deciding whether the accused was under the mistaken belief that (state the name of the alleged victim) ((would consent) (consented)), you should consider the probability or improbability of the evidence presented on the matter. You should also consider the accused's (age) (education) (experience) (prior contact with (state the name of the alleged victim)) (the nature of any conversations between the accused and (state the name of the alleged victim)) (_____) along with the other evidence on this issue (including, but not limited to (here the military judge may summarize other evidence that may bear on the accused's mistake of fact)).

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that at the time of the alleged offense the accused was not under the mistaken belief that (state the name of the alleged victim) ((would consent) (consented)) to sexual intercourse, then the defense of mistake does not exist.

NOTE 15: Compound offenses and mistake of fact. If the accused is charged with an offense that requires the intent to commit rape and the evidence raises the possibility that the accused was under the mistaken belief the victim would or did consent, the military judge should determine whether a lesser included offense has been raised. For example, if the accused is charged with burglary with intent to commit rape and the members might find the accused had a mistaken belief the intended victim would consent, the evidence may raise the lesser included offense of unlawful entry.

NOTE 16: Consent obtained by fraud. Consent obtained by fraud in the inducement (e.g., a promise to pay money, misrepresentation as to marital status, or to "respect" the partner in the morning) is valid consent. Consent obtained by fraud in factum (e.g., a misrepresentation as to the nature of the act performed) is not valid consent and is not a defense to rape. United States v. Booker, 25 MJ 114 (CMA 1987).

NOTE 17: MRE 412 ("Rape shield"). Notwithstanding the general proscriptions in MRE 412 concerning the admissibility of a sexual assault victim's past sexual behavior, such evidence may be admissible if it is probative of a victim's motive to fabricate or to show that the accused was mistaken about the victim's consent. United States v. Williams, 37 MJ 352 (CMA 1993) (extra-marital affair as to victim's motive to lie) and United States v. Kelley, 33 MJ 878 (ACMR 1991) (victim's public and aggressive sexual behavior to show accused's mistaken belief as to consent.)

NOTE 18: Carnal knowledge as lesser included offense. If carnal knowledge is a lesser included offense, give the following instructions:

Carnal knowledge is a lesser included offense of rape. If you have a reasonable doubt about either the element of force or lack of consent, but you do find beyond a reasonable doubt:

(1) That (state the time and place alleged), the accused committed an act of sexual intercourse with a female, namely: (state the name of the alleged victim);

(2) That (state the name of the alleged victim) was not the accused's (husband) (wife); and

(3) That at the time of the act of sexual intercourse (state the name of the alleged victim) was under (16) (12) years of age, you may find the accused guilty of the lesser included offense of carnal knowledge.

Neither force nor lack of consent are required for this lesser included offense. (Stated conversely, neither lack of force nor consent are defenses.) (It is no defense that the alleged victim was of unchaste character.) (Unless you find that the accused honestly and reasonably believed that (state the name of the alleged victim) was over 16 years of age), it is no defense that the accused was ignorant or misinformed as to the true age of the alleged victim.)

NOTE 19: Prior unchaste character and mistake as to age in sentencing. While the victim's unchaste character is not relevant on findings, and the accused's ignorance of the victim's age may be relevant, depending on the circumstances (See NOTE 20, below, on the mistake of fact defense), they may be considered on sentencing. See Part IV, Paragraph 45(c)(2), MCM.

NOTE 20: Mistake of fact as to victim's age. The Military Justice Act of 1996 established a mistake of fact defense to carnal knowledge. The defense applies when the victim is at least 12 years of age, and some evidence is introduced which shows the accused may have honestly and reasonably believed the victim was 16. Note that this defense is unusual in that the burden is on the defense to establish, by a preponderance of the evidence, that the belief was honest and reasonable. When the defense is raised by the evidence, the following instruction is suggested. If the parties have stipulated that the alleged victim was at least 12, the portion in parentheses in the second paragraph need not be given.

The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of carnal knowledge, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge

(_____). Specifically, the mistake concerns the accused's belief as to the age of (state the name of the alleged victim) when the alleged act(s) of sexual intercourse occurred.

For mistake of fact to be a defense, the burden is on the defense to convince you by a preponderance of evidence that the mistake exists. A preponderance of the evidence merely means that it is more likely than not that a fact exists. In this case, if you are convinced that, at the time of the alleged act(s), it is more likely than not that (the person with whom (he) (she) had sexual intercourse was at least 12 years old; and) the accused honestly and reasonably believed that the person with whom (he) (she) had sexual intercourse was at least 16 years old, then this mistake on the part of the accused is a complete defense to the offense of carnal knowledge.

To be reasonable, the accused's belief must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the alleged victim) was at least 16 years old at the time of the alleged offense(s).

In deciding whether the accused was under the mistaken belief that (state the name of the alleged victim) was at least 16 years old, you should consider the probability or improbability of the evidence presented on the matter. You should consider all the evidence presented on this issue, (including but not limited to the accused's (age) (education) (experience) (prior contact or prior conversations with (state the name of the alleged victim)) (prior contact or prior conversations with (state the name of the alleged victim)'s family member(s))) (the location where the accused met (state the name of the alleged victim)) (_____), as well as (state the name of the alleged victim)'s (appearance) (level of maturity) (demeanor) (actions) (statements made to the accused concerning (state the name of the alleged victim)'s age) (_____) (here the military judge may specify other significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).

NOTE 21: Voluntary intoxication and mistake of fact. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There is evidence in this case that indicates that, at the time of the alleged carnal knowledge offense(s), the accused may have been under the influence of (alcohol) (drugs). The accused's voluntary intoxication may not be considered in deciding whether the accused honestly and reasonably believed that (state the name of the alleged victim) was at least 16 years old. A reasonable belief is one that an ordinary prudent sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 22: Concluding instructions on mistake of fact. Give the following concluding instructions in each case in which mistake of fact is raised. If the parties have stipulated that the child is at least 12, the portion in parentheses need not be given.

If you are not convinced by a preponderance of the evidence (that (state the name of the alleged victim) was at least 12 years old, or) that the accused's belief that (state the name of the alleged victim) was at least 16 years old was honest and reasonable, then this defense of mistake does not exist.

Even if the defense fails to convince you that this defense of mistake exists, the burden remains on the prosecution to prove the accused's guilt beyond a reasonable doubt, to include each and every element of the offense of carnal knowledge.

NOTE 23: Evidentiary concerns. When the accused is charged with rape of a child, the defense may wish to introduce evidence that is arguably relevant on a mistake of fact defense as to carnal knowledge, but may not be relevant as to the charged offense. When the military judge rules that evidence is relevant for the lesser included offense, but not relevant as to the charged offense, a limiting instruction, given at the time the evidence is introduced and/or during findings instructions, may be appropriate. The following is suggested:

The accused is charged with the offense of rape. The offense of carnal knowledge is a lesser included offense of rape. These two offenses differ primarily in that rape is a non-consensual sexual offense, while in

carnal knowledge, consent is not relevant. The focus of the offense of carnal knowledge is sexual intercourse with a child. In some circumstances, about which I will provide more detailed instructions later in the trial, the accused's reasonable mistake of fact as to the child's age may be a defense. You have just (heard testimony) (reviewed evidence) which has been admitted for the limited purpose of its tendency, if any, to establish the accused's honest and reasonable belief that (state the name of the alleged victim) was over the age of 16 at the time the alleged act of sexual intercourse occurred. You may not consider this evidence for any other purpose in this trial.

NOTE 24: Age of victim—variance. For a conviction of the lesser included offense of carnal knowledge, the government must show the victim to be under the age of 16. However, as an aggravating factor, the government may plead and prove that the victim was under the age of 12. When the government pleads that the victim was under the age of 12, but the evidence is in conflict as to the victim's exact age, Instruction 7-15, Variance, may be appropriate. The court members should be clearly instructed that, in spite of the pled age, they may still find the accused guilty if they find beyond a reasonable doubt that the victim was not 16 at the time of the alleged sexual intercourse.

e. REFERENCES:

(1) Force: Black's Law Dictionary (6th ed. 1990) (West Law, 1993).

(2) Constructive force—Coker v. Georgia, 433 U.S. 584 (1977); United States v. Hicks, 24 MJ 3 (CMA 1987), *cert. denied*, 484 U.S. 827 (1987); United States v. Bradley, 28 MJ 197 (CMA 1989); United States v. Palmer, 33 MJ 7 (CMA 1991).

(3) Constructive force—abuse of military authority: United States v. Hicks, *supra*; United States v. Bradley, *supra*; United States v. Clark, 35 MJ 432 (CMA 1992), *cert. denied*, 507 U.S. 1052 (1993).

(4) Constructive force—parental compulsion and children of tender years: United States v. Palmer, supra; United States v. Rhea, 33 MJ 413 (CMA 1991); United States v. Torres, 27 MJ 867 (AFCMR 1989), *opinion set aside*, 29 MJ 299 (CMA 1989), unpublished opinion clarifying prior opinion (AFCMR November 15, 1989), *pet. denied*, 30 MJ 226 (CMA 1990), original opinion cited with approval in Palmer, *supra*, 33 MJ at 10; United States v. Dejonge, 16 MJ 974 (AFCMR 1983), *pet. denied*, 18 MJ 92 (CMA 1986); North Carolina v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

(5) Victim incapable of giving consent—mental infirmity: United States v. Henderson, 15 CMR 268 (CMA 1954); United States v. Lyons, 33 MJ 543 (ACMR 1991), *aff'd*, 36 MJ 183 (CMA 1992); 75 C.J.S. Rape section 14(b) n. 10.

(6) Victim incapable of giving consent—sleep, intoxication, or unconsciousness: Part IV, Para 45c(1)(b), MCM; United States v. Mathi, 34 MJ 33 (CMA 1992); United States v. Robertson, 33 CMR 828 (AFBR 1963), *rev'd on other grounds*, 34 CMR 108 (CMA 1963).

(7) Carnal knowledge as lesser included offense to rape when age not pled—*Compare* United States v. Smith, 7 MJ 842 (ACMR 1979) *with* Part IV, paragraph 45d(1) (e), MCM.

3–45–2. CARNAL KNOWLEDGE (ARTICLE 120)

NOTE 1: Using this instruction. Use this instruction if carnal knowledge is separately charged. If instructing on carnal knowledge as a lesser included offense of rape, use the instructions following NOTE 18, Instruction 3-45-1 (Rape).

a. MAXIMUM PUNISHMENT:

(1) Child 12 or over and under 16: DD, TF, 20 years, E-1.

(2) Child under 12: DD, TF, life without eligibility for parole, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location) on or about _____, commit the offense of carnal knowledge with _____, (a child under 12).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed an act of sexual intercourse with (state the name of the alleged victim);

(2) That (state the name of the alleged victim) was not the accused's (husband) (wife); and

(3) That at the time of the act of sexual intercourse (state the name of the alleged victim) was under (16) (12) years of age.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Sexual intercourse" is any penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.

Neither force nor lack of consent are required for this offense. (Stated conversely, neither lack of force nor consent are defenses.) (It is no defense that the alleged victim was of unchaste character.) (Unless you find that the accused honestly and reasonably believed that (state the name of the alleged victim) was over 16 years of age), it is no defense that the accused was ignorant or misinformed as to the true age of the alleged victim.)

NOTE 2: Lack of penetration in issue. If lack of penetration is in issue, the military judge should further define what is meant by the female sex organ. The instruction below may be

helpful. See also United States v. Williams, 25 MJ 854 (AFCMR 1988), pet. denied, 27 MJ 166 (CMA 1988) and United States v. Tu, 30 MJ 87 (ACMR 1990):

> The "female sex organ" includes not only the vagina which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. "Labia" is the Latin and medically correct term for "lips."

NOTE 3: Mistake of fact as to victim's age. The Military Justice Act of 1996 established a mistake of fact defense to carnal knowledge. The defense applies when the victim is at least 12 years of age, and some evidence is introduced which shows the accused may have honestly and reasonably believed the victim was 16. Note that this defense is unusual in that the burden is on the defense to establish, by a preponderance of the evidence, that the belief was honest and reasonable. When the defense is raised by the evidence, the following instruction is suggested. If the parties have stipulated that the alleged victim was at least 12, the portion in parentheses in the second paragraph need not be given.

> The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of carnal knowledge, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____). Specifically, the mistake concerns the accused's belief as to the age of (state the name of the alleged victim) when the alleged act(s) of sexual intercourse occurred.
>
> For mistake of fact to be a defense, the burden is on the defense to convince you by a preponderance of the evidence that the mistake exists. "A preponderance of the evidence" merely means that it is more likely than not that a fact exists. In this case, if you are convinced that, at the time of the alleged act(s), it is more likely than not that (the person with whom (he) (she) had sexual intercourse was at least 12 years old; and) the accused honestly and reasonably believed that the person with whom (he) (she) had sexual intercourse was at least 16 years old, then this mistake on the part of the accused is a complete defense to the offense of carnal knowledge.
>
> To be reasonable, the accused's belief must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the alleged victim) was at least 16 years old at the time of the alleged offense(s).

In deciding whether the accused was under the mistaken belief that (state the name of the alleged victim) was at least 16 years old, you should consider the probability or improbability of the evidence presented on the matter. You should consider all the evidence presented on this issue, (including but not limited to the accused's (age) (education) (experience) (prior contact or prior conversations with (state the name of the alleged victim) (prior contact or prior conversations with (state the name of the alleged victim)'s family member(s)) (the location where the accused met (state the name of the alleged victim) (_____), as well as (state the name of the alleged victim)'s (appearance) (level of maturity) (demeanor) (actions) (statements made to the accused concerning (state the name of the alleged victim)'s age) (_____) (here the military judge may specify other significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).

NOTE 4: Voluntary intoxication and mistake of fact. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There is evidence in this case that indicates that, at the time of the alleged carnal knowledge offense(s), the accused may have been under the influence of (alcohol) (drugs). The accused's voluntary intoxication may not be considered in deciding whether the accused honestly and reasonably believed that (state the name of the alleged victim) was at least 16 years old. A reasonable belief is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 5: Concluding instructions on mistake of fact. Give the following concluding instructions in each case in which mistake of fact is raised. If the parties have stipulated that the child is at least 12, the portion in parentheses need not be given.

If you are not convinced by a preponderance of the evidence (that (state the name of the alleged victim) was at least 12 years old, or) that the accused's belief that (state the name of the alleged victim) was at least

16 years old was honest and reasonable, then this defense of mistake does not exist.

Even if the defense fails to convince you that this defense of mistake exists, the burden remains on the prosecution to prove the accused's guilt beyond a reasonable doubt, to include each and every element of the offense of carnal knowledge.

NOTE 6: Prior unchaste character and ignorance of victim's age in sentencing. Evidence of the victim's prior unchaste character and ignorance of her true age may be relevant in sentencing. Part IV, Paragraph 45(c)(2), MCM.

3–45–3. RAPE (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007.

a. MAXIMUM PUNISHMENT:

(1) Rape: Death or other lawful punishment.

(2) Rape of a child: Death or other lawful punishment.

NOTE 2: Death sentence. The plurality opinion in Coker v. Georgia, 433 U.S. 584 (1977), held that the death penalty for the rape of an adult woman is unconstitutional, at least where the woman is not otherwise harmed. RCM 1004(c)(6) indicates that the death penalty for rape is authorized when the offense was committed in time of war and in territory in which the United States or its ally was an occupying power or in which the United States armed forces were engaged in active hostilities. RCM 1004(c)(9) indicates that the death penalty for rape is authorized where the victim is under the age of 12 or the accused maimed or attempted to kill the victim.

b. MODEL SPECIFICATION:

Rape:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, cause _____ to engage in (a) sexual act(s), to wit: _____, by [if force alleged, state the force used] [causing grievous bodily harm to (him/her) (_____), to wit (broken leg) (deep cut) (fractured skull) (_____)] [(threatening) (placing him/her in fear) that (he/she) (_____) would be subjected to (death) (grievous bodily harm) (kidnapping)] [rendering him/her unconscious] [administering to him/her a (drug) (intoxicant) (_____) [by (force) (threat of force)] [without his/her (knowledge) (permission)], thereby substantially impairing his/her ability to (appraise) (control) his/her conduct].

Rape of a Child:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, engage in (a) sexual act(s), to wit: _____, with _____, a child who had [not attained the age of 12 years][attained the age of 12 years, but had not attained the age of 16 years, by [if force alleged, state the force used] [causing grievous bodily harm to (him/her) (_____), to wit (broken leg) (deep cut) (fractured skull) (_____)] [(threatening) (placing him/her in fear) that (he/she) (_____) would be subjected to (death) (grievous bodily harm) (kidnapping)] [rendering him/her unconscious] [administering to him/her a (drug) (intoxicant) (_____) [by (force) (threat of force)] [without his/her (knowledge) (permission)], thereby substantially impairing his/her ability to (appraise) (control) his/her conduct]].

c. ELEMENTS:

Rape:

(1) That (state the time and place alleged), the accused caused (state name of the alleged victim) to engage in (a) sexual act(s), to wit: (state the act(s) alleged); and

(2) That the accused did so by

(a) using force against (state the name of the alleged victim), to wit: (state the force alleged).

(b) causing grievous bodily harm to (state the name of the person alleged), to wit: (state the injuries allegedly inflicted).

(c) threatening (state the name of the alleged victim) that (state the name of the person alleged) would be subjected to (death) (grievous bodily harm) (kidnapping).

(d) placing (state the name of the alleged victim) in fear that (state the name of the person alleged) would be subjected to (death) (grievous bodily harm) (kidnapping).

(e) rendering (state the name of the alleged victim) unconscious.

(f) administering to (state the name of the alleged victim) a (drug) (intoxicant) (_____) [by (force) (threat of force)] [without the (knowledge) (permission) of (state the name of the alleged victim)], thereby substantially impairing the ability of (state the name of the alleged victim) to (appraise) (control) his/her conduct.

Rape of a child:

(1) That (state the time and place alleged), the accused engaged in (a) sexual act(s), to wit: (state the act(s) alleged), with (state the name of the alleged victim); (and)

NOTE 3: Child under the age of 12 alleged. If it is alleged that the victim was under the age of 12, give the following element:

[(2)] That at the time, (state the name of the alleged victim) had not attained the age of 12 years.

NOTE 4: Child who had attained the age of 12, but had not attained the age of 16 alleged. If it is alleged that the victim had attained the age of 12, but had not attained the age of 16, give the following elements as applicable:

[(2)] That the accused did so by

(a) using force against (state the name of the alleged victim), to wit: (state the force alleged);

(b) causing grievous bodily harm to (state the name of the person alleged), to wit: (state the injuries allegedly inflicted);

(c) threatening (state the name of the alleged victim) that (state the name of the person alleged) would be subjected to (death) (grievous bodily harm) (kidnapping);

(d) placing (state the name of the alleged victim) in fear that (state the name of the person alleged) would be subjected to (death) (grievous bodily harm) (kidnapping);

(e) rendering (state the name of the alleged victim) unconscious;

(f) administering to (state the name of the alleged victim) a (drug) (intoxicant) (_____) [by (force) (threat of force)] [without the (knowledge) (permission) of (state the name of the alleged victim)], thereby substantially impairing the ability of (state the name of the alleged victim) to (appraise) (control) his/her conduct;

(3) That at the time, (state the name of the alleged victim) had not attained the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Sexual act" means the penetration, however slight, (of the vulva by the penis) (of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person).

("Substantially impaired" means that level of mental impairment that rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to decline participation in the sexual conduct at

issue, or unable to physically communicate unwillingness to engage in the sexual conduct at issue.)

("Unconscious" means incapable of responding to sensory stimuli and of having subjective experiences. An unconscious person is incapable of creating memories for later recall. Lack of memory may be evidence of unconsciousness, but the mere inability to recall, sometimes associated with excessive alcohol consumption, is insufficient to prove beyond a reasonable doubt the person was unconscious.)

NOTE 5: Lack of penetration in issue. If lack of penetration is in issue, the military judge should further define what is meant by the "vulva" or "genital opening." The instruction below may be helpful. See also United States v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) and United States v. Tu, 30 MJ 587 (ACMR 1990).

(The "vulva" is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. "Labia" is the Latin and medically correct term for "lips.")

(The "genital opening" is the entrance to the vagina, which is the canal that connects the genital opening to the uterus.)

NOTE 6: By force. When the sexual act is alleged by force, include the following instruction:

"Force" means action to compel submission of another or to overcome or prevent another's resistance by (the use or display of a dangerous weapon or object) (the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object) (physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual act).

("Dangerous weapon or object" means (any firearm, loaded or not, and whether operable or not) (any weapon, device, instrument, material, or substance, whether animate or inanimate, that in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm) (any object fashioned or utilized in such a manner

as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm). "Grievous bodily harm" means serious bodily injury. It does not include minor injuries such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. (It is a lesser degree of bodily injury than that involving a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.))

NOTE 7: By causing grievous bodily harm. When the sexual act is alleged by causing grievous bodily harm, include the following instruction:

"Grievous bodily harm" means serious bodily injury. It does not include minor injuries such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. (It is a lesser degree of bodily injury than that involving a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.)

(The grievous bodily harm which caused the alleged victim to engage in the sexual act need not have been caused by the accused to the alleged victim. It is sufficient if the accused caused grievous bodily harm to any person, which thereby caused the alleged victim to engage in the sexual act.)

NOTE 8: By threat. When the sexual act is alleged by threat or by placing in fear, include the following instruction:

("Threatening") (or) ("Placing a person in fear") means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the alleged victim or another person being subjected to death, grievous bodily harm, or kidnapping.

In proving that the accused made a threat, it need not be proven that the accused actually intended to carry out the threat.

"Grievous bodily harm" means serious bodily injury. It does not include minor injuries such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. (It is a lesser degree of bodily injury than that involving a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.)

("Kidnapping" means the unlawful and intentional detention of a person against that person's will, or if involving a child, against the will of the child's parents or legal guardian. The detention must be more than a momentary restraint on the person's freedom of movement. Although kidnapping often involves physical restraint, physical restraint is not required for kidnapping.)

(The person to be killed, to be subjected to grievous bodily harm, or to be kidnapped need not be the alleged victim. It is sufficient if the accused threatened or placed the alleged victim in fear that any person would be killed or subjected to grievous bodily harm or kidnapping, which thereby caused the alleged victim to engage in the sexual act.)

NOTE 9: Consent and mistake of fact as to age of child. When a child is the victim of the alleged rape, include the following instruction:

Under the law, a person who has not attained the age of 16 years cannot consent to sexual activity.

Accordingly, if you are convinced beyond a reasonable doubt that (state the name of the alleged victim) had not attained the age of 16 years at the time of the alleged offense(s), you are advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) had not attained the age of 16 years, and it is not a defense to rape of a child even if the accused reasonably believed that

(state the name of the alleged victim) was at least 16 years old or that the accused reasonably believed that (state the name of the alleged victim) consented to the alleged sexual act(s).

NOTE 10: Consent in issue. When a child is not the victim of the alleged rape, consent is an affirmative defense to rape. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that consent did not exist. Because lack of consent is not an element however, the prosecution need not otherwise prove lack of consent. When consent has been raised, include the following instruction:

The evidence has raised the issue of whether (state the name of the alleged victim) consented to the sexual act(s) concerning the offense(s) of rape, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

Consent is a defense to (that) (those) charged offense(s). "Consent" means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. (A person cannot consent to sexual activity if that person is

(substantially incapable of appraising the nature of the sexual conduct at issue due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise)

(substantially incapable of appraising the nature of the sexual conduct at issue due to mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue)

(substantially incapable of physically declining participation in the sexual conduct at issue)

(substantially incapable of physically communicating unwillingness to engage in the sexual conduct at issue).)

The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist. Therefore, to find the accused guilty of the offense(s) of rape, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____), you must be convinced beyond a reasonable doubt that, at the time of the sexual act(s) alleged, (state the name of the alleged victim) did not consent.

NOTE 11: Mistake of fact as to consent. When a child is not the victim of the alleged rape, mistake of fact as to consent is an affirmative defense to rape. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that mistake of fact as to consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that the mistake did not exist. When mistake of fact as to consent has been raised, include the following instruction:

The evidence has raised the issue of mistake on the part of the accused whether (state the name of the alleged victim) consented to the sexual act(s) concerning the offense(s) of rape, as alleged in (the Specification(s) (_____) of (The) (Additional) Charge (_____).

Mistake of fact as to consent is a defense to (that) (those) charged offense(s). "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake

must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

The prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist. If you are convinced beyond a reasonable doubt, at the time of the charged rape, the accused was not under a mistaken belief that the alleged victim consented to the sexual act(s), the defense does not exist. Even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual act(s), if you are convinced beyond a reasonable doubt that at the time of the charged rape, the accused's mistake was unreasonable, the defense does not exist.

NOTE 12: Voluntary intoxication and mistake of fact as to consent. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There is evidence in this case that indicates that, at the time of the alleged rape, the accused may have been under the influence of (alcohol) (drugs). The accused's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that (state the name of the alleged victim) consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 13: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6- 5, Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, Instruction 5-12, Voluntary Intoxication, as bearing on the issue of intent, if the penetration of the genital

opening of another was by a hand, finger, or object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

3–45–4. AGGRAVATED SEXUAL CONTACT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007.

a. MAXIMUM PUNISHMENT:

(1) Aggravated sexual contact: DD, TF, 20 years, E-1.

(2) Aggravated sexual contact of a child: DD, TF, 20 years, E-1.

b. MODEL SPECIFICATION:

Aggravated sexual contact:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, [(engage in sexual contact(s), to wit: _____, with _____) (cause _____ to engage in sexual contact(s), to wit: _____, with _____) (cause sexual contact(s) with or by _____, to wit: _____)] by [if force alleged, state the force used] [causing grievous bodily harm to (him/her) (_____), to wit (broken leg) (deep cut) (fractured skull) (_____)] [(threatening) (placing him/her in fear) that (he/she) (_____) would be subjected to (death) (grievous bodily harm) (kidnapping)] [rendering him/her unconscious] [administering to him/her a (drug) (intoxicant) (_____) [by (force) (threat of force)] [without his/her (knowledge) (permission)], thereby substantially impairing his/her ability to (appraise) (control) his/her conduct].

Aggravated sexual contact with a child:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, [(engage in sexual contact(s), to wit: _____, with _____) (cause _____ to engage in sexual contact(s), to wit: _____, with _____) (cause sexual contact(s) with or by _____, to wit: _____)] (a child who had not attained the age of 12 years) (a child who had attained the age of 12 years, but had not attained the age of 16 years, by [if force involved, state the force used] [causing grievous bodily harm to (him/her) (_____), to wit (broken leg) (deep cut) (fractured skull) (_____)] [(threatening) (placing him/her in fear) that (he/she) (_____) would be subjected to (death) (grievous bodily harm) (kidnapping)] [rendering him/her unconscious] [administering to him/her a (drug) (intoxicant) (_____) [by (force) (threat of force)] [without his/her (knowledge) (permission)], thereby substantially impairing his/her ability to (appraise) (control) his/her conduct]).

c. ELEMENTS:

Aggravated sexual contact:

(1) That (state the time and place alleged), the accused

(a) engaged in sexual contact(s), to wit: (state the contact(s) alleged), with (state the name of the alleged victim);

(b) caused (state the name of the alleged victim) to engage in sexual contact(s), to wit: (state the contact(s) alleged), with (state name of person alleged);

(c) caused sexual contact(s) with or by (state the name of the alleged victim), to wit: (state the contact(s) alleged);

(2) That the accused did so by

(a) using force against (state the name of the alleged victim), to wit: (state the force alleged).

(b) causing grievous bodily harm to (state the name of the person alleged), to wit: (state the injuries allegedly inflicted).

(c) threatening (state the name of the alleged victim) that (state the name of the person alleged) would be subjected to (death) (grievous bodily harm) (kidnapping).

(d) placing (state the name of the alleged victim) in fear that (state the name of the person alleged) would be subjected to (death) (grievous bodily harm) (kidnapping).

(e) rendering (state the name of the alleged victim) unconscious.

(f) administering to (state the name of the alleged victim) a (drug) (intoxicant) (_____) [by (force) (threat of force)] [without the (knowledge) (permission) of (state the name of the alleged victim)], thereby substantially impairing the ability of (state the name of the alleged victim) to (appraise) (control) his/her conduct.

Aggravated sexual contact with a child:

(1) That (state the time and place alleged), the accused

(a) engaged in sexual contact(s), to wit: (state the contact(s) alleged), with (state the name of the alleged victim);

(b) caused (state the name of the alleged victim) to engage in sexual contact(s), to wit: (state the contact(s) alleged), with (state name of person alleged);

(c) caused sexual contact(s) with or by (state the name of the alleged victim), to wit: (state the contact(s) alleged);

NOTE 2: Child under the age of 12 years alleged. If it is alleged that the victim was under the age of 12 years, give the following element:

[(2)] That at the time, (state the name of the alleged victim) had not attained the age of 12 years.

NOTE 3: Child who had attained the age of 12 years, but had not attained the age of 16 years alleged. If it is alleged that the victim had attained the age of 12 years, but had not attained the age of 16 years, give the following elements:

[(2)] That the accused did so by

(a) using force against (state the name of the alleged victim), to wit: (state the force alleged);

(b) causing grievous bodily harm to (state the name of the person alleged), to wit: (state the injuries allegedly inflicted);

(c) threatening (state the name of the alleged victim) that (state the name of the person alleged) would be subjected to (death) (grievous bodily harm) (kidnapping);

(d) placing (state the name of the alleged victim) in fear that (state the name of the person alleged) would be subjected to (death) (grievous bodily harm) (kidnapping);

(e) rendering (state the name of the alleged victim) unconscious;

(f) administering to (state the name of the alleged victim) a (drug) (intoxicant) (_____) [by (force) (threat of force)] [without the (knowledge) (permission) of (state the name of the alleged victim)], thereby substantially impairing the ability of (state the name of the alleged victim) to (appraise) (control) his/her conduct;

(3) That at the time, (state the name of the alleged victim) had not attained the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

("Substantially impaired" means that level of mental impairment that rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to decline participation in the sexual conduct at issue, or unable to physically communicate unwillingness to engage in the sexual conduct at issue.)

("Unconscious" means incapable of responding to sensory stimuli and of having subjective experiences. An unconscious person is incapable of creating memories for later recall. Lack of memory may be evidence of unconsciousness, but the mere inability to recall, sometimes associated with excessive alcohol consumption, is insufficient to prove beyond a reasonable doubt the person was unconscious.)

NOTE 4: By force. When the sexual contact is alleged by force, include the following instruction:

"Force" means action to compel submission of another or to overcome or prevent another's resistance by (the use or display of a dangerous weapon or object) (the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object) (physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual contact).

("Dangerous weapon or object" means (any firearm, loaded or not, and whether operable or not) (any weapon, device, instrument, material, or substance, whether animate or inanimate, that in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm) (any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm. "Grievous bodily harm" means serious bodily injury. It does not include minor injuries such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. (It is a lesser degree of bodily injury than that involving a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.))

NOTE 5: By causing grievous bodily harm. When the sexual contact is alleged by causing grievous bodily harm, include the following instruction:

"Grievous bodily harm" means serious bodily injury. It does not include minor injuries such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. (It is a lesser degree of bodily injury than that involving a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.)

(The grievous bodily harm which caused the alleged victim to engage in the sexual contact need not have been caused by the accused to the alleged victim. It is sufficient if the accused caused grievous bodily harm to any person, which thereby caused the alleged victim to engage in the sexual contact.)

NOTE 6: By threat. When the sexual contact is alleged by threat or by placing in fear, include the following instruction:

("Threatening") (or) ("Placing a person in fear") means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the alleged victim or another person being subjected to death, grievous bodily harm, or kidnapping. In proving that the accused made a threat, it need not be proven that the accused actually intended to carry out the threat.

"Grievous bodily harm" means serious bodily injury. It does not include minor injuries such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. (It is a lesser degree of bodily injury than that involving a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.)

("Kidnapping" means the unlawful and intentional detention of a person against that person's will, or if involving a child, against the will of the child's parents or legal guardian. The detention must be more than a momentary restraint on the person's freedom of movement. Often involving physical restraint, physical restraint is not required for kidnapping.)

(The person to be killed, to be subjected to grievous bodily harm, or to be kidnapped need not be the alleged victim. It is sufficient if the accused threatened or placed the alleged victim in fear that any person would be killed or subjected to grievous bodily harm or kidnapping, which thereby caused the alleged victim to engage in the sexual contact.)

NOTE 7: Consent and mistake of fact as to age of child. If the alleged aggravated sexual contact is with a child, include the following instruction:

Under the law, a person who has not attained the age of 16 years cannot consent to sexual activity.

Accordingly, if you are convinced beyond a reasonable doubt that (state the name of the alleged victim) had not attained the age of 16 years at

the time of the alleged offense(s), you are advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) had not attained the age of 16 years and it is not a defense to aggravated sexual contact of a child even if the accused reasonably believed that (state the name of the alleged victim) was at least 16 years old or that the accused reasonably believed that (state the name of the alleged victim) had consented to the alleged sexual contact(s).

NOTE 8: Consent in issue. When a child is not the victim of the alleged aggravated sexual contact, consent is an affirmative defense to aggravated sexual contact. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that consent did not exist. Because lack of consent is not an element however, the prosecution need not otherwise prove lack of consent. When consent has been raised, include the following instruction:

The evidence has raised the issue of whether (state the name of the alleged victim) consented to the sexual contact(s) concerning the offense(s) of aggravated sexual contact, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

Consent is a defense to (that) (those) charged offense(s). "Consent" means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. (A person cannot consent to sexual activity if that person is

(substantially incapable of appraising the nature of the sexual conduct at issue due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise)

(substantially incapable of appraising the nature of the sexual conduct at issue due to mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue)

(substantially incapable of physically declining participation in the sexual conduct at issue)

(substantially incapable of physically communicating unwillingness to engage in the sexual conduct at issue).)

The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist. Therefore, to find the accused guilty of the offense(s) of aggravated sexual contact, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____), you must be convinced beyond a reasonable doubt that, at the time of the sexual contact(s) alleged, (state the name of the alleged victim) did not consent.

NOTE 9: Mistake of fact as to consent. When a child is not the victim of the alleged aggravated sexual contact, mistake of fact as to consent is an affirmative defense to aggravated sexual contact. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that mistake of fact as to consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that the mistake did not exist. When mistake of fact as to consent has been raised, include the following instruction:

The evidence has raised the issue of mistake on the part of the accused whether (state the name of the alleged victim) consented to the sexual contact(s) concerning the offense(s) of aggravated sexual contact, as

alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

Mistake of fact as to consent is a defense to (that) (those) charged offense(s). "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

The prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist. If you are convinced beyond a reasonable doubt, at the time of the alleged aggravated sexual contact(s), the accused was not under a mistaken belief that the alleged victim consented to the sexual contact(s), the defense does not exist. Even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual contact(s), if you are convinced beyond a reasonable doubt that at the time of the charged aggravated sexual contact(s), the accused's mistake was unreasonable, the defense does not exist.

NOTE 10: Voluntary intoxication and mistake of fact as to consent. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There is evidence in this case that indicates that, at the time of the alleged sexual contact(s), the accused may have been under the influence of (alcohol) (drugs). The accused's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that (state the name of the alleged victim) consented must be that which a reasonably careful, ordinary, prudent,

sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 11: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, Instruction 5-12, Voluntary Intoxication, as bearing on the issue of intent, if the intentional touching was with the intent (or was caused with the intent) to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

3–45–5. AGGRAVATED SEXUAL ASSAULT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007.

a. MAXIMUM PUNISHMENT:

(1) Aggravated sexual assault: DD, TF, 30 years, E-1.

(2) Aggravated sexual assault of a child: DD, TF, 20 years, E-1.

b. MODEL SPECIFICATION:

Aggravated sexual assault:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, [cause _____ to engage in (a) sexual act(s), to wit: _____, by (causing bodily harm to (him/her) (_____), to wit: _____) ((threatening) (placing him/her in fear of) (state subject of threat or fear that amounts to a lesser degree of harm than that any person will be subjected to death, grievous bodily harm, or kidnapping)] [engage in (a) sexual act(s), to wit: _____, with _____, who was (substantially incapacitated) (substantially incapable of appraising the nature of the sexual act(s)) (substantially incapable of declining participation in the sexual act(s)) (substantially incapable of communicating unwillingness to engage in the sexual act(s))].

Aggravated sexual assault of a child:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, engage in (a) sexual act(s), to wit: _____, with _____, who had attained the age of 12 years, but had not attained the age of 16 years.

c. ELEMENTS:

Aggravated sexual assault:

NOTE 2: Caused alleged victim to engage in sexual act(s). If it is alleged that the accused caused the victim to engage in sexual act(s), give the following elements:

(1) That (state the time and place alleged), the accused caused (state the name of the alleged victim) to engage in (a) sexual act(s), to wit: (state the act(s) alleged); and

(2) That the accused did so by

(a) causing bodily harm to (state the name of the person alleged), to wit: (state the injuries allegedly inflicted).

(b) threatening (state the name of the alleged victim), to wit: (state subject of threat that amounts to a lesser degree of harm than that

any person will be subjected to death, grievous bodily harm, or kidnapping).

(c) placing (state the name of the person alleged) in fear of (state subject of fear that amounts to something other than that any person will be subjected to death, grievous bodily harm, or kidnapping).

NOTE 3: Engaged in sexual act(s) with alleged victim. If it is alleged that the accused engaged in sexual act(s) with the victim, give the following elements:

(1) That (state the time and place alleged), the accused engaged in (a) sexual act(s), to wit: (state the act(s) alleged), with (state the name of the alleged victim); and

(2) That the accused did so when (state the name of the person alleged) was substantially [incapacitated] [(incapable of appraising the nature of) (incapable of declining participation in) (incapable of communicating unwillingness to engage in) the sexual act(s)].

Aggravated sexual assault of a child:

(1) That (state the time and place alleged), the accused engaged in (a) sexual act(s), to wit: (state the act(s) alleged), with (state the name of the alleged victim); and

(2) That at the time, (state the name of the alleged victim) had not attained the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Sexual act" means the penetration, however slight, (of the vulva by the penis) (of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person).

("Substantially incapacitated") (and) ("Substantially incapable") mean(s) that level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the

sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.

NOTE 4: Lack of penetration in issue. If lack of penetration is in issue, the military judge should further define what is meant by the "vulva" or "genital opening." The instruction below may be helpful. See also United States v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) and United States v. Tu, 30 MJ 587 (ACMR 1990).

(The "vulva" is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. "Labia" is the Latin and medically correct term for "lips.")

(The "genital opening" is the entrance to the vagina, which is the canal that connects the genital opening to the uterus.)

NOTE 5: By causing bodily harm. When the sexual act is alleged by causing bodily harm, include the following instruction:

"Bodily harm" means any offensive touching of another, however slight.

(The bodily harm which caused (state the name of the alleged victim) to engage in the sexual act need not have been caused by the accused to (state the name of the alleged victim). It is sufficient if the accused caused bodily harm to any person, which thereby caused (state the name of the alleged victim) to engage in the sexual act.)

NOTE 6: By threat. When the sexual act is alleged by threat or by placing in fear, include the following instruction:

("Threatening") (or) ("Placing a person in fear") means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the alleged victim or another person being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping. Such lesser degree of harm includes (physical injury to another person or to another person's property) (a threat to accuse any person of a crime) (a threat to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule) (a threat through the use or abuse of

military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person).

(The person subjected to harm need not be (state the name of the alleged victim). It is sufficient if the accused threatened or placed (state the name of the alleged victim) in fear that any person would be subjected to harm, which thereby caused (state the name of the alleged victim) to engage in the sexual act(s).)

NOTE 7: Marriage. Marriage is an affirmative defense to certain aggravated sexual assaults (i.e., if the alleged victim was substantially incapacitated, substantially incapable of appraising the nature of the sexual act, substantially incapable of declining participation in the sexual act, or substantially incapable of communicating unwillingness to engage in the sexual act) and aggravated sexual assault of a child. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that marriage is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that the marriage did not exist. When marriage between the accused and the alleged victim of the aggravated sexual assault has been raised, include the following instruction:

The evidence has raised the issue of marriage between the accused and (state the name of the alleged victim) concerning the offense(s) of aggravated sexual assault (of a child), as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

It is a defense to (that) (those) charged offense(s) that the accused and (state the name of the alleged victim) were married to each other when they engaged in the sexual act(s). A "marriage" is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and (state the name of the alleged victim) as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.

The prosecution has the burden of proving beyond a reasonable doubt that the marriage did not exist. Therefore, if you are convinced beyond a reasonable doubt that, at the time of the sexual act(s) alleged, the accused and (state the name of the alleged victim) were not married to each other, the defense of marriage does not exist.

(The defense of marriage also does not apply if the accused's intent at the time of the sexual act(s) was to abuse, humiliate, or degrade any person.)

NOTE 8: Mistake of fact as to age. Mistake of fact as to age is an affirmative defense to aggravated sexual assault of a child that had attained the age of 12 years, but had not attained the age of 16 years. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that mistake of fact as to age is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that the mistake did not exist. When mistake of fact as to age has been raised, include the following instruction:

The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of aggravated sexual assault of a child, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____). Specifically, the mistake concerns the accused's belief that (state the name of the alleged victim) was at least 16 years of age, when the alleged sexual act(s) occurred.

The prosecution is not required to prove the accused knew that (state the name of the alleged victim) was under the age of 16 years at the time the alleged sexual act(s) occurred. However, an honest and reasonable mistake of fact as to (state the name of the alleged victim)'s age is a defense to (that) (those) charged offense(s).

"Mistake of fact as to age" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct was at least 16 years old. The ignorance or

mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the alleged victim) was at least 16 years old. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.)

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged aggravated sexual assault(s), the accused was not under a mistaken belief that (state the name of the alleged victim) was at least 16 years old, the defense does not exist. Even if you conclude the accused was under the honest and mistaken belief that (state the name of the alleged victim) was at least 16 years old, if you are convinced beyond a reasonable doubt that, at the time of the charged aggravated sexual assault(s), the accused's mistake was unreasonable, the defense does not exist.

NOTE 9: Consent in issue. When a child is not the victim of the alleged aggravated sexual assault, consent is an affirmative defense to aggravated sexual assault (See NOTE 11 if a child is the victim of the alleged aggravated sexual assault). The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that consent did not exist. Because lack of consent is not an element however, the prosecution need not otherwise prove lack of consent. When consent has been raised, include the following instruction:

The evidence has raised the issue of whether (state the name of the alleged victim) consented to the sexual act(s) concerning the offense(s)

of aggravated sexual assault, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

Consent is a defense to (that) (those) charged offense(s). "Consent" means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. (A person cannot consent to sexual activity if that person is

(substantially incapable of appraising the nature of the sexual conduct at issue due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise)

(substantially incapable of appraising the nature of the sexual conduct at issue due to mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue)

(substantially incapable of physically declining participation in the sexual conduct at issue)

(substantially incapable of physically communicating unwillingness to engage in the sexual conduct at issue).)

The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist. Therefore, to find the accused guilty of the offense(s) of aggravated sexual assault, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____), you must be convinced beyond a reasonable doubt that, at the time of the sexual act(s) alleged, (state the name of the alleged victim) did not consent.

NOTE 10: Mistake of fact as to consent. When a child is not the victim of the alleged aggravated sexual assault, mistake of fact as to consent is an affirmative defense to aggravated sexual assault (See NOTE 11 if a child is the victim of the alleged aggravated sexual assault). The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that mistake of fact as to consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that the mistake did not exist. When mistake of fact as to consent has been raised, include the following instruction:

The evidence has raised the issue of mistake on the part of the accused whether (state the name of the alleged victim) consented to the sexual act(s) concerning the offense(s) of aggravated sexual assault, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

Mistake of fact as to consent is a defense to (that) (those) charged offense(s). "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.)

The prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist. If you are convinced beyond a reasonable doubt, at the time of the charged aggravated sexual assault(s), the accused was not under a mistaken belief that the alleged victim consented to the sexual act(s), the defense does not exist. Even if you conclude the accused was under a mistaken belief that the

alleged victim consented to the sexual act(s), if you are convinced beyond a reasonable doubt that at the time of the charged aggravated sexual assault(s), the accused's mistake was unreasonable, the defense does not exist.

NOTE 11: Consent of Child. If a child is the victim of the alleged aggravated sexual assault, use the following instruction and not the instruction in NOTE 9 or NOTE 10:

Under the law, a person who has not attained the age of 16 years cannot consent to sexual activity.

Accordingly, if you are convinced beyond a reasonable doubt that (state the name of the alleged victim) had not attained the age of 16 years at the time of the alleged offense(s), you are advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) had not attained the age of 16 years at the time of the alleged offense(s), and it is not a defense to aggravated sexual assault of a child even if the accused reasonably believed that (state the name of the alleged victim) had consented to the alleged sexual act(s).

NOTE 12: Voluntary intoxication and mistake of fact as to age and consent. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There is evidence in this case that indicates that, at the time of the alleged aggravated sexual assault (of a child), the accused may have been under the influence of (alcohol) (drugs). The accused's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that (state the name of the alleged victim) (consented) (was at least 16 years of age at the time of the alleged offense(s)) must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 13: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, Instruction 5-12, Voluntary Intoxication, as bearing on the issue of intent, if the penetration of the genital

opening of another was by a hand, finger, or object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

3–45–6. ABUSIVE SEXUAL CONTACT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007.

a. MAXIMUM PUNISHMENT:

(1) Abusive sexual contact: DD, TF, 7 years, E-1.

(2) Abusive sexual contact with a child: DD, TF, 15 years, E-1.

b. MODEL SPECIFICATION:

Abusive sexual contact:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, [(engage in sexual contact(s), to wit: _____, with _____) (cause _____ to engage in sexual contact(s), to wit: _____, with _____) (cause sexual contact(s) with or by _____, to wit: _____)] by [causing bodily harm to (him/her) (_____), to wit: _____] [[(threatening) (placing him/her in fear of) (state subject of threat or fear that amounts to a lesser degree of harm than that any person will be subjected to death, grievous bodily harm, or kidnapping)] [doing so when _____ was (substantially incapacitated) (substantially incapable of appraising the nature of the sexual act(s)) (substantially incapable of declining participation in the sexual act(s)) (substantially incapable of communicating unwillingness to engage in the sexual act(s))].

Abusive sexual contact with a child:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (engage in sexual contact(s), to wit: _____, with _____) (cause _____ to engage in sexual contact(s), to wit: _____, with _____) (cause sexual contact(s) with or by _____, to wit: _____), a child who had attained the age of 12 years, but had not attained the age of 16 years.

c. ELEMENTS:

Abusive sexual contact:

(1) That (state the time and place alleged), the accused

(a) engaged in sexual contact(s), to wit: (state the contact(s) alleged), with (state the name of the alleged victim);

(b) caused (state the name of the alleged victim) to engage in sexual contact(s), to wit: (state the contact(s) alleged), with (state name of person alleged);

(c) caused sexual contact(s) with or by (state the name of the alleged victim), to wit: (state the contact(s) alleged);

(2) That the accused did so

(a) by causing bodily harm to (state the name of the person alleged), to wit: (state the injuries allegedly inflicted).

(b) by threatening (state the name of the alleged victim), to wit: (state subject of threat that amounts to a lesser degree of harm than that any person will be subjected to death, grievous bodily harm, or kidnapping).

(c) by placing (state the name of the person alleged) in fear of (state subject of fear that amounts to something other than that any person will be subjected to death, grievous bodily harm, or kidnapping).

(d) when (state the name of the person alleged) was substantially [incapacitated] [(incapable of appraising the nature of) (incapable of declining participation in) (incapable of communicating unwillingness to engage in) the sexual contact(s)].

Abusive sexual contact with a child:

(1) That (state the time and place alleged), the accused

(a) engaged in sexual contact(s), to wit: (state the contact(s) alleged), with (state the name of the alleged victim);

(b) caused (state the name of the alleged victim) to engage in sexual contact(s), to wit: (state the contact(s) alleged), with (state name of person alleged);

(c) caused sexual contact(s) with or by (state the name of the alleged victim), to wit: (state the contact(s) alleged);

(2) That at the time, (state the name of the alleged victim) had not attained the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

("Substantially incapacitated") (and) ("Substantially incapable") mean(s) that level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.

NOTE 2: By causing bodily harm. When the sexual contact is alleged by causing bodily harm, include the following instruction:

"Bodily harm" means any offensive touching of another, however slight.

(The bodily harm which caused (state the name of the alleged victim) to engage in the sexual contact need not have been caused by the accused to (state the name of the alleged victim). It is sufficient if the accused caused bodily harm to any person, which thereby caused (state the name of the alleged victim) to engage in the sexual contact.)

NOTE 3: By threat. When the sexual contact is alleged by threat or by placing in fear, include the following instruction:

("Threatening") (or) ("Placing a person in fear") means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the alleged victim or another person being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping. Such lesser degree of harm includes (physical injury to another person or to another person's property) (a threat to

accuse any person of a crime) (a threat to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule) (a threat through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person).

(The person subjected to harm need not be (state the name of the alleged victim). It is sufficient if the accused threatened or placed (state the name of the alleged victim) in fear that any person would be subjected to harm, which thereby caused (state the name of the alleged victim) to engage in the sexual contact(s).)

NOTE 4: Marriage. Although not specifically identified by the National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order as such, marriage is considered an affirmative defense to abusive sexual contact (i.e., if the alleged victim was substantially incapacitated, substantially incapable of appraising the nature of the sexual act, substantially incapable of declining participation in the sexual act, or substantially incapable of communicating unwillingness to engage in the sexual act) and abusive sexual contact with a child. When identified as an affirmative defense, the National Defense Authorization Act for Fiscal year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that marriage is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that the marriage did not exist. When marriage between the accused and the alleged victim of the abusive sexual contact(s) has been raised, include the following instruction:

The evidence has raised the issue of marriage between the accused and (state the name of the alleged victim) concerning the offense(s) of abusive sexual contact(s) (with a child), as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

It is a defense to (that) (those) charged offense(s) that the accused and (state the name of the alleged victim) were married to each other when the sexual contact(s) occurred. A "marriage" is a relationship, recognized by the laws of a competent State or foreign jurisdiction,

between the accused and (state the name of the alleged victim) as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.

The prosecution has the burden of proving beyond a reasonable doubt that the marriage did not exist. Therefore, if you are convinced beyond a reasonable doubt that, at the time of the sexual contact(s) alleged, the accused and (state the name of the alleged victim) were not married to each other, the defense of marriage does not exist.

(The defense of marriage also does not apply if the accused's intent at the time of the sexual contact(s) was to abuse, humiliate, or degrade any person.)

NOTE 5: Mistake of fact as to age. Mistake of fact as to age is an affirmative defense to abusive sexual contact with a child that had attained the age of 12 years, but had not attained the age of 16 years. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that mistake of fact as to age is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that the mistake did not exist. When mistake of fact as to age has been raised, include the following instruction:

The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of abusive sexual contact with a child, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____). Specifically, the mistake concerns the accused's belief that (state the name of the alleged victim) was at least 16 years of age, when the alleged sexual contact(s) occurred.

The prosecution is not required to prove the accused knew that (state the name of the alleged victim) was under the age of 16 years at the time the alleged sexual contact(s) occurred. However, an honest and reasonable mistake of fact as to (state the name of the alleged victim)'s age is a defense to (that) (those) charged offense(s).

"Mistake of fact as to age" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct was at least 16 years old. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that (state the name of the alleged victim) was at least 16 years old. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged abusive sexual contact(s), the accused was not under a mistaken belief that (state the name of the alleged victim) was at least 16 years old, the defense does not exist. Even if you conclude the accused was under the honest and mistaken belief that (state the name of the alleged victim) was at least 16 years old, if you are convinced beyond a reasonable doubt that, at the time of the charged abusive sexual contact(s), the accused's mistake was unreasonable, the defense does not exist.

NOTE 6: Consent in issue. When a child is not the victim of the alleged abusive sexual contact, consent is an affirmative defense to abusive sexual contact (See NOTE 8 if a child is the victim of the alleged abusive sexual contact). The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that consent did not exist. Because lack of consent is not an element however, the prosecution need not otherwise prove lack of consent. When consent has been raised, include the following instruction:

The evidence has raised the issue of whether (state the name of the alleged victim) consented to the sexual contact(s) concerning the offense(s) of abusive sexual contact, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

Consent is a defense to (that) (those) charged offense(s). "Consent" means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. (A person cannot consent to sexual activity if that person is

(substantially incapable of appraising the nature of the sexual conduct at issue due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise)

(substantially incapable of appraising the nature of the sexual conduct at issue due to mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue)

(substantially incapable of physically declining participation in the sexual conduct at issue)

(substantially incapable of physically communicating unwillingness to engage in the sexual conduct at issue).)

The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist. Therefore, to find the accused guilty of the offense(s) of abusive sexual contact, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____), you must be convinced beyond a reasonable doubt that, at the time of the sexual contact(s) alleged, (state the name of the alleged victim) did not consent.

NOTE 7: Mistake of fact as to consent. When a child is not the victim of the alleged abusive sexual contact, mistake of fact as to consent is an affirmative defense to abusive sexual contact (See NOTE 8 if a child is the victim of the alleged abusive sexual contact). The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that mistake of fact as to consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that the mistake did not exist. When mistake of fact as to consent has been raised, include the following instruction:

The evidence has raised the issue of mistake on the part of the accused whether (state the name of the alleged victim) consented to the sexual contact(s) concerning the offense(s) of abusive sexual contact, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

Mistake of fact as to consent is a defense to (that) (those) charged offense(s). "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

The prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist. If you are convinced beyond a reasonable doubt, at the time of the charged abusive sexual contact(s), the accused was not under a mistaken belief that the alleged victim consented to the sexual contact(s), the defense does not exist. Even if you conclude the accused was under a mistaken belief that the

alleged victim consented to the sexual contact(s), if you are convinced beyond a reasonable doubt that at the time of the charged abusive sexual contact(s), the accused's mistake was unreasonable, the defense does not exist.

NOTE 8: Consent of Child. If a child is the victim of the alleged abusive sexual contact, use the following instruction and not the instruction in NOTE 6 or NOTE 7:

Under the law, a person who has not attained the age of 16 years cannot consent to sexual activity.

Accordingly, if you are convinced beyond a reasonable doubt that (state the name of the alleged victim) had not attained the age of 16 years at the time of the alleged offense(s), you are advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) had not attained the age of 16 years at the time of the alleged offense(s), and it is not a defense to abusive sexual contact with a child even if the accused reasonably believed that (state the name of the alleged victim) consented to the alleged sexual contact(s).

NOTE 9: Voluntary intoxication and mistake of fact as to age and consent. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There is evidence in this case that indicates that, at the time of the alleged abusive sexual contact (with a child), the accused may have been under the influence of (alcohol) (drugs). The accused's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that (state the name of the alleged victim) (consented) (was at least 16 years of age at the time of the alleged offense(s)) must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 10: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, Instruction 5-12, Voluntary Intoxication, as bearing on the issue of intent, if the intentional touching was with

the intent (or was caused with the intent) to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

3–45–7. AGGRAVATED SEXUAL ABUSE OF A CHILD (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007.

a. MAXIMUM PUNISHMENT: DD, TF, 20 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, engage in a lewd act, to wit: _____, with _____, a child who had not attained the age of 16 years.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused engaged in a lewd act, to wit: (state the act(s) alleged), with (state the name of the alleged victim); and

(2) That at the time, (state the name of the alleged victim) was a child who had not attained the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Lewd act" means (the intentional touching, not through the clothing, of the genitalia of another person) (or) (intentionally causing another person to touch, not through the clothing, the genitalia of any person) with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

"Child" means any person who has not attained the age of 16 years.

NOTE 2: Consent of Child. Since the National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that a child under the age of 16 years cannot consent to sexual activity, the military judge should provide the following instruction:

Under the law, a person who has not attained the age of 16 years cannot consent to sexual activity.

Accordingly, if you are convinced beyond a reasonable doubt that (state the name of the alleged victim) had not attained the age of 16 years at the time of the alleged offense(s), you are advised that the prosecution is

not required to prove that the accused knew that (state the name of the alleged victim) had not attained the age of 16 years at the time of the alleged offense(s), and it is not a defense to aggravated sexual abuse of a child even if the accused reasonably believed that (state the name of the alleged victim) consented to the alleged act(s).

NOTE 3: Marriage. Marriage is an affirmative defense to aggravated sexual abuse of a child unless the accused's intent at the time of the act(s) was to abuse, humiliate, or degrade any person. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that marriage is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that the marriage did not exist. When marriage between the accused and the alleged victim of the lewd act(s) has been raised, include the following instruction:

The evidence has raised the issue of marriage between the accused and (state the name of the alleged victim) concerning the offense(s) of aggravated sexual abuse of a child, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

It is a defense to (that) (those) charged offense(s) that the accused and (state the name of the alleged victim) were married to each other when the alleged act(s) occurred. A “marriage” is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and (state the name of the alleged victim) as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.

The prosecution has the burden of proving beyond a reasonable doubt that the marriage did not exist. Therefore, if you are convinced beyond a reasonable doubt that, at the time of the alleged act(s), the accused and (state the name of the alleged victim) were not married to each other, the defense of marriage does not exist.

(The defense of marriage also does not apply if the accused's intent at the time of the alleged lewd act(s) was to abuse, humiliate, or degrade any person.)

NOTE 4: Mistake of fact as to age. Mistake of fact as to age is an affirmative defense to aggravated sexual abuse of a child. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that mistake of fact as to age is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt the mistake did not exist. When mistake of fact as to age has been raised, include the following instruction:

The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of aggravated sexual abuse of a child, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____). Specifically, the mistake concerns the accused's belief that (state the name of the alleged victim) was at least 16 years of age, when the alleged act(s) occurred.

The prosecution is not required to prove the accused knew that (state the name of the alleged victim) was under the age of 16 years at the time the alleged act(s) occurred. However, an honest and reasonable mistake of fact as to (state the name of the alleged victim)'s age is a defense to (that) (those) charged offense(s).

"Mistake of fact as to age" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the alleged act(s) was at least 16 years old. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that (state the name of the alleged victim) was at least 16 years old. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a

reasonably careful person would do under the same or similar circumstances.)

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged act(s), the accused was not under a mistaken belief that (state the name of the alleged victim) was at least 16 years old, the defense does not exist. Even if you conclude the accused was under the honest and mistaken belief that (state the name of the alleged victim) was at least 16 years old, if you are convinced beyond a reasonable doubt that, at the time of the charged act(s), the accused's mistake was unreasonable, the defense does not exist.

NOTE 5: Voluntary intoxication and mistake of fact as to age. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There is evidence in this case that indicates that, at the time of the alleged aggravated sexual abuse, the accused may have been under the influence of (alcohol) (drugs). The accused's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that (state the name of the alleged victim) was at least 16 years of age at the time of the alleged offense(s) must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 6: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, Instruction 5-12, Voluntary Intoxication, as bearing on the issues of intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

3–45–8. INDECENT LIBERTY WITH A CHILD (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007.

a. MAXIMUM PUNISHMENT: DD, TF, 15 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (take indecent liberties) (engage in indecent conduct) in the physical presence of _____, a child under 16 years of age, by _____, with the intent to [(arouse) (appeal to) (gratify) the sexual desire of (the accused) (_____)] [(abuse) (humiliate) (degrade) _____].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed (a) certain (act(s)) (communication(s)) (state the (act(s) alleged and the manner, if alleged) (communication(s) alleged));

(2) That the (act(s)) (communication(s)) (was) (were) indecent;

(3) That the accused committed the (act(s)) (communication(s)) in the physical presence of (state the name of the alleged victim);

(4) That the accused committed the (act(s)) (communication(s)) with the intent to [(arouse) (appeal to) (gratify) the sexual desire of (state the name of the person alleged)] [(abuse) (humiliate) (degrade) (state the name of the person alleged)];

(5) That at the time, (state the name of the alleged victim) was under 16 years of age.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Indecent liberty" means indecent conduct, but physical contact is not required. (It includes one who with the requisite intent exposes one's genitalia, anus, buttocks, or female areola or nipple to a child.) (An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child

is exposed to or involved in sexual conduct, it is an indecent liberty; the child's consent is not relevant.)

("Indecent conduct") and ("indecent language") means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

"Child" means any person who has not attained the age of 16 years.

NOTE 2: Marriage. Marriage is an affirmative defense to indecent liberty with a child, unless the accused's intent at the time of the (act(s)) (communication(s)) was to abuse, humiliate, or degrade any person. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that marriage is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt the marriage did not exist. When marriage between the accused and the alleged victim of the indecent liberty has been raised, include the following instruction:

The evidence has raised the issue of marriage between the accused and (state the name of the alleged victim) concerning the offense(s) of indecent liberty with a child, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

It is a defense to (that) (those) charged offense(s) that the accused and (state the name of the alleged victim) were married to each other when the (act(s)) (communication(s)) occurred. A "marriage" is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and (state the name of the alleged victim) as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.

The prosecution has the burden of proving beyond a reasonable doubt that the marriage did not exist. Therefore, if you are convinced beyond a reasonable doubt that, at the time of the (act(s)) (communication(s))

alleged, the accused and (state the name of the alleged victim) were not married to each other, the defense of marriage does not exist.

(The defense of marriage also does not apply if the accused's intent at the time of the (act(s)) (communication(s)) was to abuse, humiliate, or degrade any person.)

NOTE 3: Mistake of fact as to age. Mistake of fact as to age is an affirmative defense to indecent liberty with a child if the child victim had attained the age of 12 years, but had not attained the age of 16 years (if the child is under 12 years old, mistake of fact as to age is not a defense). The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that mistake of fact as to age is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt the mistake did not exist. When mistake of fact as to age has been raised, include the following instruction:

The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of indecent liberty with a child, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____). Specifically, the mistake concerns the accused's belief that (state the name of the alleged victim) was at least 16 years of age, when the alleged indecent (act(s)) (communication) occurred.

The prosecution is not required to prove the accused knew that (state the name of the alleged victim) was under the age of 16 years at the time the alleged (act(s)) (communication(s)) occurred. However, an honest and reasonable mistake of fact as to (state the name of the alleged victim)'s age is a defense to (that) (those) charged offense(s).

"Mistake of fact as to age" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct was at least 16 years old. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it,

that would indicate to a reasonable person that (state the name of the alleged victim) was at least 16 years old. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged indecent (act(s)) (communication(s)), the accused was not under a mistaken belief that (state the name of the alleged victim) was at least 16 years old, the defense does not exist. Even if you conclude the accused was under the honest and mistaken belief that (state the name of the alleged victim) was at least 16 years old, if you are convinced beyond a reasonable doubt that, at the time of the charged indecent (act(s)) (communication(s)), the accused's mistake was unreasonable, the defense does not exist.

NOTE 4: Voluntary intoxication and mistake of fact as to age. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There is evidence in this case that indicates that, at the time of the alleged indecent liberty with a child, the accused may have been under the influence of (alcohol) (drugs). The accused's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that (state the name of the alleged victim) was at least 16 years of age at the time of the alleged offense(s)) must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 5: Child under 16 years of age alleged. When a child who has not attained the age of 16 years is the victim of the alleged indecent liberty, include the following instruction:

If you are convinced beyond a reasonable doubt that (state the name of the alleged victim) had not attained the age of 16 years at the time of the alleged offense(s), you are advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) had not attained the age of 16 years at the time of the alleged offense(s), and it is not a defense to indecent liberty with a child even if the accused reasonably believed that (state the name of the alleged victim) consented to the alleged indecent liberty.

NOTE 6: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, Instruction 5-12, Voluntary Intoxication, as bearing on the issues of intent to arouse, appeal to, and/or gratify the sexual desire of any person, and/or intent to abuse, humiliate, or degrade any person.

3–45–9. INDECENT ACT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007.

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully commit indecent conduct, to wit: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused engaged in certain wrongful conduct, to wit: (state the act(s) alleged and, if alleged, the manner); and

(2) That the conduct was indecent.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Indecent conduct" means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. (Indecent conduct includes, but is not limited to, observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person's consent, and contrary to that other person's reasonable expectation of privacy, of (that other person's genitalia, anus, or buttocks, (or if that other person is female, that person's areola or nipple)) (or) (that other person while that other person is engaged in a sexual act, sodomy, or sexual contact)).

("Sexual act" means the penetration, however slight, (of the vulva by the penis) (of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.)

("Sodomy" means unnatural carnal copulation with another person or animal. It is unnatural carnal copulation for a person to take into that

person's mouth or anus the sexual organ of another person or animal; or to place that person's sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal. Penetration, however slight is required.)

("Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.)

"Wrongful" means without legal justification or lawful excuse.

NOTE 2: Private Consensual Sexual Activity Between Adults. If the evidence raises the issue of private consensual sexual conduct between adults (e.g., sexual intercourse, sodomy) the following instruction should be given. See United States v. Izquierdo, 51 MJ 421 (CAAF 1999) and United States v. Leak, 58 MJ 869 (ACCA 2003).

Article 120, UCMJ, is not intended to regulate the wholly private consensual sexual activities of individuals. In the absence of aggravating circumstances, private consensual sexual activity (including (sexual intercourse) and/or (sodomy)) is not punishable as an indecent act. Among possible aggravating circumstances is that the sexual activity was open and notorious. Sexual activity may be open and notorious when the participants know that someone else is present. This presence of someone else may include a person who is present and witnesses the sexual activity, or is present and aware of the sexual activity through senses other than vision. On the other hand, sexual activity that is not performed in the close proximity of someone else, and which passes unnoticed, may not be considered open and notorious. Sexual activity may also be considered open and notorious when the act occurs under circumstances in which there is a substantial risk that the act(s) could be witnessed by someone else, despite the fact that no such discovery occurred.

3–45–10. FORCIBLE PANDERING (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007.

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, compel _____ to engage in (an act) (acts) of prostitution, to wit: _____, with (a) person(s) to be directed to him/her by the said _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused compelled (state the name of the alleged victim) to engage in (an act) (acts) of prostitution, to wit: (state the act(s) of prostitution alleged), with (another) person(s); and

(2) That the accused directed such other person(s) to (state the name of the alleged victim) for the purpose of such act(s).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Act of prostitution" means a sexual act, sexual contact, or lewd act for the purpose of receiving money or other compensation.

("Sexual act" means (contact between the penis and the vulva; contact involving the penis occurs upon penetration, however slight) (or) (the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person).)

("Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse,

humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.)

("Lewd act" means (the intentional touching, not through the clothing, of the genitalia of another person) (or) (intentionally causing another person to touch, not through the clothing, the genitalia of any person) with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.)

"Compel" means to force.

NOTE 2: Pandering as requiring three persons. Pandering requires three persons. If only two persons are involved, the evidence may raise the offense of solicitation to commit prostitution. United States v. Miller, 47 MJ 352 (CAAF 1997).

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, Instruction 5-12, Voluntary Intoxication, as bearing on any issue of specific intent.

3–45–11. WRONGFUL SEXUAL CONTACT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007.

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully engage in sexual contact(s), to wit: _____, with, and without the permission of, _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused engaged in sexual contact(s), to wit: (state the contact(s) alleged), with (state the name of the alleged victim);

(2) That such sexual contact(s) (was) (were) without the permission of (state the name of the alleged victim); and

(3) That such sexual contact(s) (was) (were) wrongful.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Wrongful" means without legal justification or lawful authorization.

"Sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

NOTE 2: Marriage. Marriage is an affirmative defense to wrongful sexual contact, unless the accused's intent at the time of the contact(s) was to abuse, humiliate, or degrade any person. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that marriage is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that the marriage did not exist. When marriage between the accused and the alleged victim has been raised, include the following instruction:

The evidence has raised the issue of marriage between the accused and (state the name of the alleged victim) concerning the offense(s) of wrongful sexual contact, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

It is a defense to (that) (those) charged offense(s) that the accused and (state the name of the alleged victim) were married to each other when the alleged sexual contact(s) occurred. A "marriage" is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and (state the name of the alleged victim) as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.

The prosecution has the burden of proving beyond a reasonable doubt that the marriage did not exist. Therefore, if you are convinced beyond a reasonable doubt that, at the time of the alleged sexual contact(s), the accused and (state the name of the alleged victim) were not married to each other, the defense of marriage does not exist.

(The defense of marriage also does not apply if the accused's intent at the time of the sexual contact was to abuse, humiliate, or degrade any person.)

NOTE 3: Consent. When consent is at issue, include the following instruction:

I have advised you that the second element the prosecution must prove beyond a reasonable doubt is that the alleged sexual contact(s) (was) (were) without the permission of (state the name of the alleged victim). "Without permission" means without consent. "Consent" means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall

not constitute consent. (A person cannot consent to sexual activity if that person is

(under 16 years of age)

(substantially incapable of appraising the nature of the sexual conduct at issue due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise)

(substantially incapable of appraising the nature of the sexual conduct at issue due to mental disease or defect which renders the person unable to understand the nature of the sexual conduct at issue)

(substantially incapable of physically declining participation in the sexual conduct at issue)

(substantially incapable of physically communicating unwillingness to engage in the sexual conduct at issue).)

The prosecution has the burden to prove lack of consent beyond a reasonable doubt. Therefore, to find the accused guilty of the offense(s) of wrongful sexual contact, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____), you must be convinced beyond a reasonable doubt that, at the time of the sexual contact(s) alleged, (state the name of the alleged victim) did not consent.

NOTE 4: Mistake of fact as to consent. When mistake of fact as to consent has been raised, include the following instruction:

The evidence has raised the issue of mistake on the part of the accused whether (state the name of the alleged victim) consented to the sexual contact(s) concerning the offense(s) of wrongful sexual contact, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____).

Mistake of fact as to consent is a defense to (that) (those) charged offense(s). "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person

engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would do under the same or similar circumstances.)

The prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist. If you are convinced beyond a reasonable doubt, at the time of the charged offense(s), the accused was not under a mistaken belief that the alleged victim consented to the sexual contact(s), the defense does not exist. Even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual contact(s), if you are convinced beyond a reasonable doubt that at the time of the charged offense(s), the accused's mistake was unreasonable, the defense does not exist.

NOTE 5: Voluntary intoxication and mistake of fact as to consent. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

There is evidence in this case that indicates that, at the time of the alleged wrongful sexual contact(s), the accused may have been under the influence of (alcohol) (drugs). The accused's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that (state the name of the alleged victim) consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 6: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, Instruction 5-12, Voluntary Intoxication, as bearing on the issue of intent, if the intentional touching was with

the intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

3–45–12. INDECENT EXPOSURE (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007.

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, intentionally expose in an indecent manner his/her _____ while (at the barracks) (in a public place) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused exposed (his) (her) (state part of the body exposed);

(2) That such exposure was at place where the conduct involved could reasonably be expected to be viewed by people other than members of the accused's family or household, to wit: (state the location alleged);

(3) That such exposure was intentional; and

(4) That such exposure was indecent.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Indecent" means a form of exhibition which signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

"Intentional" means willful or on purpose.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), Instruction 6-5, Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, Instruction 5-12, Voluntary Intoxication, as bearing on the issue of specific intent.

3–45A–1. STALKING (ARTICLE 120a)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), who (knew) (should have known) that (name of alleged victim) would be placed in reasonable fear of (death) (bodily harm) to (himself) (herself) (_____, a member of (his) (her) immediate family), did, (at/on board--location) (subject-matter jurisdiction data, if required), (on or about _____) (from about _____ to about _____), wrongfully engage in a course of conduct directed at (name of alleged victim), to wit: _____, thereby inducing in (name of alleged victim) a reasonable fear of (death) (bodily harm) to (himself) (herself) (_____, a member of (his) (her) immediate family).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully engaged in a course of conduct directed at (state the name of alleged victim), that is: (state the conduct alleged), that would cause a reasonable person to fear death or bodily harm to himself/herself (a member of his/her immediate family);

(2) That the accused knew, or should have known, that (state the name of alleged victim) would be placed in such fear; and

(3) That the accused's acts induced such fear in (state the name of alleged victim).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Course of Conduct" means a repeated maintenance of visual or physical proximity to a specific person; or a repeated conveyance of verbal threats, written threats, or threats implied by conduct, or a combination of such threats, directed at or towards a specific person.

"Repeated" means on two or more occasions.

(A "threat" is a communication, by words or conduct, of a present determination or intent to physically harm the alleged victim or a member of his/her immediate family, presently or in the future. (The threat may be made directly to or in the presence of the person it is directed at or towards, or the threat may be conveyed to such person in some

manner.) Proof that the accused actually intended to physically harm the alleged victim or a member of his/her immediate family is not required.

Proof that the accused actually intended to induce the requisite fear in the alleged victim is also not required.

"Immediate family" means a spouse, parent, child, or sibling of (state the name of alleged victim) (or any other (family member) (relative) (or) (intimate partner) of (state the name of alleged victim) (who regularly resides in the household of (state the name of alleged victim) (or) (who within the six months preceding the commencement of the course of conduct regularly resided in the household of (state the name of alleged victim)).

("Intimate partner" means a person whose relationship with the alleged victim is characterized by a very close association or familiarity of a very personal nature. Proof of a sexual relationship is not required.)

"Fear of bodily harm" means a belief or apprehension of any physical injury to or offensive touching, however slight, of (state the name of alleged victim) or a member of his/her immediate family.

"Wrongful" means without legal justification or authorization.

NOTE: Other instructions. The following modified Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable to advise the members concerning the required knowledge.

I have instructed you that you must be satisfied beyond a reasonable doubt that the accused knew, or should have known, that (state the name of alleged victim) would be placed in fear of death or bodily harm to (himself/herself) (a member of his/her immediate family). This knowledge, like any other fact, may be proved by circumstantial evidence.

The accused had the required knowledge if (he) (she) actually knew that (state the name of alleged victim) would be placed in fear of death or bodily harm to (himself/herself) (a member of his/her immediate family)

by the accused's acts. The accused also had the required knowledge if the circumstances known to the accused were such as would have caused a reasonable person in the same or similar circumstances to know that (state the name of alleged victim) would be placed in fear of death or bodily harm to (himself/herself) (a member of his/her immediate family) by the accused's acts.

In deciding this issue you must consider all relevant facts and circumstances.

3–46–1. LARCENY (ARTICLE 121)

a. MAXIMUM PUNISHMENT:

(1) Military property—$500.00 or less: BCD, TF, 1 year, E-1.

(2) Other than military property—$500 or less: BCD, TF, 6 months, E-1.

(3) Military property—more than $500, or of any military motor vehicle, aircraft, vessel, firearm, or explosive: DD, TF, 10 years, E-1.

(4) Other than military property—more than $500, or any motor vehicle, aircraft, vessel, firearm, or explosive: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, steal _____, (military property), of a value of (about) $_____, the property of _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully (took) (withheld) (obtained) certain property, that is, (state the property allegedly taken), from the possession of (state the name of the owner or other person alleged);

(2) That the property belonged to (state the name of the owner or other person alleged);

(3) That the property was of a value of _____ (or of some lesser value, in which case the finding should be in the lesser amount); (and)

(4) That the (taking) (withholding) (obtaining) by the accused was with the intent (permanently to (deprive) (defraud) (state the name of the owner or other person alleged) of the use and benefit of the property) (or) (permanently to appropriate the property to the accused's own use or the use of someone other than the owner); [and]

NOTE 1: Military and other property subject to enhanced punishment provisions when alleged. Add the following element and give the appropriate definitions:

[(5)] That the property was ((military property) (a military) (a) (an) (motor vehicle) (aircraft) (vessel) (firearm) (explosive)).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Possession" means care, custody, management, or control.

"Owner" refers to any person (or entity) who, at the time of the (taking) (obtaining) (withholding) had a greater right to possession than the accused did, in the light of all conflicting interests.

Property "belongs" to a person or entity having (title to the property) (a greater right to possession of the property than the accused) (or) (possession of the property).

("Took" means any actual or constructive moving, carrying, leading, riding, or driving away of another's personal property.)

NOTE 2: <u>Wrongfulness of the taking, withholding, or obtaining</u>. When an issue of wrongfulness is raised by the evidence, an instruction tailored substantially as follows should be given:

(A (taking) (or) (withholding) is wrongful only if done without the consent of the owner and with a criminal state of mind.)

(An obtaining is wrongful only when it is accomplished by false pretenses with a criminal state of mind.)

(A criminal "false pretense" is any misrepresentation of fact by a person who knows it to be untrue, which is intended to deceive, which does in fact deceive, and which is the means by which value is obtained from another without compensation. The misrepresentation must be an important factor in causing the owner to part with the property. The misrepresentation does not, however, have to be the only cause of the obtaining.)

(In determining whether the (taking) (or) (withholding) (or) (obtaining) was wrongful, you should consider all the facts and circumstances presented by the evidence.) (Consider evidence that the (taking) (or) (withholding) (or) (obtaining) may have been (from a person with a greater right to possession) (without lawful authorization) (without the authority of apparently lawful orders) (_____)).

(On the other hand, consider evidence that the (taking) (or) (withholding) (or) (obtaining) may have been (negligent) (under a mistaken belief of right) (with lawful authority) (authorized by apparently lawful superior orders) (from a person with a lesser right to possession than the accused) (from a person with whom the accused enjoyed an equal right to possession) (for the purpose of returning the property to the owner) (_____)).

NOTE 3: Non-larcenous or "innocent" motive. If there is evidence that the accused took property as a joke or trick, to "teach another a lesson," or for a similar reason, the following instruction may be appropriate. See United States v. Kastner, 17 MJ 11 (CMA 1983) (overruling the "innocent purpose defense" of United States v. Roark, 31 CMR 64 (CMA 1961)), and United States v. Johnson, 17 MJ 140 (CMA 1984). This evidence will ordinarily raise the lesser included offense of wrongful appropriation:

Evidence has been presented that the accused may have (taken) (or) (obtained) (or) (withheld) the (state the property allegedly taken) as a (joke) (trick) (to teach another a lesson) (to test security) (_____). The accused's reason for (taking) (or) (withholding) (or) (obtaining) the property is neither an element of larceny nor is it a defense. However, it is evidence that may be considered in determining whether the accused, at the time of the (taking) (or) (obtaining) (or) (withholding) had the intent permanently to:

a. (deprive) (defraud) (state the name of the owner or other person alleged) of the use and benefit of the property; or

b. appropriate the property to (his/her) own use or the use of any other person other than the owner.

The burden is upon the prosecution to establish the guilt of the accused. Unless you are satisfied beyond a reasonable doubt that the accused had the intent permanently to ((deprive) (defraud) (state the name of the owner or other person alleged) of the use and benefit of the property) (or) (appropriate the property to (his/her) own use or the use of any person other than the owner), the accused may not be found guilty of larceny.

NOTE 4: Possession of recently stolen property. If the accused may have been found in possession of recently stolen property, an instruction tailored substantially as follows is appropriate:

If the facts establish that the property was wrongfully (taken) (or) (obtained) (or) (withheld) from the possession of (state the name of the owner or other person alleged) and that shortly thereafter it was discovered in the knowing, conscious, and unexplained possession of the accused, you may infer that the accused (took) (or) (obtained) (or) (withheld) the property. The drawing of this inference is not required.

It is not required that the property actually be in the hands of or on the person of the accused, and possession may be established by the fact that the property is found in a place which the accused controls. Two or more persons may be in possession of the same property at the same time. One person may have actual possession of property for that person and others. But mere presence in the vicinity of the property or mere knowledge of its location does not constitute possession.

"Shortly thereafter" is a relative term and has no fixed meaning. Whether property may be considered as discovered shortly thereafter it has been taken depends upon the nature of the property and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the (taking) (or) (obtaining) (or) (withholding), the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

In considering whether the possession of the property has been explained, you are reminded that in the exercise of Constitutional and statutory rights, an accused need not take the stand and testify. Possession may be explained by facts, circumstances, and evidence independent of the testimony of the accused.

NOTE 5: Lost, mislaid, or abandoned property. If the evidence raises the possibility that before it was taken the property was abandoned, lost, or mislaid, the instruction that follows is appropriate. In addition, Instruction 5-11, Mistake of Fact, may apply to the issue of intent to deprive or to the issue of the wrongfulness of the taking:

The evidence has raised the issue of whether the property was abandoned, lost, or mislaid. In deciding this issue you should consider, along with all the other evidence that you have before you, the place where and the conditions under which the property was found (as well as how the property was marked).

"Abandoned property" is property which the owner has thrown away, relinquishing all right and title to and possession of the property with no intention to reclaim it. One who finds, takes, and keeps abandoned property becomes the new owner and does not commit larceny.

"Lost property" is property which the owner has involuntarily parted with due to carelessness, negligence, or other involuntary reason. In such cases, the owner has no intent to give up ownership. The circumstances and conditions under which the property was found may support the inference that it was left unintentionally but you are not required to draw this inference. One who finds lost property is not guilty of larceny unless (he) (she) takes possession of the property with both the intent permanently to (deprive) (defraud) the owner of its use and benefit or permanently to appropriate the property to (his) (her) own use, or the use of someone other than the owner, and has a clue as to the identity of the owner.

A clue as to identity of the owner may be provided by the character, location, or marking of the property, or by other circumstances. The clue must provide a reasonably immediate means of knowing or ascertaining the owner of the property.

"Mislaid property" is property which the owner voluntarily and intentionally leaves or puts in a certain place for a temporary purpose and then forgets where it was left or inadvertently leaves it behind. A person who finds mislaid property has no right to take possession of it, other than for the purpose of accomplishing its return to the owner.

Such a person is guilty of larceny if the property is wrongfully taken with the same intent permanently to deprive, defraud, or appropriate the

property as I discussed earlier with lost property even though there is no clue as to the identity of the owner.

The burden is on the government to prove each and every element of larceny beyond a reasonable doubt. The accused cannot be convicted unless you are convinced beyond a reasonable doubt that the property was not abandoned. In addition, if you are convinced beyond a reasonable doubt that the property was "mislaid," the accused may be convicted only if you are convinced beyond a reasonable doubt of all the elements of larceny. If you are convinced beyond a reasonable doubt that the property was not abandoned but are not convinced beyond a reasonable doubt that the property was "mislaid," you should consider the property to be "lost." In this circumstance, the accused cannot be convicted unless you are convinced beyond a reasonable doubt that, at the time of the taking, along with the other elements of larceny, the accused had a clue as to the identity of the owner.

NOTE 6: Bailment and withholding by conversion—other than pay and allowances erroneously paid. The following instruction may be appropriate where there is evidence that the accused misused property given to him or her in a bailment arrangement. See United States v. Hale, 28 MJ 310 (CMA 1989) and United States v. Jones, 35 MJ 143 (CMA 1992):

You may find that a wrongful withholding occurred if you find beyond a reasonable doubt that the owner loaned, rented, or otherwise entrusted property to the accused for a certain period of use, the accused later retained the property beyond the period contemplated without consent or authority from the owner, and had the intent permanently to (deprive) (defraud) the owner of its use and benefit.

NOTE 7: Withholding of pay and/or allowances. When the accused has erroneously received either pay and/or allowances, an instruction tailored substantially as below may be given. This instruction is based upon United States v. Helms, 47 MJ 1 (CAAF 1997). Helms clarified a previously unsettled area by making clear that knowing receipt, without any action on the part of the service member, when coupled with an intent permanently to deprive, is sufficient to prove larceny. Thus, there is neither a requirement for an affirmative action on the part of the service member which causes the payment (as was previously indicated in United States v. Antonelli, 43 MJ 183 (CAAF 1995)), nor a requirement for the service member to fail to account for the payment when called upon to do so (as was previously indicated in United States v. Thomas, 36 MJ 617 (ACMR 1992)).

The question is one of proof: (1) did the service member realize he/she was receiving the payment; and (2) did the service member form the intent to steal? An affirmative action (Antonelli) or failure to account (Thomas) is still relevant as evidence of knowledge of the payment(s) and/or intent to steal, along with other examples listed in the paragraph below.

The mere failure to inform authorities of an overpayment of (an allowance) (pay) (pay and allowances) does not of itself constitute a wrongful withholding of that property.

In order to find that the accused wrongfully withheld (an allowance) (pay) (pay and allowances), you must find beyond a reasonable doubt that:

(1) the accused knew that (he) (she) was erroneously receiving (an allowance) (pay) (pay and allowances); and

(2) the accused, either at the time of receipt of the (allowance) (pay) (pay and allowances), or at any time thereafter, formed an intent (permanently to (deprive) (defraud) the government of the use and benefit of the money) (or) (permanently to appropriate the money to the accused's own use or the use of someone other than the government).

In deciding whether the accused knew (he) (she) was erroneously receiving (pay) (an allowance) (pay and allowances) and whether the accused formed the requisite intent, you must consider all the facts and circumstances, including but not limited to (the accused's intelligence) (the length of time the accused has been in the military) (any affirmative action by the accused which caused the overpayment) (the length of time the accused received the overpayment) (any failure by the accused to account for the funds when called upon to do so) (the amount of the erroneous payment when compared to the accused's total pay) (any statement(s) made by the accused) (any actions taken by the accused to (conceal) (correct) the erroneous payment) (any representations made to the accused concerning the erroneous payment by persons in a position of authority to make such representations) (_____).

NOTE 8: Custodian of a fund. When the accused was the custodian of a fund and may have failed to produce property on request or to render an accounting, an instruction tailored substantially as follows may be given:

The mere (failure on the part of the custodian to account for or deliver the property when, in the ordinary course of affairs, an accounting is due) (refusal on the part of the custodian to deliver the property when delivery is due or upon timely request by proper authority) does not of itself constitute a larceny of that property. However, (failure on the part of the custodian to account for or deliver the property when, in the ordinary course of affairs, an accounting is due) (a refusal on the part of the custodian to deliver the property when delivery is due or upon timely request by proper authority) will permit an inference that the custodian has wrongfully withheld the property. The drawing of this inference is not required. Whether it should be drawn at all and the weight to be given to it, if it is drawn, are matters for your exclusive determination. In making this determination you should consider the circumstances surrounding any (refusal) (failure) to (account for) (deliver) the property. In making your decision, you should also apply your common sense and general knowledge of human nature and the ordinary affairs of life.

NOTE 9: Military property. For a definition of military property, See United States v. Schelin, 15 MJ 218 (CMA 1983), and United States v. Simonds, 20 MJ 279 (CMA 1985). See also NOTE 10 below when money is alleged as military property. When military property is alleged, the following instruction should be given:

"Military property" is real or personal property owned, held, or used by one of the armed forces of the United States which either has a uniquely military nature or is used by an armed force in furtherance of its mission.

NOTE 10: "Money" as military property. In United States v. Hemingway, 36 MJ 349 (CMA 1993), the court held that appropriated funds belonging to the Army—even if only being "held" by the Army for immediate disbursement to an individual service member for duty travel—are military property. Hemingway did not mention any of the service court cases that had addressed the issue such as United States v. Dailey, 34 MJ 1039 (NMCMR 1992) ("money" paid as BAQ was considered to be "military property" because it was appropriated by Congress and used to provide an integral morale and welfare function); United States v. Newsome, 35 MJ 749 (NMCMR 1992) (treasury checks are military property); and United States v. Field, 36 MJ 697 (AFCMR 1992) (appropriated funds for PCS and TDY travel are military property). Without so stating, Hemingway apparently overrules United States v. Thomas, 31 MJ 794 (AFCMR 1990) ("money" paid as TLA (temporary lodging allowance) and VHA was not "military property" because ordinarily it is the property purchased with appropriations, and not "money," which has a unique military nature or is put to a function meriting special status).

NOTE 11: Motor vehicle, aircraft, vessel, explosive, and firearm defined. If the property is alleged to be a motor vehicle, aircraft, vessel, explosive, or firearm, the following definitions will usually be sufficient. In a complex case, the military judge should consult the rules and statutes cited below:

Vehicle: 1 USC section 4
Motor Vehicle: 18 USC section 31 and 18 USC section 2311
Aircraft: 18 USC section 31 and 18 USC section 2311
Vessel: 1 USC section 3
Explosive: RCM 103(11), 18 USC section 844(j), and 18 USC section 232(5)
Firearm: RCM 103(12) and 18 USC section 232(4)

("Motor vehicle" includes every description of carriage or other contrivance propelled or drawn by mechanical power and used, or capable of being used, as a means of transportation on land.)

("Aircraft" means any contrivance used or designed for navigation of or for flight in the air.)

("Vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.)

("Firearm" means any weapon which is designed for or may be readily converted to expel any projectile by the action of an explosive.)

("Explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device.)

NOTE 12: Military or specified property, variance. If the property is alleged to be military property and/or a motor vehicle, aircraft, vessel, firearm, or explosive, and an issue as to its nature is raised by the evidence, the following instruction should be given:

The government has charged that the property allegedly stolen was "((military property)) ((a military) (a) (an) (motor vehicle) (aircraft) (vessel) (firearm) (explosive))." To convict the accused as charged, you must be convinced beyond a reasonable doubt of all the elements, including that the property is of the nature as alleged. If you are convinced of all the elements beyond a reasonable doubt except the element that the

property was of the nature as alleged, you may still convict the accused of larceny. In this event you must make appropriate findings by excepting the words"((military property)) ((a military) (a) (an) (motor vehicle) (aircraft) (vessel) (firearm) (explosive))."

NOTE 13: Value alleged as $500 or less and property in evidence. Under these circumstances, the following instruction may be given:

When property is alleged to have a value of $500.00 or less, the prosecution is required to prove only that the property has some value. When, as here (you have evidence of the nature of the property) (the property has been admitted in evidence as an exhibit and can be examined by the members), you may infer that it has some value. The drawing of this inference is not required.

NOTE 14: Value alleged in excess of $500. If value in excess of $500 is alleged, Instruction 7-16, Value, Damage, or Amount, may be appropriate.

NOTE 15: Larceny of a completed check, money order or similar instrument. The following instruction may be appropriate:

When the subject of the larceny is a completed check, money order, or similar instrument, the value is the face amount for which it is written (in the absence of evidence to the contrary raising a reasonable doubt as to that value).

NOTE 16: Asportation. The asportation (the taking or carrying away) continues, and thus the crime of larceny continues, as long as there is any movement of the property with the requisite intent, even if not off the premises. As long as the perpetrator is dissatisfied with the location of the property, a relatively short interruption of the movement of the property does not end the asportation. See United States v. Escobar, 7 MJ 197 (CMA 1979).

NOTE 17: Receiver of stolen property or accessory after the fact. Larceny by "withholding" cannot be premised on evidence of receiving stolen property or being an accessory after the fact. See United States v. Jones, 33 CMR 167 (CMA 1963).

NOTE 18: Taking and stealing of mail. See paragraph 93, Part IV, MCM and Instructions 3-93-1, Mail—Taking, and 3-93-2, Mail—Opening, Secreting, or Destroying.

NOTE 19: Tangible property subject of larceny. Money, personal property or article of value, as those terms are used in Article 121, UCMJ, include only tangible items having corporeal existence and do not include services or other intangibles, such as taxicab and telephone services, or use and occupancy of government quarters, or a debt. See United States v. Roane, 43 MJ 93 (CMA 1995), United States v. Abeyta, 12 MJ 507 (ACMR 1981) and

United States v. Mervine, 26 MJ 482 (CMA 1988). (Theft of intangibles may be charged under Article 134 as obtaining services under false pretenses or dishonorably failing to pay just debts; under 18 USC section 641, using Article 134(3); or as a violation of a state statute, assimilated through 18 USC section 13.)

NOTE 20: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), normally applies. Instruction 7-16, Variance - Value, Damage, or Amount, may apply. Instruction 7-15, Variance, may apply.

NOTE 21: Wrongful appropriation as a lesser included offense. When wrongful appropriation is raised as a lesser included offense, give the following:

The offense of wrongful appropriation is a lesser included offense of the offense of larceny as set forth in (The) Specification (__) of (The) (Additional) Charge (__). If you find the accused not guilty of larceny, you should then consider the lesser included offense of wrongful appropriation, also in violation of Article 121. In order to find the accused guilty of this lesser offense, you must be satisfied by legal and competent evidence beyond a reasonable doubt of the following elements:

(1) That (state the time and place alleged), the accused wrongfully (took) (obtained) (withheld) certain property, that is, (state the property allegedly taken), from the possession of (state the name of the owner or other person alleged);

(2) That the property belonged to (state the name of the owner or other person alleged);

(3) That the property was of a value of _____ (or of some lesser value, in which case the finding should be in the lesser amount); (and)

(4) That the (taking) (obtaining) (withholding) by the accused was with the intent (temporarily to (deprive) (defraud) (state the name of the owner or other person alleged) of the use and benefit of the property) (or) (temporarily to appropriate the property to the accused's own use or the use of someone other than the owner.) [and]

[(5)] That the property was (a) (an) (motor vehicle) (aircraft) (vessel) (firearm) (explosive).

The offense of larceny differs from the offense of wrongful appropriation in that the offense of larceny requires as an essential element that you be satisfied beyond a reasonable doubt that at the time of the (taking) (withholding) (obtaining), the accused had the intent permanently to deprive the owner of the use and benefit of the property or had the intent permanently to appropriate the property to (his) (her) own use or the use of anyone other than the lawful owner. The lesser included offense of wrongful appropriation does not include that element but does require as an essential element that you be satisfied beyond reasonable doubt that at the time of the (taking) (withholding) (obtaining) the accused had the intent temporarily to deprive the owner of the use and benefit of the property or had the intent temporarily to appropriate the property to (his) (her) own use or the use of anyone other than the lawful owner.

NOTE 22: Other instructions distinguishing larceny from wrongful appropriation. The following instructions may be appropriate:

The (taking) (withholding) (obtaining) as a (joke) (trick) (to teach another a lesson) (to test security) (_____) is not a defense to wrongful appropriation.

(The character of the property as military property is not an element of the offense of wrongful appropriation (however, that the property is ((a) (an)) (motor vehicle) (aircraft) (vessel) (firearm) (explosive) is an element.))

e. REFERENCES: Abandoned, lost, mislaid property: United States v. Wiederkehr, 33 MJ 539 (AFCMR 1991); Pay and allowances: United States v. Helms, 47 MJ 1 (CAAF 1997).

3–46–2. WRONGFUL APPROPRIATION (ARTICLE 121)

NOTE 1: Applicability of this instruction. Use this instruction when wrongful appropriation is the charged offense. When instructing upon wrongful appropriation as a lesser included offense of larceny, use Instruction 3-46-1.

a. MAXIMUM PUNISHMENT:

(1) $500.00 or less: 2/3 x 3 months, 3 months, E-1.

(2) More than $500.00: BCD, TF, 6 months, E-1.

(3) Of motor vehicle, aircraft, vessel, firearm, or explosive: DD, TF, 2 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully appropriate _____, of a value of (about) $_____, the property of _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully (took) (withheld) (obtained) certain property, that is, (state the property allegedly taken), from the possession of (state the name of the owner or other person alleged);

(2) That the property belonged to (state the name of the owner or other person alleged);

(3) That the property was of a value of _____ (or of some lesser value, in which case the finding should be in the lesser amount); (and)

(4) That the (taking) (withholding) (obtaining) by the accused was with the intent (temporarily to (deprive) (defraud) (state the name of the owner or other person alleged) of the use and benefit of the property) (or) (temporarily to appropriate the property to the accused's own use or the use of someone other than the owner). [and]

NOTE 2: Property subject to enhanced punishment provisions when alleged. Add the following element and give the appropriate definitions:

[(5)] That the property was (a) (an) (motor vehicle) (aircraft) (vessel) (firearm) (explosive).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Possession" means care, custody, management, or control.

"Owner" refers to any person (or entity) who, at the time of the (taking) (obtaining) (withholding) had a greater right to possession than the accused did, in the light of all conflicting interests.

Property "belongs" to a person or entity having (title to the property) (a greater right to possession of the property than the accused) (or) (possession of the property).

("Took" means any actual or constructive moving, carrying, leading, riding, or driving away of another's personal property.)

NOTE 3: <u>Wrongfulness of the taking, withholding, or obtaining</u>. When an issue of wrongfulness is raised by the evidence, an instruction tailored substantially as follows should be given:

(A (taking) (or) (withholding) is wrongful only if done without the consent of the owner and with a criminal state of mind.)

(An obtaining is wrongful only when it is accomplished by false pretenses with a criminal state of mind.)

(A criminal "false pretense" is any misrepresentation of fact by a person who knows it to be untrue, which is intended to deceive, which does in fact deceive, and which is the means by which value is obtained from another without compensation. The misrepresentation must be an important factor in causing the owner to part with the property. The misrepresentation does not, however, have to be the only cause of the obtaining.)

(In determining whether the (taking) (or) (withholding) (or) (obtaining) was wrongful, you should consider all the facts and circumstances presented by the evidence.)

(Consider evidence that the (taking) (or) (withholding) (or) (obtaining) may have been (from a person with a greater right to possession)

(without lawful authorization) (without the authority of apparently lawful orders) (_____).)

(On the other hand, consider evidence that the (taking) (or) (withholding) (or) (obtaining) may have been (negligent) (under a mistaken belief of right) (with lawful authority) (authorized by apparently lawful superior orders) (from a person with a lesser right to possession than the accused) (from a person with whom the accused enjoyed an equal right to possession) (for the purpose of returning the property to the owner) (_____).)

NOTE 4: "Innocent" motive. An "innocent" motive to take the property, such as for a joke or trick, to "teach another a lesson," or for a similar reason, is NOT a defense to wrongful appropriation.

NOTE 5: Possession of recently taken property. If the accused may have been found in possession of recently taken property, an instruction tailored substantially as follows is appropriate:

If the facts establish that the property was wrongfully (taken) (or) (obtained) (or) (withheld) from the possession of (state the name of the owner or other person alleged) and that shortly thereafter it was discovered in the knowing, conscious, and unexplained possession of the accused, you may infer that the accused (took) (or) (obtained) (or) (withheld) the property. The drawing of this inference is not required.

It is not required that the property actually be in the hands of or on the person of the accused, and possession may be established by the fact that the property is found in a place which the accused controls. Two or more persons may be in possession of the same property at the same time. One person may have actual possession of property for that person and others. But mere presence in the vicinity of the property or mere knowledge of its location does not constitute possession.

"Shortly thereafter" is a relative term and has no fixed meaning. Whether property may be considered as discovered shortly thereafter it has been taken depends upon the nature of the property and all the facts and circumstances shown by the evidence in the case. The longer the period

of time since the (taking) (or) (obtaining) (or) (withholding), the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

In considering whether the possession of the property has been explained, remember that in the exercise of Constitutional and statutory rights, an accused need not take the stand and testify. Possession may be explained by facts, circumstances and evidence independent of the testimony of the accused.

NOTE 6: Lost, mislaid, or abandoned property. If the evidence raises the possibility that before it was taken, the property was abandoned, lost, or mislaid, the instruction that follows is appropriate. In addition, Instruction 5-11, Mistake of Fact, may apply to the issue of intent to deprive or to the issue of the wrongfulness of the taking.

The evidence has raised the issue of whether the property was abandoned, lost, or mislaid. In deciding this issue you should consider, along with all the other evidence that you have before you, the place where and the conditions under which the property was found (as well as how the property was marked).

"Abandoned property" is property which the owner has thrown away, relinquishing all right and title to and possession of the property with no intention to reclaim it. One who finds, takes, and keeps abandoned property becomes the new owner and does not commit wrongful appropriation.

"Lost property" is property which the owner has involuntarily parted with due to carelessness, negligence, or other involuntary reason. In such cases, the owner has no intent to give up ownership. The circumstances and conditions under which the property was found may support the inference that it was left unintentionally but you are not required to draw this inference. One who finds lost property is not guilty of wrongful appropriation unless (he) (she) takes possession of the property with both the intent temporarily to (deprive) (defraud) the owner of its use and benefit or temporarily to appropriate the property to (his) (her) own use,

or the use of someone other than the owner, and has a clue as to the identity of the owner.

A clue as to identity of the owner may be provided by the character, location, or marking of the property, or by other circumstances. The clue must provide a reasonably immediate means of knowing or ascertaining the owner of the property.

"Mislaid property" is property which the owner voluntarily and intentionally leaves or puts in a certain place for a temporary purpose and then forgets where it was left or inadvertently leaves it behind. A person who finds mislaid property has no right to take possession of it, other than for the purpose of accomplishing its return to the owner. Such a person is guilty of wrongful appropriation if the property is wrongfully taken with the same intent temporarily to deprive, defraud, or appropriate the property (as was discussed earlier with lost property) even though there is no clue as to the identity of the owner.

The burden is on the government to prove each and every element of wrongful appropriation beyond a reasonable doubt. The accused cannot be convicted unless you are convinced beyond a reasonable doubt that the property was not abandoned. In addition, if you are convinced beyond a reasonable doubt that the property was "mislaid," the accused may be convicted only if you are convinced beyond a reasonable doubt of all the elements of wrongful appropriation. If you are convinced beyond a reasonable doubt that the property was not abandoned but are not convinced beyond a reasonable doubt that the property was "mislaid," you should consider the property to be "lost." In this circumstance, the accused cannot be convicted unless you are convinced beyond a reasonable doubt that, at the time of the taking, along with the other elements of wrongful appropriation, the accused had a clue as to identity of the owner.

NOTE 7: Bailment and withholding by conversion — other than pay and allowances erroneously paid. The following instruction may be appropriate where there is evidence that the accused misused property given to him or her in a bailment arrangement. See

***United States v. Hale*, 28 MJ 310 (CMA 1989) and *United States v. Jones*, 35 MJ 143 (CMA 1992):**

You may find that a wrongful withholding occurred if you find beyond a reasonable doubt that the owner loaned, rented, or otherwise entrusted property to the accused for a certain period of use, the accused later retained the property beyond the period contemplated without consent or authority from the owner, and had the intent temporarily to (deprive) (defraud) the owner of its use and benefit.

NOTE 8: Withholding of pay and/or allowances. When the accused has erroneously received either pay and/or allowances, an instruction tailored substantially as below may be given. This instruction is based upon United States v. Helms, 47 MJ 1 (CAAF 1997). Helms clarified a previously unsettled area by making clear that knowing receipt, without any action on the part or the service member, when coupled with an intent permanently to deprive, is sufficient to prove larceny. Thus, there is neither a requirement for an affirmative action on the part of the service member which causes the payment (as was previously indicated in United States v. Antonelli, 43 MJ 183 (CAAF 1995)), nor a requirement for the service member to fail to account for the payment when called upon to do so (as was previously indicated in United States v. Thomas, 36 MJ 617 (ACMR 1992)). The question now is one of proof: (1) did the service member realize (he) (she) was receiving the payment; and (2) did the service member form the intent to temporarily deprive? An affirmative action (Antonelli) or failure to account (Thomas) is still relevant as evidence of knowledge of the payment(s) and/or intent to temporarily deprive, but is only an example of proof as listed with other examples in the paragraph below.

The mere failure to inform authorities of an overpayment of (an allowance) (pay) (pay and allowances) does not of itself constitute a wrongful withholding of that property.

To find that the accused wrongfully withheld (an allowance) (pay) (pay and allowances), you must find beyond a reasonable doubt that:

(1) the accused knew that (he) (she) was erroneously receiving (an allowance) (pay) (pay and allowances); and

(2) the accused, either at the time of receipt of the (allowance) (pay) (pay and allowances), or at any time thereafter, formed an intent (temporarily to (deprive) (defraud) the government of the use and benefit of the money) (or) (temporarily to appropriate the money to the accused's own use or the use of someone other than the government).

In deciding whether the accused knew (he) (she) was erroneously receiving (pay) (an allowance) (pay and allowances) and whether the accused formed the requisite intent, you must consider all the facts and circumstances, including but not limited to (the accused's intelligence) (the length of time the accused has been in the military) (any affirmative action by the accused which caused the overpayment) (the length of time the accused received the overpayment) (any failure by the accused to account for the funds when called upon to do so) (the amount of the erroneous payment when compared to the accused's total pay) (any statement(s) made by the accused) (any actions taken by the accused to (conceal) (correct) the erroneous payment) (any representations made to the accused concerning the erroneous payment by persons in a position of authority to make such representations) (_____).

NOTE 9: Custodian of a fund. When the accused was the custodian of a fund and may have failed to produce property on request or to render an accounting, an instruction tailored substantially as follows may be given:

The mere (failure on the part of the custodian to account for or deliver the property when, in the ordinary course of affairs, an accounting is due) (refusal on the part of the custodian to deliver the property when delivery is due or upon timely request by proper authority) does not of itself constitute a wrongful appropriation of that property. However, (failure on the part of the custodian to account for or deliver the property when, in the ordinary course of affairs, an accounting is due) (a refusal on the part of the custodian to deliver the property when delivery is due or upon timely request by proper authority) will permit an inference that the custodian has wrongfully withheld the property. The drawing of this inference is not required. Whether it should be drawn at all and the weight to be given to it, if it is drawn, are matters for your exclusive determination. In making this determination you should consider the circumstances surrounding any (refusal) (failure) to (account for) (deliver) the property. In making your decision, you should also apply your common sense and general knowledge of human nature and the ordinary affairs of life.

NOTE 10: <u>Motor vehicle, aircraft, vessel, explosive, and firearm defined</u>. If the property is alleged to be a motor vehicle, aircraft, vessel, explosive, or firearm, the following definitions will usually be sufficient. In a complex case, the military judge should consult the rules and statutes cited below:

Vehicle: 1 USC section 4
Motor Vehicle: 18 USC section 31 and 18 USC section 2311
Aircraft: 18 USC section 31 and 18 USC section 2311
Vessel: 1 USC section 3
Explosive: RCM 103(11), 18 USC section 844(j), and 18 USC section 232(5)
Firearm: RCM 103(12) and 18 USC section 232(4)

("Motor vehicle" includes every description of carriage or other contrivance propelled or drawn by mechanical power and used, or capable of being used, as a means of transportation on land.)

("Aircraft" means any contrivance used or designed for navigation of or for flight in the air.)

("Vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.)

("Firearm" means any weapon which is designed for or may be readily converted to expel any projectile by the action of an explosive.)

("Explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device.)

NOTE 11: <u>Specified property, variance</u>. If the property is alleged to be a motor vehicle, aircraft, vessel, firearm, or explosive, and an issue as to its nature is raised by the evidence, the following instruction should be given:

The government has charged that the property allegedly taken was "(a) (an) (motor vehicle) (aircraft) (vessel) (firearm) (explosive)." To convict the accused as charged, you must be convinced beyond a reasonable doubt of all the elements, including that the property is of the nature as alleged. If you are convinced of all the elements beyond a reasonable doubt except the element that the property was of the nature as alleged,

you may still convict the accused of wrongful appropriation. In this event you must make appropriate findings by excepting the words "(a) (an) (motor vehicle) (aircraft) (vessel) (firearm) (explosive))."

NOTE 12: Value alleged as $500 or less and property in evidence. Under these circumstances, the following instruction may be given:

When property is alleged to have a value of $500.00 or less, the prosecution is required to prove only that the property has some value. When, as here (you have evidence of the nature of the property) (the property has been admitted in evidence as an exhibit and can be examined by the members), you may infer that it has some value. The drawing of this inference is not required.

NOTE 13: Value alleged in excess of $500. If value in excess of $500 is alleged, Instruction 7-16, Variance - Value, Damage, or Amount, may be appropriate.

NOTE 14: Wrongful appropriation of a completed check, money order, or similar instrument. The following instruction may be appropriate:

When the subject of the wrongful appropriation is a completed check, money order, or similar instrument, the value is the face amount for which it is written (in the absence of evidence to the contrary raising a reasonable doubt as to that value).

NOTE 15: Asportation. The asportation (the taking or carrying away) continues, and thus the crime of wrongful appropriation continues, as long as there is any movement of the property with the requisite intent, even if not off the premises. As long as the perpetrator is dissatisfied with the location of the property, a relatively short interruption of the movement of the property does not end the asportation. See United States v. Escobar, 7 MJ 197 (CMA 1979).

NOTE 16: Taking of mail. See paragraph 93, Part IV, MCM and Instruction 3-93-1, Mail—Taking.

NOTE 17: Tangible property subject of wrongful appropriation. Money, personal property, or article of value, as those terms are used in Article 121, UCMJ, include only tangible items having corporeal existence and do not include services or other intangibles, such as taxicab and telephone services, or use and occupancy of government quarters, or a debt. See United States v. Roane, 43 MJ 93 (CMA 1995), United States v. Abeyta, 12 MJ 507 (ACMR 1981) and United States v. Mervine, 26 MJ 482 (CMA 1988). (Wrongful appropriation of intangibles may be charged under Article 134 as obtaining services under false pretenses or dishonorably failing to pay just debts; under 18 USC section 641, using Article 134(3); or as a violation of a state statute, assimilated through 18 USC section 13).

NOTE 18: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), normally applies. Instruction 7-16, Variance - Value, Damage, and Amount, may apply. Instruction 7-15, Variance, may apply.

e. REFERENCES: Abandoned, lost, mislaid property: United States v. Wederkehr, 33 MJ 539 (AFCMR 1991). Pay and allowances: United States v. Helms, 47 MJ 1 (CAAF 1997).

3–47–1. ROBBERY (ARTICLE 122)

a. MAXIMUM PUNISHMENT:

(1) With a firearm: DD, TF, 15 years, E-1.

(2) Other cases: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, by means of (force) (violence) (force and violence) (and) (putting him/her in fear) (with a firearm) steal from the (person) (presence) of _____, against his/her will, (a watch) (_____) of value of (about) $_____, the property of _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully took (state the property allegedly taken) (from the person) (from the possession and in the presence) of (state the name of the person allegedly robbed);

(2) That the taking was against the will of (state the name of the person allegedly robbed);

(3) That the taking was by means of (force) (violence) (force and violence) (and) (or) (putting him/her in fear of:

(a) (immediate) (future) injury to (his/her person) (the person of a relative) (the person of a member of his/her family) (the person of anyone in his/her company at the time of the alleged robbery) [and/or]

(b) (immediate) (future) injury to (his/her property) (the property of a relative) (the property of a member of his/her family) (the property of anyone in his/her company at the time of the alleged robbery);

(4) That the property belonged to (state the name of the person allegedly robbed);

(5) That the property was of a value of $_____ (or of some lesser value, in which case the finding should be in the lesser amount); (and)

(6) That the taking of the property by the accused was with the intent permanently to deprive (state the name of the person allegedly robbed) of the use and benefit of the property; [and]

NOTE 1: Use of firearm alleged. If the specification alleges that the robbery was committed with a firearm, add the seventh element below:

[(7)] That the means of force or violence or putting in fear was a firearm.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Property "belongs" to a person who has title to the property, a greater right to possession of the property than the accused, or possession of the property.

A taking is wrongful only when done without the consent of the owner and accompanied by a criminal state of mind. In determining whether the taking was wrongful, you should consider all the facts and circumstances presented by the evidence, (such as, evidence that the taking may have been (from a person with a greater right to possession than the accused) (without lawful authorization) (without the authority of apparently lawful orders) (_____)).

(On the other hand, you should also consider evidence which tends to show that the taking was not wrongful, including, but not limited to, evidence that the taking may have been (under a mistaken belief of right) (with lawful authority) (authorized by apparently lawful superior orders) (from a person with a lesser right to possession than the accused) (from a person with whom the accused enjoyed an equal right to possession) (_____).)

NOTE 2: Taking by force and/or violence alleged. If the case involves an issue of taking by force, violence, or both, a tailored instruction substantially as follows may be appropriate:

(The (force) (and) (violence) required for this offense must have been applied to the person of the victim and either precede or accompany the taking. Additionally, it must (overcome the resistance of the victim) (or)

(put the victim in a position where he/she makes no resistance.) (The fact that the victim was not afraid is unimportant).)

NOTE 3: Taking by fear alleged. If the case involves an issue of taking by putting in fear, use the following instruction:

(The fear of present or future injury required for this offense must be sufficient to justify (state the name of the alleged victim) giving up the property. The fear of injury must exist at the time of the unlawful taking.)

NOTE 4: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, or Instruction 5-12, Voluntary Intoxication, as bearing on the issue of specific intent to permanently deprive, may be applicable. Instruction 7-16, Variance - Value, Damage, or Amount, and Instruction 7-15, Variance, may be applicable.

NOTE 5. Lesser included offenses commonly raised. Robbery is a compound offense, composed of larceny and some form of assault. Be prepared to instruct upon the various forms of assault reasonably raised by the evidence, e.g., assault with intentional infliction of grievous bodily harm, assault with a dangerous weapon, as well as larceny and wrongful appropriation. Should the members find both an assault and wrongful appropriation, these findings must be expressed separately as violations of the respective articles of the UCMJ.

3–48–1. FORGERY—MAKING OR ALTERING (ARTICLE 123)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent to defraud, falsely [(make (in its entirety) (the signature of _____ as an indorsement to) (the signature of _____ to) (_____) a certain (check) (writing) (_____) in the following words and figures, to wit: _____] [alter a certain (check) (writing) (_____) in the following words and figures, to wit: _____, by (adding thereto _____) (_____)], which said (check) (writing) (_____) would, if genuine, apparently operate to the legal harm of another [and which _____ (could be) (was) used to the legal harm of _____, in that _____.]

NOTE 1: Used to legal harm alleged. The language contained in the last set of brackets in the model specification should be used when the document specified is not one which by its nature would clearly operate to the legal prejudice of another—for example, an insurance application. The manner in which the document could be or was used to prejudice the legal rights of another should be alleged in the last blank.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused falsely (made) (altered) a certain ((signature to a) (check) (writing) (_____)) (part of a (check) (writing) (_____)), as described in the specification, to wit: (describe the signature, part of a writing, or writing allegedly falsely made or altered);

(2) That the alleged (check) (writing) (_____) would, if genuine, apparently (impose a legal liability on another) (or) (change his/her legal right or duty to his/her harm) (in that (here, if alleged, set forth the manner in which the legal status of another could be or was allegedly harmed)); and

(3) That the alleged false (making) (altering) was with the intent to defraud.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Falsely (made) (altered)" means an unauthorized signing of a document or an unauthorized (making) (altering) of the writing which causes it to appear to be different from what it really is.

"Intent to defraud" means an intent to obtain an article or thing of value through a misrepresentation and to apply it to one's own use and benefit or the use and benefit of another, whether temporarily or permanently.

NOTE 2: <u>When alleging means by which legal harm could ensue is required</u>. Unless it is clear from the nature of the writing in what manner it is capable of affecting the legal rights of another, extrinsic facts must be alleged in the specification showing how the writing could be, or was in fact used to affect such legal rights.

A writing would, if genuine, apparently impose a legal duty on another or change his/her legal right or liability to his/her harm if the writing is capable of (paying an obligation) (delaying) (increasing) (diminishing) (or) (releasing a person from an obligation) (or) (transferring to another) (_____) a legal right.

NOTE 3: <u>No evidence of actual defrauding</u>. When there is no evidence that anyone was defrauded or that the accused did anything other than falsely make or alter a document, the following instruction should be given:

The third element of this offense requires an intent to defraud. The fact (that no one was actually defrauded) (and) (that no further action was taken with the document other than the false (making) (altering) of the writing) is unimportant.

NOTE 4: <u>Lack of intent raised</u>. When there is evidence that the accused did not intend to defraud, or operated under a state of mind inconsistent with an intent to defraud, the military judge should instruct on such evidence. For example, when the defense theory is that the accused intended simply to deceive and not to defraud and is, therefore, not guilty of the offense of forgery, the members must be advised of the distinctions between the intent to defraud and the intent to deceive, and that an intent to deceive unaccompanied by an intent to deprive another of something of value is not the requisite intent for the offense of forgery. The following is a suggested general approach:

There is evidence in this case which raises the issue of whether there was a lack of intent to defraud. (The accused has testified that (he) (she)) (There is evidence to the effect that the accused) (had no intent to defraud) (intended only to deceive) (completed the alleged forgery with a belief that (he) (she) was dealing in (his) (her) own property) (completed the alleged forgery with a belief that (he) (she) was acting under proper authority) (_____). (On the other hand, there is evidence that (<u>here</u>

outline facts which support an inference of intent to defraud). More than a mere intent to deceive is required.

An intent to deceive is an intent to cheat, to trick, or to misrepresent. An intent to defraud, however, is a misrepresentation intended to cause some loss of an item of value to another or the gain of an item of value for oneself or another, either temporarily or permanently.

NOTE 5: Permissible inference instruction. When it appears that a writing was altered while in the exclusive possession of the accused, and that it was one in which the accused had an interest, the following suggested instruction on the permissible inference that the accused altered the writing may be given:

If the facts demonstrate that the writing described in the specification was in the exclusive possession of the accused, that (he) (she) had an interest in the writing, in the sense that (he) (she) stood to benefit from an alteration, and that while in the accused's exclusive possession the alteration was made, you may infer that the accused made the alteration. The drawing of this inference is not required.

NOTE 6: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, as bearing on the issue of the specific intent to defraud, may be applicable.

3–48–2. FORGERY—UTTERING (ARTICLE 123)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent to defraud, (utter) (offer) (issue) (transfer) a certain (check) (writing) (_____) in the following words and figures, to wit: _____, a writing which would, if genuine, apparently operate to the legal harm of another, [which said (check) (writing) (_____)] [the signature to which said (check) (writing) (_____)] [_____] was, as he/she, the said _____, then well knew, falsely (made) (altered) [and which _____ (could be) (was) used to the legal harm of _____, in that _____].

NOTE 1: Used to legal harm alleged. The language in the last set of brackets in the model specification should be used when the document specified is not one which by its nature would clearly operate to the legal prejudice of another—for example, an insurance application. The manner in which the document could be or was used to harm the legal rights of another should be set forth in the last blank.

c. ELEMENTS:

(1) That a certain (signature to a (check) (writing) (_____)) (part of a (check) (writing) (_____)) (check) (writing) (_____) was falsely (made) (altered), as alleged, to wit: (describe the signature, part of a writing, or writing allegedly falsely made or altered);

(2) That the (check) (writing) (_____) described in the specification would, if genuine, apparently impose a legal liability on another or change his/her legal right or duty to his/her harm (in that (here, if alleged, set forth the manner in which the legal status of another could be or was allegedly harmed));

(3) That (state the time and place alleged), the accused (uttered) (offered) (issued) (transferred) this (check) (writing) (_____);

(4) That, at such time, the accused knew that the (check) (writing) (_____) was falsely (made) (altered); and

(5) That the (uttering) (offering) (issuing) (transferring) was with intent to defraud.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Falsely (made) (altered)" means an unauthorized signing of a document or an unauthorized (making) (altering) of the writing which causes it to seem to be different from what it really is.

"Intent to defraud" means an intent to obtain an article or thing of value through a misrepresentation and to apply it to one's own use and benefit or the use and benefit of another, whether temporarily or permanently.

"Utter" means to use a writing with the representation, by words or actions, that it is genuine.

NOTE 2: When alleging means by which legal harm could ensue is required. Unless it is clear from the nature of the writing in what manner it is capable of affecting the legal rights of another, extrinsic facts must be alleged in the specification showing how the writing could be, or was in fact used to affect such legal rights.

A writing would, if genuine, apparently impose a legal duty on another or change his/her legal right or duty to his/her harm if the writing is capable of (paying an obligation) (delaying) (increasing) (diminishing) (or) (releasing a person from an obligation) (or) (transferring) a legal right.

NOTE 3: No evidence of actual defrauding. When there is no evidence that anyone received any benefit or was actually defrauded, the following instruction should be given:

I have instructed you that the fifth element of this offense requires an intent to defraud. The fact (that no one was actually defrauded) (and) (that no one received any benefit) is unimportant.

NOTE 4: Lack of intent raised. When there is evidence that the accused did not intend to defraud, or operated under a state of mind inconsistent with an intent to defraud, the military judge must instruct on such evidence. For example, when the defense theory is that the accused intended simply to deceive and not to defraud and is, therefore, not guilty of the offense of forgery, the members must be advised of the distinctions between the intent to defraud and the intent to deceive, and that an intent to deceive unaccompanied by an intent to deprive another of something of value is not the requisite intent for the offense of forgery. The following is a suggested general approach:

There is evidence in this case which raises the issue of whether there was a lack of intent to defraud. (The accused has testified that (he) (she)) (There is evidence to the effect that the accused) (had no intent to

defraud) (intended only to deceive) (uttered the alleged forgery with a belief that (he) (she) was acting under proper authority) (_____). (On the other hand, there is evidence that (here the military judge may outline facts which support an inference of intent to defraud.) More than a mere intent to deceive is required. An intent to deceive is an intent to cheat, to trick, or to misrepresent. An intent to defraud, however, is a misrepresentation intended to cause the loss of an item of value to another or the gain of an item of value for oneself or another, either temporarily or permanently.

NOTE 5: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable. Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, as bearing on the issue of the specific intent to defraud, may be applicable.

3–49–1. CHECK, WORTHLESS, WITH INTENT TO DEFRAUD (ARTICLE 123a)

NOTE 1: Using this specification. This is a different offense from Instruction 3-49-2, Check, Worthless, with Intent to Deceive. As the specification alleges that the making, drawing, uttering, or delivering was for the procurement of any article or thing of value, the requisite intent is the intent to defraud and the specification must so allege. See United States v. Wade, 34 CMR 287 (CMA 1964).

a. MAXIMUM PUNISHMENT: (If "mega-spec" alleged, *see* United States v. Mincey, 42 MJ 376 (CAAF 1995)).

(1) $500.00 or less: BCD, TF, 6 months, and E-1.

(2) More than $500.00: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent to defraud and for the procurement of (lawful currency) (and) (_____ (an article) (a thing) of value), wrongfully and unlawfully ((make) (draw)) ((utter) (deliver) to _____,) a certain (check) (draft) (money order) upon the (_____ Bank) (_____ depository) in words and figures as follows, to wit: _____, then knowing that (he/she) (_____), the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentment.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (made) (drew) (uttered) (delivered) to (state the name of the payee or other alleged victim) a certain (check) (draft) (money order) drawn upon the _____ (Bank) (_____), as alleged, to wit: (describe the check, draft, money order, or, if set forth in the specification, make reference to it);

(2) That, at the time of the (making) (drawing) (uttering) (delivering), the accused knew that (he/she) (_____), the (maker) (drawer) thereof, did not or would not have sufficient (funds in) (credit with) the (bank) (depository) for the payment of the (check) (draft) (money order) in full upon its presentment;

(3) That the (making) (drawing) (uttering) (delivering) was for the procurement of any (article) (thing) of value; and

(4) That the (making) (drawing) (uttering) (delivering) was wrongful, unlawful, and with intent to defraud.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Made" and "drew" mean the same thing. They refer to the acts of writing and signing the instrument described in the specification(s).)
("Utter" means to use a check, draft, or money order with the representation by words or actions that it will be paid in full by the (bank) (depository) when presented for payment by a person or organization entitled to payment.)

("Representation" means acts or words designed to mislead another.)

("Deliver" means to transfer to another.)

("Sufficient funds" means an account balance of the maker or drawer in a (bank) (depository) when the (check) (draft) (money order) is presented for payment which is at least equal to the amount of the (check) (draft) (money order) and which has not become incapable of payment.)

("Credit" means an arrangement with the (bank) (depository) for the payment of a check, draft, or money order.)

("Upon its presentment" means the time when the (check) (draft) (money order) is presented for payment to the (bank) (depository) which, on the face of the (check) (draft) (money order), has the responsibility to pay the sum indicated.)

("For the procurement of any article or thing of value" means for the purpose of obtaining something of value.)

"Intent to defraud" means an intent to obtain an article or thing of value through a misrepresentation and to apply it to one's own use or benefit or to the use and benefit of another either temporarily or permanently.

NOTE 2: Inference of guilty intent or knowledge. The following instruction on an inference of guilty intent and knowledge may be given when the military judge determines that there is some evidence to support each factor listed below:

You may infer that the accused intended to defraud and had knowledge of the insufficiency of the (funds in) (credit with) the (bank) (depository), if the following facts are established by the evidence in the case:

(1) The accused was the (maker) (drawer) of a (check) (draft) (money order) described in the specification; and

(2) The accused (made) (drew) (uttered) (delivered) to (state the name of the payee or other alleged victim) the (check) (draft) (money order), drawn upon the _____ (bank) (depository); and

(3) The payment of the (check) (draft) (money order) was refused by the (bank) (depository); and

(4) The refusal to pay was because the accused had insufficient (funds in) (credit with) the _____ (bank) (depository) when the (check) (draft) (money order) was presented for payment; and

(5) The accused was given oral or written notice that the (check) (draft) (money order) was not paid when it was presented because of insufficient funds; and

(6) The accused did not pay to the person or organization entitled to payment the amount described on the (check) (draft) (money order) within 5 days after receiving notice of insufficiency of funds.

Drawing this inference, however, is not required.

NOTE 3: Evidence inconsistent with intent or knowledge raised. The military judge must be on the alert for evidence inconsistent with the requisite guilty intent or knowledge, such as evidence that the accused believed that instrument was to be used only as evidence of indebtedness, or that there were or would be sufficient funds to cover the instrument. Such evidence will provide a basis for submission of the issue to the members with proper instructions. For guidance in this area, see Instruction 5-11, Ignorance or Mistake of Fact or Law.

NOTE 4: Gambling debts and checks for gambling funds. In United States v. Falcon, 65 MJ 386 (CAAF 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's defense"). See

***United States v. Wallace*, 36 CMR 148 (CMA 1966), *United States v. Allberry*, 44 MJ 226 (CAAF 1996); *United States v. Green*, 44 MJ 828 (ACCA 1996).**

Note that the CAAF in *Falcon* declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. *Id.*, at footnote 4.

The CAAF also specifically declined to address the ongoing validity of *United States v. Walter*, 23 CMR 275 (CMA 1957), and *United States v. Lenton*, 25 CMR 194 (CMA 1958), because *Falcon* dealt with legal gambling and *Walter* and *Lenton* dealt with illegal gambling. *Falcon*, at footnote 6. Until the CAAF specifically addresses the ongoing validity of *Walter* and *Lenton*, if there is an issue whether the check was used to pay a debt from illegal gambling or the check was used to obtain funds to gamble illegally, the first paragraph of the instruction below should be given. If there is an issue that some but not all of the check arose from an illegal gambling debt or was used to obtain funds for illegal gambling, the fourth paragraph of the instruction below should also be given.

The evidence has raised the issue whether the check(s) in question (was) (were) written to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). The Uniform Code of Military Justice may not be used to enforce worthless checks used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally) when the purported victim (or payee of the check) was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in (The) Specification(s) (___) of (The) (Additional) Charge(s) (___), you must be convinced beyond reasonable doubt that the check(s) in question (was) (were) not used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). Even if the check(s) (was) (were) used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally), if you are convinced beyond reasonable doubt that the purported victim (or payee of the check) was not a party to and did not actively facilitate the illegal gambling, and otherwise did not have knowledge of the illegal gambling-related purpose of the check, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(Also, if you find beyond reasonable doubt that the accused intentionally, that is, purposely, avoided the check-cashing facility's efforts to discover that (he) (she) was on a dishonored or "bad check" list, you may find the accused guilty notwithstanding the UCMJ limitation I mentioned, when all other elements of the offense have been proven beyond a reasonable doubt.)

(The evidence has also raised the issue whether all or only part of the check(s) in question (was) (were) used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). The UCMJ limitation I mentioned only extends to that part of the check's(s') proceeds that (was) (were) used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the check(s) which you are convinced beyond a reasonable doubt was not used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). You do this by excepting the value(s) alleged in the specification(s) and substituting (that) (those) value(s) of which you are convinced beyond a reasonable doubt (was) (were) not used to (pay a debt from gambling illegally) (obtain proceeds to gamble illegally).)

NOTE 5: Lesser included offense commonly raised. Making and Uttering a Worthless Check by Dishonorably Failing to Maintain Sufficient Funds (Art 134) is an LIO of Art 123a, which must be instructed upon, sua sponte, when raised by the evidence. See Instruction 3-68-1, Checks Worthless, Making and Uttering.

NOTE 6: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable. Instruction 6-5, Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, or Instruction 5-12, Voluntary Intoxication, as bearing on the issues of intent to defraud and knowledge may be applicable.

3–49–2. CHECK, WORTHLESS, WITH INTENT TO DECEIVE (ARTICLE 123a)

NOTE 1: Using this specification. This is a different offense from Instruction 3-49-1, Making Worthless Checks with Intent to Defraud. Because the specification alleges the conduct was for the payment of a past due obligation or any other purpose, it should allege an intent to deceive. See United States v. Wade, 34 CMR 287 (CMA 1964); United States v. Hardsaw, 49 MJ 256 (CAAF 1998) (finding the intent to deceive is included in the intent to defraud and affirming a specification alleging an intent to defraud for the purpose of paying a past due obligation).

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, and E-1 (if "mega-spec" alleged, *see* United States v. Mincey, 42 MJ 376 (CAAF 1995)).

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent to deceive and (for the payment of a past due obligation, to wit: _____) (for the purpose of _____) wrongfully and unlawfully ((make) (draw)) ((utter) (deliver) to _____,) a certain (check) (draft) (money order) for the payment of money upon (_____ Bank) (_____ depository), in words and figures as follows, to wit: _____, then knowing that (he/she) (_____), the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentment.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (made) (drew) (uttered) (delivered) to (state the name of the payee or other alleged victim) a certain (check) (draft) (money order) drawn upon the _____ (Bank) (_____), as alleged, to wit: (describe the check, draft, money order, or, if set forth in the specification, make reference to it);

(2) That, at the time of the (making) (drawing) (uttering) (delivering), the accused knew that (he) (she) (_____), the (maker) (drawer) thereof, did not or would not have sufficient (funds in) (credit with) the (bank) (depository) when the (check) (draft) (money order) was presented for payment in full;

(3) That the (making) (drawing) (uttering) (delivering) was (for the payment of a past due obligation) (_____); and

(4) That the (making) (drawing) (uttering) (delivering) was wrongful, unlawful, and with intent to deceive.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("For the payment of any past due obligation" means for the purpose of satisfying in whole or in part any past due obligation.)

("For any other purpose" means for all purposes except the payment of a past due obligation or the obtaining of any item of value.)

("Intent to deceive" means an intent to cheat, to mislead, to trick, or to misrepresent.)

("Made" and "drew" mean the same thing. They refer to the acts of writing and signing the instrument described in the specification.)

("Utter" means to use a check, draft, or money order with the representation by words or actions that it will be paid in full by the (bank) (depository) when presented for payment by a person or organization entitled to payment.)

("Representation" means acts or words designed to mislead another.)

("Deliver" means to transfer to another.)

("Sufficient funds" means an account balance of the maker or drawer in a (bank) (depository) when the (check) (draft) (money order) is presented for payment which is at least equal to the amount of the (check) (draft) (money order) and which has not become incapable of payment.)

("Credit" means an arrangement with the bank for the payment of a check, draft, or money order.)

("Upon its presentment" means the time when the (check) (draft) (money order) is presented for payment to the bank which on the face of the (check) (draft) (money order) has the responsibility to pay the sum indicated.)

NOTE 2: Gambling debts and checks for gambling funds. In United States v. Falcon, 65 MJ 386 (CAAF 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's defense"). See

***United States v. Wallace*, 36 CMR 148 (CMA 1966), *United States v. Allberry*, 44 MJ 226 (CAAF 1996); *United States v. Green*, 44 MJ 828 (ACCA 1996).**

Note that the CAAF in *Falcon* declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. *Id.*, at footnote 4.

The CAAF also specifically declined to address the ongoing validity of *United States v. Walter*, 23 CMR 275 (CMA 1957), and *United States v. Lenton*, 25 CMR 194 (CMA 1958), because *Falcon* dealt with legal gambling and *Walter* and *Lenton* dealt with illegal gambling. *Falcon*, at footnote 6. Until the CAAF specifically addresses the ongoing validity of *Walter* and *Lenton*, if there is an issue whether the check was used to pay a debt from illegal gambling or the check was used to obtain funds to gamble illegally, the first paragraph of the instruction below should be given. If there is an issue that some but not all of the check arose from an illegal gambling debt or was used to obtain funds for illegal gambling, the fourth paragraph of the instruction below should also be given.

The evidence has raised the issue whether the check(s) in question (was) (were) written to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). The Uniform Code of Military Justice may not be used to enforce worthless checks used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally) when the purported victim (or payee of the check) was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in (The) Specification(s) (___) of (The) (Additional) Charge(s) (___), you must be convinced beyond reasonable doubt that the check(s) in question (was) (were) not used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). Even if the check(s) (was) (were) used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally), if you are convinced beyond reasonable doubt that the purported victim (or payee of the check) was not a party to and did not actively facilitate the illegal gambling, and otherwise did not have knowledge of the illegal gambling-related purpose of the check, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(Also, if you find beyond reasonable doubt that the accused intentionally, that is, purposely, avoided the check-cashing facility's efforts to discover that (he) (she) was on a dishonored or "bad check" list, you may find the accused guilty notwithstanding the UCMJ limitation I mentioned, when all other elements of the offense have been proven beyond a reasonable doubt.)

(The evidence has also raised the issue whether all or only part of the check(s) in question (was) (were) used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). The UCMJ limitation I mentioned only extends to that part of the check's(s') proceeds that (was) (were) used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the check(s) which you are convinced beyond a reasonable doubt was not used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). You do this by excepting the value(s) alleged in the specification(s) and substituting (that) (those) value(s) of which you are convinced beyond a reasonable doubt (was) (were) not used to (pay a debt from gambling illegally) (obtain proceeds to gamble illegally).)

NOTE 3: Lesser included offense commonly raised. Making and Uttering a Worthless Check by Dishonorably Failing to Maintain Sufficient Funds (Art 134) is an LIO of Art 123a, which must be instructed upon, sua sponte, when raised by the evidence. See Instruction 3-68-1, Checks Worthless, Making and Uttering.

NOTE 4: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable. Instruction 6-5, Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, or Instruction 5-12, Voluntary Intoxication, as bearing on the issues of intent to defraud and knowledge may be applicable.

3–50–1. MAIMING (ARTICLE 124)

a. MAXIMUM PUNISHMENT: DD, TF, 20 years, E-1. (For offenses occurring prior to 1 October 2007, the maximum sentence is DD, TF, 7 years, E-1.)

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, maim _____ by (crushing his/her foot with a sledge hammer) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused, without justification or excuse, inflicted upon (state the name of the alleged victim) a certain injury, namely: (state the injury alleged);

(2) That this injury (seriously disfigured by mutilation the person of (state the name of the alleged victim)) (destroyed or disabled a body part of (state the name of the alleged victim)) (seriously diminished the physical vigor of (state the name of the alleged victim)) by injuring an organ or other part of his/her body; and

(3) That the accused inflicted this injury with an intent to cause some injury to the person of (state the name of the alleged victim).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

(A disfigurement does not have to mutilate an entire body part, but it must cause visible bodily damage and significantly detract from the victim's physical appearance.)

The disfigurement, diminished physical vigor, or destruction or disablement of the body part must be a serious injury of a substantially permanent nature. Once the injury is inflicted, it does not matter that the victim may eventually recover the use of the body part, or that the disfigurement may be corrected medically.

Maiming requires a specific intent to injure but not a specific intent to maim. Thus, one commits the offense who intends only a slight injury, if in fact there is infliction of an injury of the type specified in this article.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–51–1. SODOMY—NOT INVOLVING FORCE (ARTICLE 125)

NOTE 1: Using this instruction. If consensual sodomy is separately charged, use this instruction. If forcible sodomy is the charged offense, use Instruction 3-51-2.

a. MAXIMUM PUNISHMENT:

(1) With a child under 12: DD, TF, life without eligibility for parole, E-1.

(2) With a child at least 12, but under 16: DD, TF, 20 years, E -1.

(3) Other cases: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit sodomy with _____ (a child under the age of (12) (16) years).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused engaged in unnatural carnal copulation with (state the name of the alleged victim) by _____[and]

NOTE 2: Child under the age of 12 or 16 years alleged. If it is alleged that the victim was under the age of 12 or 16, give the following element:

[(2)] That (state the name of the alleged victim) was a child under the age of (12) (16) years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Sodomy" is unnatural carnal copulation. "Unnatural carnal copulation" occurs when a person (takes into his/her (mouth) (anus) the reproductive sexual organ of another person) (places his penis into the (mouth) (anus) of another) (penetrates the female sex organ with his/her (mouth) (lips) (tongue)) (places his/her sexual reproductive organ into any opening of the body, except the sexual reproductive parts, of another person) (places his/her sexual reproductive organ into any opening of an animal's body).

Penetration of the (mouth) (anus) (_____), however slight, is required to establish this offense. An ejaculation is not required.

Neither force nor lack of consent are required for this offense. (Stated conversely, neither lack of force nor consent are defenses.)

(It is also no defense that the accused was ignorant or misinformed as to the true age of the child (or that the child was of unchaste character.) It is the fact of the child's age, and not the accused's knowledge or belief, that fixes criminal responsibility.)

NOTE 3: Lack of penetration in issue. If lack of penetration of the female sex organ is in issue, the military judge should further define what is meant by the female sex organ. The instruction below may be helpful. See also United States v. Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA1988) (licking clitoris is penetration) and United States v. Tu, 30 MJ 587 (ACMR 1990) (guilty plea where accused admitted to kissing and licking vagina sufficient to permit finding of penetration.) But see United States v. Deland, 16 MJ 889 (ACMR 1983), aff'd in part and rev'd in part, 22 MJ 70 (CMA 1986), cert. denied, 479 U.S. 856 (1986) ("licking vagina" or "licking penis" not sufficient to sustain conviction.) The military judge must be alert to inaccurate terminology or squeamishness in describing body parts. For example, the vagina is clearly an internal organ and reaching it requires penetration of the labia. However, witness or counsel may use the term "vagina" to describe "private parts" or the "pubic area," that may lead to confusion about whether penetration has occurred.

The "female sex organ" includes not only the vagina which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. "Labia" is the Latin and medically correct term for "lips."

NOTE 4: Prior unchaste character and ignorance of victim's age in sentencing. While the victim's unchaste character or the accused's ignorance of the victim's age are not relevant to fin dings, they may be considered on sentencing. See Part IV, Paragraph 45(c) (2), MCM.

3–51–2. FORCIBLE SODOMY (ARTICLE 125)

a. MAXIMUM PUNISHMENT: DD, TF, life without eligibility for parole, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdictional data), did, (at/on board— location), on or about _____, commit sodomy with _____ (a child under the age of (12) (16) years) by force and without the consent of the said _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused engaged in unnatural carnal copulation with (state the name of the alleged victim) by (state the manner alleged); (and)

(2) That the act was done by force and without the consent of (state the name of the alleged victim). [and]

NOTE 1: Child under the age of 12 or 16 years alleged. If it is alleged that the victim was under the age of 12 or 16, give the following element:

[(3)] That (state the name of the alleged victim) was a child under the age of (12) (16) years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Sodomy" is unnatural carnal copulation. "Unnatural carnal copulation" occurs when the person (takes into his/her (mouth) (anus) the reproductive sexual organ of another person) (places his penis into the (mouth) (anus) of another) (penetrates the female sex organ with his/her (mouth) (lips) (tongue)) (places his/her sexual reproductive organ into any opening of the body, except the sexual reproductive parts, of another person).

Penetration of the (mouth) (anus) (_____), however slight, is required to establish this offense. An ejaculation is not required.

NOTE 2: Lack of penetration in issue. If lack of penetration of the female sex organ is in issue, the military judge should further define what is meant by the female sex organ. The instruction below may be helpful. See also United States v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) (licking clitoris is penetration) and United States v. Tu, 30 MJ 587 (ACMR 1990) (guilty plea where accused admitted to kissing and licking

vagina sufficient to permit finding of penetration.) But see United States v. Deland, 16 MJ 889 (ACMR 1983), aff'd in part and rev'd in part, 22 MJ 70 (CMA 1986), cert. denied, 479 U.S. 856 (1986) ("licking vagina" or "licking penis" not sufficient to sustain conviction.) The military judge must be alert to inaccurate terminology or squeamishness in describing body parts. For example, the vagina is clearly an internal organ and reaching it requires penetration of the labia. However, witnesses or counsel may use the term "vagina" to describe "private parts" or the "pubic area," that may lead to confusion about whether penetration has occurred.

> The "female sex organ" includes not only the vagina which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. "Labia" is the Latin and medically correct term for "lips."

NOTE 3: Using this instruction. NOTEs 4 through 11 and the instructions that follow address common scenarios involving potential force and consent issues. The military judge must identify those issues raised by the evidence and select the appropriate instruction. Many of the instructions following a note contain identical language found in instructions following other NOTEs. This repetitiveness is necessary to ensure all issues addressed by the note are instructed upon and in the correct order. Below is a guide to the instructions. Where multiple issues of constructive force or ability to consent are raised (sleeping child victim, for example), the military judge may have to combine the instructions. In such cases, the military judge should give the common portions of the instructions only once; the order of the instructions must be preserved.

a. Actual, physical force (and none of the issues listed below are raised): NOTE 4.

b. Constructive force by intimidation and threats: NOTE 5.

c. Constructive force—abuse of military power: NOTE 6.

d. Constructive force (parental or analogous compulsion) and consent of a child of tender years NOT in issue: NOTE 7.

e. Victim incapable of giving consent (children of tender years) and parental or analogous compulsion NOT in issue: NOTE 8.

f. BOTH constructive force (parental or analogous compulsion) AND consent of a child of tender years in issue: NOTE 9.

g. Victim incapable of giving consent - due to mental infirmity: NOTE 10.

h. Victim incapable of giving consent - due to sleep, unconsciousness, or intoxication: NOTE 11.

NOTE 4: Actual, physical force. Where the force involved is actual, physical force and constructive force and special situations involving lack of consent are not raised, give the following instructions:

Both force and lack of consent are necessary to the offense.

"Force" is physical violence or power applied by the accused to the victim. An act of sodomy occurs "by force" when the accused uses physical violence or power to compel the victim to submit against his/her will.

If the alleged victim consents to the act of sodomy, it was not done without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of his/her mental and physical faculties, fails to make her/his lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that he/ she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where he/she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because he/she was unable to resist due to mental or physical inability) (_____), sodomy was committed without consent.

NOTE 5: Constructive force by intimidation or threats. Where the evidence raises the issue of constructive force by threat or intimidation, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury

make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her/him and that (further) resistance would be futile, the act of sodomy has been accomplished by force.

If the alleged victim consents to the act of sodomy, it was not done without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that he/she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where he/she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because he/she was unable to resist due to mental or physical inability) (_____), the act was done without consent.

NOTE 6: Constructive force—abuse of military power. When there is some evidence the accused employed constructive force based upon his military position, rank, or authority, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active

resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her/him and that (further) resistance would be futile, the act has been accomplished by force.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because he/she was unable to resist due to mental or physical inability) (_____), sodomy was done without consent.

There is evidence which, if believed, indicates that the accused (used) (abused) (his) (her) (military) (_____) (position) (and) (or) (rank) (and) (or) (authority) (_____) in order to (coerce) (and) (or) (force) (state the name of the alleged victim) to commit sodomy. (Specifically, I draw your attention to (summarize the evidence concerning the accused's possible use or abuse of (his) (her) position, rank, or authority).) You may consider this evidence in deciding whether (state

the name of the alleged victim) had a reasonable belief that death or great bodily injury would be inflicted on her/him and that (further) resistance would be futile. This evidence is also part of the surrounding circumstances you may use in deciding whether (state the name of the alleged victim) consented to the act of sodomy.

NOTE 7: Constructive force—parental or analogous compulsion. When the evidence raises the issue of constructive force based upon a child's acquiescence because of duress or a coercive atmosphere created by a parent or one acting in loco parentis, give the following instructions. If parental or analogous compulsion AND consent issues involving a child of tender years are also involved, give the instructions following NOTE 9 instead of the instructions below:

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her/him and that (further) resistance would be futile, the act of sodomy has been accomplished by force.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical

faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she/he was unable to resist due to mental or physical inability) (_____), sodomy was done without consent.

Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent's) (stepparent's) (_____) position of authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you must consider all of the facts and circumstances, including but not limited to (the age of the child when the alleged abuse started) (the child's ability to fully comprehend the nature of the acts involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (state any other evidence surrounding the parent-child, or similar, relationship from which constructive force could reasonably be inferred). If (state the name of the alleged victim) (did not resist) (or) (ceased resistance) due to the (compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sodomy was done by force and without consent.

NOTE 8: Victims incapable of giving consent—children of tender years. If parental, or analogous, compulsion is not in issue, but the victim is of tender years and may not have, as a matter of fact, the requisite mental maturity to consent, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent a child's active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in a child's mind that death or physical injury would be inflicted on her/him and that (further) resistance would be futile, an act of sodomy has been accomplished by force.

When a victim is incapable of consenting because she/he lacks the mental capacity to understand the nature of the act, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily

harm) (because she/he was unable to resist due to mental or physical inability) (_____), sodomy was done without consent.

If (state the name of the alleged victim) was incapable, due to her/his (tender age) (and) (lack of) mental development, of giving consent, then the act was done by force and without consent. A child (of tender years) is not capable of consenting to an act of sodomy until she/he understands the act, its motive, and its possible consequences. In deciding whether (state the name of alleged victim) had, at the time of the sodomy, the requisite knowledge and mental (development) (capacity) (ability) to consent you should consider all the evidence in the case (including but not limited to: (the military judge may state any lay or expert testimony relevant to the child's development or any other information about the alleged victim, such as the level and extent of education, and prior sex education and experiences, if any)).

If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent, the act of sodomy was done by force and without consent.

NOTE 9: Constructive force (parental or analogous compulsion) AND consent issues involving children of tender years. When the evidence raises the issue of constructive force based upon a child's acquiescence because of duress or a coercive atmosphere created by a parent or one acting in loco parentis, AND also the issue of consent by children of tender years, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death

or physical injury would be inflicted on her/him and that (further) resistance would be futile, the act of sodomy has been accomplished by force.

Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent's) (stepparent's) (_____) position of authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you must consider all of the facts and circumstances, including but not limited to (the age of the child when the alleged abuse started) (the child's ability to fully comprehend the nature of the acts involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (the military judge may state any other evidence surrounding the parent-child, or similar relationship, from which constructive force could reasonably be inferred). If (state the name of the alleged victim) (did not resist) (or) (ceased resistance) due to the (compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sodomy was done by force and without consent.

When a victim is incapable of consenting because she/he lacks the mental capacity to understand the nature of the act, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his lack of consent reasonably manifest by taking such measures of resistance as are called for by the

circumstances, the inference may be drawn that she/ he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she/he was unable to resist due to mental or physical inability) (_____), sodomy was done without consent.

If (state the name of the alleged victim) was incapable, due to her/his (tender age) (and) (lack of) mental development, of giving consent, then the act was done by force and without consent. A child (of tender years) is not capable of consenting to an act of sodomy until she/he understands the act, its motive, and its possible consequences. In deciding whether (state the name of the alleged victim) had, at the time of the sodomy, the requisite knowledge and mental (development) (capacity) (ability) to consent you should consider all the evidence in the case (including but not limited to: (the military judge may state any lay or expert testimony relevant to the child's development or any other information about the alleged victim, such as the level and extent of education, and prior sex education and experiences, if any)).

If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent, the act of sodomy was done by force and without consent.

NOTE 10: Victims incapable of giving consent—due to mental infirmity. Where there is some evidence that the victim may be incapable of giving consent because of a mental handicap or disease, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of sodomy, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her/him and that (further) resistance would be futile, the act of sodomy has been accomplished by force.

When a victim is incapable of consenting because she/he lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she/ he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because he/she was unable to resist due to mental or physical

inability) (_____), sodomy was done without consent. If (state the name of the alleged victim) was incapable, due to mental infirmity, of giving consent, then the act was done by force and without her/his consent. A person is capable of consenting to an act of sodomy unless her/his mental infirmity is so severe that she/he is incapable of understanding the act, its motive, and its possible consequences. In deciding whether (state the name of the alleged victim) had, at the time of the sodomy, the requisite mental capacity to consent you should consider all the evidence in the case (including but not limited to: (the military judge may state any expert testimony relevant to the alleged victim's mental infirmity or any other information about the alleged victim, such as the level and extent of education; ability, or inability, to hold a job or manage finances; and prior sex education and experiences, if any)). You may also consider her/his demeanor in court and her/his general intelligence as indicated by her/his answers to questions propounded to her/him in court.

If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent, the act of sodomy was done by force and without consent.

NOTE 11: Victims incapable of giving consent—due to sleep, unconsciousness, or intoxication. Where there is some evidence that the victim may have been asleep, unconscious, or intoxicated and, therefore, incapable of giving consent at the time of the act, give the following instructions:

Both force and lack of consent are necessary to the offense. "Force" is physical violence or power applied by the accused to the victim. An act of sodomy occurs "by force" when the accused uses physical violence or power to compel the victim to submit against her/his will.

When a victim is incapable of consenting because she/he is asleep, unconscious, or intoxicated to the extent that she/he lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sodomy, it is not without consent. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her/his mental and physical faculties, fails to make her/his lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she/he consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she/he is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sodomy (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she/he was unable to resist due to mental or physical inability) (_____), sodomy was done without consent. If (state the name of the alleged victim) was incapable, due to lack of mental or physical faculties, of giving consent, then the act was done by force and without consent. A person is capable of consenting to an act of sodomy unless she/he is incapable of understanding the act, its motive, and its possible consequences. In deciding whether (state the name of the alleged victim) had consented to the sodomy you should consider all the evidence in the case, (including but not limited to: ((the degree of the alleged victim's) (intoxication, if any,) (and) (or) (consciousness or unconsciousness) (and) (or) (mental alertness)) ((the ability or inability of the alleged victim) (to walk) (and) (or) (to communicate coherently)) ((whether the alleged victim may have consented to the act of sodomy prior) (to lapsing into unconsciousness) (and) (or) (falling asleep)) (the military judge may state any other evidence tending to show the alleged victim may have been acquiescing to the act rather than actually being asleep, unconscious, or otherwise unable to consent).)

If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent because he/she was (asleep) (unconscious) (intoxicated), the act of sodomy was done by force and without consent.

NOTE 12: Mistake of fact as to consent—completed forcible sodomy. Honest and reasonable mistake of fact as to the victim's consent is a defense to forcible sodomy. See United States v. Carr, 18 MJ 297 (CMA 1984); United States v. Taylor, 26 MJ 127 (CMA 1988); and United States v. Peel, 29 MJ 235 (CMA 1989), cert. denied, 493 U.S. 1025 (1990). If mistake of fact is in issue, the following instructions should be given. If mistake of fact as to consent is raised in relation to attempts and other offenses requiring an intent to commit sodomy, use the instructions following NOTE 14 instead of the instructions below:

The evidence has raised the issue of mistake on the part of the accused concerning whether (state the name of the alleged victim) consented to sodomy.

If the accused had an honest and mistaken belief that (state the name of the alleged victim) consented to the act of sodomy, (he) (she) is not guilty of forcible sodomy, if the accused's belief was reasonable. To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the alleged victim) was consenting to sodomy.

In deciding whether the accused was under the mistaken belief that (state the name of the alleged victim) consented, you should consider the probability or improbability of the evidence presented on the matter.

You should also consider the accused's (age) (education) (experience) (prior contact with (state the name of the alleged victim) (the nature of any conversations between the accused and (state the name of alleged victim)) (_____) along with the other evidence on this issue, (including but not limited to (here state other evidence that may bear on the accused's mistake of fact)).

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the

charged sodomy, the accused was not under the mistaken belief that (state the name of the alleged victim) consented to sodomy, the defense of mistake does not exist. Even if you conclude that the accused was under the honest and mistaken belief that (state the name of the alleged victim) consented to sodomy, if you are convinced beyond a reasonable doubt that, at the time of the charged offense, the accused's mistake was unreasonable, the defense of mistake does not exist.

NOTE 13: Voluntary intoxication and mistake of fact as to consent. If there is evidence the accused may have been under the influence of an intoxicant and the evidence raises mistake of fact as to consent to a completed sodomy, give the following instruction:

There is evidence in this case that indicates that at the time of the alleged sodomy, the accused may have been under the influence of (alcohol) (drugs).

You may not consider the accused's voluntary intoxication in deciding whether the accused reasonably believed (state the name of the alleged victim) consented to sodomy. A reasonable belief is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

NOTE 14: Mistake of fact to consent—attempts and other offenses requiring intent to commit forcible sodomy. To be a defense, the mistake of fact as to consent in attempted forcible sodomy, or offenses where forcible sodomy is the intended offense (assault, burglary, conspiracy, etc.), need only be honest. United States v. Langley, 33 MJ 278 (CMA 1991). When mistake of fact as to consent is in issue with respect to these offenses, give the instructions following this NOTE. The military judge must be alert to situations when the accused is charged with an offense which includes forcible sodomy as the intended offense and the evidence permits a finding that only consensual sodomy was intended. In such cases, the military judge must remind the members that mistake of fact as to consent does not apply to consensual sodomy.

The evidence has raised the issue of mistake on the part of the accused concerning whether (state the name of the alleged victim) ((consented) (would consent)) to an act of forcible sodomy in relation to the offense of _____.

I advised you earlier that to find the accused guilty of the offense of (attempted forcible sodomy) (assault with intent to commit forcible sodomy) (burglary with intent to commit forcible sodomy) (conspiracy to commit forcible sodomy) (_____), you must find beyond a reasonable doubt that the accused had the specific intent to commit forcible sodomy, that is, sodomy by force and without consent.

If the accused at the time of the offense was under the mistaken belief that (state the name of the alleged victim) ((would consent) (consented)) to sodomy, then (he) (she) cannot be found guilty of the offense of (attempted forcible sodomy) (assault with intent to commit forcible sodomy) (burglary with intent to commit forcible sodomy) (conspiracy to commit forcible sodomy) (_____).

The mistake, no matter how unreasonable it might have been, is a defense. In deciding whether the accused was under the mistaken belief that (state the name of the alleged victim) ((would consent) (consented)) to sodomy, you should consider the probability or improbability of the evidence presented on the matter.

(You should also consider the accused's (age) (education) (experience) (prior contact with (state the name of the alleged victim)) (the nature of any conversations between the accused and (state the name of the alleged victim)) (_____) along with the other evidence on this issue (including but not limited to (here the military judge may state other evidence that may bear on the accused's mistake of fact)).)

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that at the time of the alleged offense the accused was not under the mistaken belief that (state the name of the alleged victim) ((would consent) (consented)) to sodomy, then the defense of mistake does not exist.

NOTE 15: Consent obtained by fraud. Consent obtained by fraud in the inducement (e.g., a promise to pay money, misrepresentation as to marital status, or to "respect" the partner in the morning) is valid consent. Consent obtained by fraud in factum (e.g., a

misrepresentation as to the nature of the act performed) is not valid consent and is not a defense to sodomy. United States v. Booker, 25 MJ 114 (CMA 1987).

NOTE 16: MRE 412 ("Rape shield"). Notwithstanding the general proscriptions in MRE 412 about the admissibility of a sexual assault victim's past sexual behavior, such evidence may be admissible if probative of a victim's motive to fabricate or to show that the accused was mistaken about the victim's consent. United States v. Williams, 37 MJ 352 (CMA 1993) (extra-marital affair as to victim's motive to lie) and United States v. Kelley, 33 MJ 878 (ACMR 1991) (victim's public and aggressive sexual behavior to show accused's mistaken belief as to consent.)

NOTE 17: Compound offenses involving forcible sodomy and lesser included offenses. If the accused is charged with an offense that requires the intent to commit forcible sodomy and some evidence indicates that the accused only intended to commit consensual sodomy, the military judge must carefully analyze what lesser included offenses are raised. For example, if the accused is charged with burglary with intent to commit forcible sodomy, the lesser included offenses of burglary with intent to commit consensual sodomy and unlawful entry may be raised depending on whether the evidence indicates that no sodomy, or consensual sodomy, was intended.

NOTE 18: Child under 12 or 16—force or lack of consent in issue. If the accused is charged with forcible sodomy on a child under the age of 12 or 16 and force or lack of consent are in issue, give the following instructions:

> If you have no reasonable doubt that the accused committed an act of sodomy with (state the name of the alleged victim) who was a child under the age of (12) (16), but you do have a reasonable doubt that the act was by force or was without consent, you may find the accused guilty of non-forcible sodomy with a child under the age of (12) (16). The Findings Worksheet which I will give you includes a form for announcing such a finding.
>
> Neither force nor lack of consent are required to make this finding. (Stated conversely, neither lack of force or consent are defenses.)
>
> (It is also no defense that the accused was ignorant or misinformed as to the true age of the child (or that the child was of unchaste character.) It is the fact of the child's age, and not the accused knowledge or belief, that fixes criminal responsibility.)

NOTE 19: Child under the age of 12 or 16—age in issue. If the accused is charged with forcible sodomy on a child under the age of 12 or 16, and the evidence places the victim's age in issue, the following should be given:

If you have no reasonable doubt that the accused committed an act of sodomy with (state the name of the alleged victim) by force and without consent, but you do have a reasonable doubt that (state the name of the alleged victim) was a child under the age of (12) (16), you may find the accused guilty of forcible sodomy. The Findings Worksheet which I will give you includes a form for announcing such a finding.

NOTE 20: Consensual sodomy as a lesser included offense. If consensual sodomy is a lesser included offense, give the following instructions:

Consensual sodomy is a lesser included offense of the offense of sodomy by force and without consent. If you have a reasonable doubt about either the element of force or lack of consent, but you are convinced beyond a reasonable doubt that an act of sodomy occurred between the accused and (state the name of the alleged victim), you may find the accused guilty of the lesser included offense of consensual sodomy.

Neither force nor lack of consent are required to establish this lesser included offense. (Stated conversely, neither lack of force or consent are defenses.)

NOTE 21: Prior unchaste character and ignorance of victim's age in sentencing. While the victim's unchaste character or the accused's ignorance of the victim's age are not relevant to findings in consensual sodomy, they may be considered on sentencing. See Part IV, Paragraph 45(c) (2), MCM.

e. REFERENCES:

(1) Force: Black's Law Dictionary (6th ed. 1990) (West Law, 1993).

(2) Constructive force: Coker v. Georgia, 433 U.S. 584 (1977); United States v. Hicks, 24 MJ 3 (CMA 1987), *cert. denied*, 484 U.S. 827 (1987); United States v. Bradley, 28 MJ 197 (CMA 1989); United States v. Palmer, 33 MJ 7 (CMA 1991).

(3) Constructive force—abuse of military authority: United States v. Hicks, *supra*; United States v. Bradley, *supra*; United States v. Clark, 35 MJ 432 (CMA 1992), *cert. denied*, 507 U.S. 1052 (1993).

(4) Constructive force—parental compulsion and children of tender years: United States v. Palmer, supra; United States v. Rhea, 33 MJ 413 (CMA 1991), *aff'd*, 37 MJ 213 (CMA 1993); United States v. Torres, 27 MJ 867 (AFCMR), opinion set aside, 29 MJ 299 (CMA 1989), unpublished opinion clarifying prior opinion (AFCMR November 15, 1989), *pet. denied*, 30 MJ 226 (CMA 1990), original opinion cited

with approval in Palmer, *supra*, 33 MJ at 10; United States v. Dejonge, 16 MJ 974 (AFCMR 1983), *pet. denied*, 18 MJ 92 (CMA 1986); North Carolina v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

(5) Victim incapable of giving consent—mental infirmity: United States v. Henderson, 15 CMR 268 (CMA 1954); United States v. Lyons, 33 MJ 543 (ACMR 1991), *aff'd*, 36 MJ 183 (CMA 1992); 75 C.J.S. Rape section 14(b) n. 10.

(6) Victim incapable of giving consent—sleep, intoxication, or unconsciousness: Part IV, Paragraph 45c(1) (b), MCM; United States v. Mathi, 34 MJ 33 (CMA 1992); United States v. Robertson, 33 CMR 828 (AFBR 1963), *rev'd on other grounds*, 34 CMR 108 (CMA 1963).

3–52–1. ARSON—AGGRAVATED—INHABITED DWELLING (ARTICLE 126)

a. MAXIMUM PUNISHMENT: DD, TF, 20 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, willfully and maliciously (burn) (set on fire) an inhabited dwelling, to wit: (the residence of _____) (_____), the property of _____ of a value of (about) $_____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (burned) (set on fire) an inhabited dwelling, that is: (describe the inhabited dwelling alleged), which was the property of (state the name of the owner or other person alleged);

(2) That (describe the inhabited dwelling alleged) was of a value of _____ (or of some lesser value in which case the finding should be in the lesser amount); and

(3) That the act was willful and malicious.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act is done "willfully" if done intentionally or on purpose.

An act is done "maliciously" if done deliberately for some mischievous purpose and without legal justification or excuse. The malice required for this offense does not have to amount to ill will or hostility. It is sufficient if a person deliberately and without legal justification or excuse burns or sets fire to the inhabited dwelling.

There is no requirement that the accused specifically intend to set fire to or burn the dwelling alleged in the specification. To satisfy the first and third elements of this offense, the accused need only willfully and maliciously start the fire that resulted in the burning or charring of the dwelling alleged.

"Inhabited dwelling" means a house, building, or structure where a person lives.

("Inhabited dwelling" includes the outbuildings that form part of a group of buildings used as a residence).

(A shop or store is not an "inhabited dwelling" unless someone lives there).

(A house that has never been occupied or which has been temporarily abandoned is not an inhabited dwelling).

(Proof that a human being was actually in the inhabited dwelling at the time of the fire or burning is not required to establish aggravated arson.)

(Proof that the dwelling was destroyed or seriously damaged is not required to establish the offense. It is sufficient if any part of the dwelling is burned or charred.) (A mere scorching or discoloration caused by heat is not sufficient.)

NOTE 1: Value and ownership. Proof of the value and ownership of the inhabited dwelling are not elements of this offense. They are included, however, to permit a finding of the lesser included offense of simple arson, where value and ownership are elements. See Instruction 3-52-3.

NOTE 2: Other instructions. If the specification alleges value or ownership, or both, Instructions 7-16, Variance - Value, Damage, or Amount, and Instruction 7-15, Variance, maybe applicable.

e. REFERENCES: United States v. Acevedo-Velez, 17 MJ 1 (CMA 1983); United States v. Caldwell, 17 MJ 8 (CMA 1983); United States v. DeSha, 23 MJ 66 (CMA 1986); United States v. Banta, 26 MJ 109 (CMA 1988); United States v. Crutcher, 49 MJ 236 (CAAF 1998).

3–52–2. ARSON—AGGRAVATED—STRUCTURE (ARTICLE 126)

a. MAXIMUM PUNISHMENT: DD, TF, 20 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, willfully and maliciously (burn) (set on fire) a structure, knowing that a human being was therein at the time, (the Post Theater) (_____), the property of _____, of a value of (about) $_____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (burned) (set on fire) a certain structure, that is: (describe the structure alleged), which was the property of (state the name of the owner or other person alleged);

(2) That the act was willful and malicious;

(3) That there was a human being in the structure at the time;

(4) That the accused knew that there was a human being other than the accused or (his) (her) confederates in the structure at the time; and

(5) That the property was of a value of _____ (or of some lesser value, in which case the finding should be in the lesser amount).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act is done "willfully" if done intentionally or on purpose.

An act is done "maliciously" if done deliberately for some mischievous purpose and without legal justification or excuse. The malice required for this offense does not have to amount to ill will or hostility. It is sufficient if a person deliberately and without legal justification or excuse burns or sets fire to the structure.

There is no requirement that the accused specifically intend to set fire to or burn the structure alleged in the specification. To satisfy the first and second elements of this offense, the accused need only willfully and

maliciously start the fire that resulted in the burning or charring of the structure alleged.

(Proof that the structure was destroyed or seriously damaged is not required to establish the offense. It is sufficient if any part of the structure is burned or charred. A mere scorching or discoloration caused by heat is not sufficient.)

NOTE 1: Value and ownership. Proof of the value and ownership of the structure are not required. They are included, however, to permit a finding of the lesser included offense of simple arson, where value and ownership are elements. See Instruction 3-52-3 Arson—Simple.

NOTE 2: Other instructions. If the specification alleges value or ownership, or both, Instructions 7-16, Variance - Value, Damage, or Amount, and Instruction 7-15, Variance, may be applicable. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

e. REFERENCES: United States v. Acevedo-Velez, 17 MJ 1 (CMA 1983); United States v. Caldwell, 17 MJ 8 (CMA 1983); United States v. DeSha, 23 MJ 66 (CMA 1986); United States v. Banta, 26 MJ 109 (CMA 1988); United States v. Crutcher, 49 MJ 236 (CAAF 1998).

3–52–3. ARSON—SIMPLE (ARTICLE 126)

a. MAXIMUM PUNISHMENT:

(1) $500 or less: DD, TF, 1 year, E-1.

(2) Over $500: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, willfully and maliciously (burn) (set on fire to) (an automobile) (_____), the property of _____, of a value of (about) $_____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (burned) (set on fire) certain property, that is: (describe the property alleged), which was the property of (state the name of the alleged victim);

(2) That the property was of a value of _____ (or of some lesser value, in which case the finding should be in the lesser amount); and

(3) That the act was willful and malicious.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act is done "willfully" if done intentionally or on purpose.

An act is done "maliciously" if done deliberately for some mischievous purpose and without legal justification or excuse. The malice required for this offense does not have to amount to ill will or hostility. It is sufficient if a person deliberately and without legal justification or excuse burns or sets fire to the property of another.

There is no requirement that the accused specifically intend to set fire to or burn the dwelling alleged in the specification. To satisfy the first and third elements of this offense, the accused need only willfully and maliciously start the fire that resulted in the burning or charring of the property of another alleged.

(Proof that the structure was destroyed or seriously damaged is not required to establish the offense. It is sufficient if any part of the property is burned or charred. A mere scorching or discoloration caused by heat is not sufficient.)

NOTE 1: Other instructions. Instructions 7-16, Variance - Value, Damage, or Amount, is ordinarily applicable.

e. REFERENCES: United States v. Acevedo-Velez, 17 MJ 1 (CMA 1983); United States v. Caldwell, 17 MJ 8 (CMA 1983); United States v. DeSha, 23 MJ 66 (CMA 1986); United States v. Banta, 26 MJ 109 (CMA 1988); United States v. Crutcher, 49 MJ 236 (CAAF 1998).

3–53–1. EXTORTION (ARTICLE 127)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent unlawfully to obtain (something of value) (an acquittance) (an advantage, to wit: _____) (an immunity, to wit: _____), communicate to _____ a threat to (here describe the threat).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused communicated:

(a) certain language, namely: (state the language alleged), or words to that effect; or

(b) an intent to (state the alleged threatened injury);

(2) That the communication was made known to:

(a) (state the name of the person allegedly threatened) or

(b) (state the name of another alleged), a third person;

(3) That the language used by the accused was a threat, that is, a clear and present intent to injure the (person) (property) (reputation) of another presently or in the future;

(4) That such communication was wrongful, and without justification or excuse; and

(5) That the accused thereby intended unlawfully to obtain _____, which was (something of value) (an acquittance) (an advantage) (an immunity).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

The offense of extortion is complete when one wrongfully communicates a threat with the intent to obtain (something of value) (_____). Proof that anything was in fact obtained is not required.

A threat may be communicated either by spoken language or in writing. The threat must, however, be received by the intended victim.

The threat in extortion may be (a threat to do any unlawful injury to the person or property of the individual threatened or of any member of his/her family or any other person held dear to him/her (a threat to accuse the individual threatened, or any member of his/her family or any other person held dear to him/her, of any crime) (a threat to expose or attribute any disgrace or physical or mental defect to the individual threatened or to any member of his/her family or any other person held dear to him/her (a threat to expose any secret affecting the individual threatened or any member of his/her family or any other person held dear to him/her or a threat to do any harm).

(An "acquittance" is a release or discharge from an obligation.)

(An intent to obtain any advantage or immunity may include an intent to make a person do an act against his/her will.)

NOTE 1: Declarations made in jest. A declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose or which contradicts the expressed intent to commit the act, is not wrongful. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another. Consequently, if the evidence raises any such defense, the military judge must, sua sponte, instruct carefully and comprehensively on the issue.

NOTE 2: Advantage or immunity. Unless it is clear from the circumstances, the advantage or immunity sought should be described in the specification. An intent to make a person do an act against his/her will is not, by itself, sufficient to constitute extortion.

3–54–1. SIMPLE ASSAULT (ARTICLE 128)

a. MAXIMUM PUNISHMENT: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, assault _____ by (striking at him/her with a _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (attempted) (offered) to do bodily harm to (state the name of the alleged victim);

(2) That the accused did so by (state the manner alleged); and

(3) That the (attempt) (offer) was done with unlawful force or violence.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 1: Assault by attempt. If the specification alleges an attempt to do bodily harm, give the following instruction:

An "assault" is an attempt with unlawful force or violence to do bodily harm to another with the specific intent to inflict bodily harm. An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability to do bodily harm to another. Physical injury or offensive touching is not required. (The mere use of threatening words is not an assault.)

NOTE 2: Assault by offer alleged. If the specification alleges assault by offer, give the following instruction:

An "assault" is an offer with unlawful force or violence to do bodily harm to another. An "offer to do bodily harm" is (an intentional) (or) (a culpably negligent) (act) (failure to act) which foreseeably causes another to reasonably believe that force will immediately be applied to his/her person. Specific intent to inflict bodily harm is not required. There must be an apparent present ability to bring about bodily harm.

Physical injury or offensive touching is not required. (The mere use of threatening words is not an assault.)

NOTE 3: Culpable negligence. If culpable negligence is mentioned in the instructions, it should be defined as follows:

"Culpable negligence" is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; that is what "due care" means. "Culpable negligence," on the other hand, is a negligent (act) (or) (failure to act) accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others, instead of merely a failure to use due care.

NOTE 4: When the assault is consummated by a battery. For the standard instruction on battery, see Instruction 3-54-2, Assault Consummated by a Battery.

3–54–1A. SIMPLE ASSAULT (WITH AN UNLOADED FIREARM) (ARTICLE 128)

a. MAXIMUM PUNISHMENT:

(1) When committed with an unloaded firearm: DD, TF, 3 years, and E-1

(2) All other cases: 2/3 x 3 months, 3 months, E-1

b. MODEL SPECIFICATION:

NOTE 1: Aggravating circumstance in the model specification. The 1998 Amendments to the MCM increased the maximum punishment for simple assault when committed with an unloaded firearm for offenses committed after 26 May 1998. Although the change did not modify the model specification to require pleading the use of a firearm, this aggravating circumstance must be alleged for the increased maximum punishment to apply. The model specification below has been modified to suggest appropriate language that might be used. The use of an unloaded firearm, when alleged, should be set forth in element 2 below.

In that _____ (personal jurisdiction data), did, (at/on board--location), on or about _____, assault _____ by (striking at him/her with a _____) ((pointing at) (_____) her/him with an unloaded firearm) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (attempted) (offered) to do bodily harm to (state the name of the alleged victim);

(2) That the accused did so by (state the manner alleged); and

(3) That the (attempt) (offer) was done with unlawful force or violence.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

("Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive. (Although this offense requires that a firearm have been used, there is no requirement that the firearm be loaded at the time.))

NOTE 2: Use of a firearm in issue. When use of a firearm is alleged and there is a factual issue whether a firearm was used, the below instruction is ordinarily appropriate:

[The accused is charged with committing a simple assault with an unloaded firearm. To convict the accused as charged, you must be convinced beyond a reasonable doubt of all the elements, including that a firearm was used in the commission of the alleged assault. If you are convinced of all the elements beyond a reasonable doubt except the element that a firearm was used, you may still convict the accused of simple assault. In that event, you must modify the specification to correctly reflect your findings by excepting the words (here the military judge should indicate the words that would be excepted if the accused were found guilty of a simple assault not involving a firearm.)]

NOTE 3: Assault by attempt. If the specification alleges an attempt to do bodily harm, give the following instruction:

An "assault" is an attempt with unlawful force or violence to do bodily harm to another with the specific intent to inflict bodily harm. An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability to do bodily harm to another. Physical injury or offensive touching is not required. (The mere use of threatening words is not an assault.)

NOTE 4: Assault by offer alleged. If the specification alleges assault by offer, give the following instruction:

An "assault" is an offer with unlawful force or violence to do bodily harm to another. An "offer to do bodily harm" is (an intentional) (or) (a culpably negligent) (act) (failure to act) which foreseeably causes another to reasonably believe that force will immediately be applied to his/her person. Specific intent to inflict bodily harm is not required. There must be an apparent present ability to bring about bodily harm. Physical injury or offensive touching is not required. (The mere use of threatening words is not an assault.)

NOTE 5: Culpable negligence. If culpable negligence is mentioned in the instructions, it should be defined as follows:

"Culpable negligence" is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law

requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; that is what “due care” means. “Culpable negligence,” on the other hand, is a negligent (act) (or) (failure to act) accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others, instead of merely a failure to use due care.

NOTE 6: When the assault is consummated by a battery. For the standard instruction on battery, see Instruction 3-54-2, Assault Consummated by a Battery.

3–54–2. ASSAULT CONSUMMATED BY A BATTERY (ARTICLE 128)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, unlawfully (strike) (_____) _____ (on) (in) the _____ with _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused did bodily harm to (state the name of the alleged victim);

(2) That the accused did so by (state the manner alleged); and

(3) That the bodily harm was done with unlawful force or violence.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is inflicted is called a battery. A "battery" is an unlawful and intentional (or) (culpably negligent) application of force or violence to another. The act must be done without legal justification or excuse and without the lawful consent of the victim. "Bodily harm" means any physical injury to or offensive touching of another person, however slight.

NOTE: Culpable negligence. If culpable negligence is mentioned in the instructions, it should be defined as follows:

"Culpable negligence" is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; that is what "due care" means. "Culpable negligence," on the other hand, is a negligent (act) (or) (failure to act) accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.

3–54–3. ASSAULT UPON A COMMISSIONED OFFICER (ARTICLE 128)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, assault _____, who then was and was then known by the accused to be a commissioned officer of (_____, a friendly foreign power) (the United States (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)) by _____.

c. ELEMENTS:

(1) That (state the time and place alleged) the accused (attempted to do) (offered to do) (did) bodily harm to (state the name and rank of the alleged victim);

(2) That the accused did so by (state the alleged manner of the assault or battery);

(3) That the (attempt) (offer) (bodily harm) was done with unlawful force or violence;

(4) That (state the name and rank of the alleged victim) was a commissioned officer of the (the United States Army) (_____); and

(5) That the accused then knew that (state the name and rank of the alleged victim) was a commissioned officer of the (the United States Army) (_____).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 1: Assault by attempt. If the specification alleges an attempt to do bodily harm, give the following instruction:

An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability and specific intent to do bodily harm to another. Physical injury or offensive

touching is not required. (The mere use of threatening words is not an "attempt to do bodily harm.")

NOTE 2: Assault by offer. If the specification alleges assault by offer, give the following instruction:

An "offer to do bodily harm" is an (intentional) (or) (culpably negligent) (act) (failure to act) which foreseeably causes another to reasonably believe that force will immediately be applied to his/her person. Specific intent to inflict bodily harm is not required. There must be an apparent present ability to bring about bodily harm. Physical injury or offensive touching is not required. (The mere use of threatening words is not an "offer to do bodily harm.")

NOTE 3: Battery. If the specification alleges a battery, give the following instruction:

An "assault" is an offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is inflicted is called a battery. A "battery" is an unlawful and (intentional) (or) (culpably negligent) application of force or violence to another. "Bodily harm" means any physical injury to or offensive touching of another person, however slight.

NOTE 4: Culpable negligence. If culpable negligence is mentioned in the instructions, it should be defined as follows:

"Culpable negligence" is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances. That is what "due care" means. "Culpable negligence," on the other hand, is a negligent (act) (or) (failure to act) accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others, instead of merely a failure to use due care.

NOTE 5: Knowledge of commissioned status. That the accused did not know the victim was a commissioned officer is a defense to this kind of assault, but not to a lesser included offense in which the official position of the victim is immaterial.

NOTE 6: Superior status/execution of office. It is not necessary that the victim be superior in rank or command to the accused, in the same armed force, or in execution of office at the time of the assault.

NOTE 7: Divestiture or abandonment defense. When the issue arises whether the victim's conduct divested the victim of his or her status as a commissioned officer, the following instruction should be given:

> The evidence has raised an issue as to whether (state the name and rank of the alleged victim) conducted himself/herself prior to the charged assault in a manner which took away his/her status as a commissioned officer. An officer whose own (language) (and) (conduct) under all the circumstances departs substantially from the required standards appropriate for a commissioned officer under similar circumstances is considered to have abandoned his/her status as a commissioned officer. In determining this issue you must consider all the relevant facts and circumstances (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).
>
> You may find the accused guilty of the offense of assault upon a commissioned officer only if you are convinced beyond a reasonable doubt that _____, by his/her (conduct) (and) (language) did not abandon his/her status as a commissioned officer.

NOTE 8: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–54–4. ASSAULT UPON A WARRANT, NONCOMMISSIONED, OR PETTY OFFICER (ARTICLE 128)

a. MAXIMUM PUNISHMENT:

(1) Upon a warrant officer: DD, TF, 18 months, E-1.

(2) Upon a noncommissioned or petty officer: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, assault _____, who then was and was then known by the accused to be a (warrant) (noncommissioned) (petty) officer of the United States (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard), by _____.

c. ELEMENTS:

(1) That (state the time and place alleged) the accused (attempted to do) (offered to do) (did) bodily harm to (state the name and rank of the alleged victim);

(2) That the accused did so by (state the alleged manner of the assault or battery);

(3) That the (attempt) (offer) (bodily harm) was done with unlawful force or violence;

(4) That (state the name and rank of the alleged victim) was a (warrant) (noncommissioned) (petty) officer of the (United States Army) (_____); and

(5) That the accused then knew that (state the name and rank of the alleged victim) was a (warrant) (noncommissioned) (petty) officer of the (United States Army) (_____).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 1: Assault by attempt. If the specification alleges an attempted to do bodily harm, give the following instruction:

An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability and specific intent to do bodily harm to another. Physical injury or offensive touching is not required. (The mere use of threatening words is not an "attempt to do bodily harm.")

NOTE 2: Assault by offer. If the specification alleges assault by offer, give the following instruction:

An "offer to do bodily harm" is an (intentional) (or) (culpably negligent) (act) (failure to act) which foreseeably causes another to reasonably believe that force will immediately be applied to his/her person. Specific intent to inflict bodily harm is not required. There must be an apparent present ability to bring about bodily harm. Physical injury or offensive touching is not required. (The mere use of threatening words is not an "offer to do bodily harm.")

NOTE 3: Battery. If the specification alleges a battery, give the following instruction:

An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is inflicted is called a battery. A "battery" is an unlawful and (intentional) (or) (culpably negligent) application of force or violence to another. "Bodily harm" means any physical injury to or offensive touching of another person, however slight.

NOTE 4: Culpable negligence. If culpable negligence is mentioned in the instructions, it should be defined as follows:

"Culpable negligence" is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances. That is what "due care" means. "Culpable negligence," on the other hand, is a negligent (act) (or) (failure to act) accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others, instead of merely a failure to use due care.

NOTE 5: Knowledge of the victim's status. That the accused did not know the victim was a warrant, noncommissioned, or petty officer is a defense to this kind of assault, but not to a lesser included offense in which the official position of the victim is immaterial.

NOTE 6: Superior status/execution of office. It is not necessary that the victim be superior in rank or command to the accused, in the same armed force, or in execution of office at the time of the assault.

NOTE 7: Divestiture or abandonment defense. When the issue arises whether the victim's conduct was in a manner that divested the victim of his or her status as a warrant, noncommissioned, or petty officer, the following instruction should be given:

> The evidence has raised an issue as to whether (state the name and rank of the alleged victim) conducted himself/herself prior to the charged assault in a manner which took away his/her status as a (warrant), (noncommissioned) (petty) officer. An officer whose own (language) (and) (conduct) under all the circumstances departs substantially from the required standards appropriate for a (warrant) (noncommissioned) (petty) officer under similar circumstances is considered to have abandoned his/her status as a (warrant) (noncommissioned) (petty) officer. In determining this issue you must consider all the relevant facts and circumstances, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).
>
> You may find the accused guilty of the offense of assault upon a (warrant) (noncommissioned) (petty) officer only if you are convinced beyond a reasonable doubt that (state the name and rank of the alleged victim), by his/her (conduct) (and) (language) did not abandon his/her status as a (warrant) (noncommissioned) (petty) officer.

NOTE 8: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–54–5. ASSAULT UPON A SENTINEL OR LOOKOUT (ARTICLE 128)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, assault _____, who then was and was then known by the accused to be a (sentinel) (lookout) in the execution of (his/her) duty, ((in) (on) the _____) (with (a) (his/her) _____) (by _____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (attempted to do) (offered to do) (did) bodily harm to (state the name and rank of the alleged victim);

(2) That the accused did so by (state the manner alleged);

(3) That the (attempt) (offer) (bodily harm) was done with unlawful force or violence;

(4) That (state the name and rank of the alleged victim) was a (sentinel) (lookout) who was then in the execution of his/her duty; and

(5) That the accused knew that (state the name and rank of the alleged victim) was a (sentinel) (lookout) in the execution of his/her duty.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A (sentinel) (lookout) is a person whose duties include the requirement to maintain constant alertness, be vigilant, and remain awake, in order to observe for the possible approach of the enemy, or to guard persons, property, or a place, and to sound the alert, if necessary.

A (sentinel) (lookout) is “in the execution of his/her duty” when doing any act or service required or authorized to be done by statute, regulation, the order of a superior, military usage, or by custom of the service.

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 1: Assault by attempt. If the specification alleges an attempt to do bodily harm, give the following instruction:

An "assault" is an attempt with unlawful force or violence to do bodily harm to another with the specific intent to inflict bodily harm. An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability to do bodily harm to another. Physical injury or offensive touching is not required. (The mere use of threatening words is not an assault.)

NOTE 2: Assault by offer. If the specification alleges assault by offer, give the following instruction:

An "assault" is an offer with unlawful force or violence to do bodily harm to another. An "offer to do bodily harm" is an (intentional) (or) (culpably negligent) (act) (failure to act) which foreseeably causes another to reasonably believe that force will immediately be applied to his/her person. Specific intent to inflict bodily harm is not required. There must be an apparent present ability to bring about bodily harm. Physical injury or offensive touching is not required. (The mere use of threatening words is not an assault.)

NOTE 3: Battery. If the specification alleges a battery, give the following instruction:

An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is inflicted is called a battery. A "battery" is an unlawful and (intentional) (or) (culpably negligent) application of force or violence to another. "Bodily harm" means any physical injury to or offensive touching of another person, however slight.

NOTE 4: Culpable negligence. If culpable negligence is mentioned in the instructions, it should be defined as follows:

"Culpable negligence" is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; that is what "due care" means. "Culpable

negligence," on the other hand, is a negligent (act) (or) (failure to act) accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others, instead of merely a failure to use due care.

NOTE 5: Knowledge of status of victim as a sentinel or lookout. That the accused did not know the victim was engaged in duties as a sentinel or lookout is a defense to this kind of assault, but not to the lesser included offense in which the official position of the victim is immaterial.

NOTE 6: Divestiture of status. When the issue has arisen as to whether the lookout or sentinel has conducted himself or herself in a manner which has divested the sentinel or lookout of that status, acting in the execution of his or her duty, the following instruction should be given:

The evidence has raised an issue as to whether (state the name and rank of the alleged victim) conducted himself/herself prior to the charged assault in a manner which took away his/her status as a (sentinel) (lookout) acting in the execution of his/her duty. A (sentinel) (lookout) whose own (language) (and) (conduct) under all the circumstances departs substantially from the required standards appropriate for the (sentinel's) (lookout's) rank and position under similar circumstances is considered to have abandoned that position. In determining this issue you must consider all the relevant facts and circumstances, (including but, not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

You may find the accused guilty of assault on a (sentinel) (lookout) in the execution of his/her duties only if you are satisfied beyond a reasonable doubt that (state the name and rank of the alleged victim), by his/her (conduct) (and) (language) did not abandon his/her status as a (sentinel) (lookout) acting in the execution of his/her duty.

NOTE 7: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable. For the standard instructions on assault and battery, see Instruction 3-54-1, Simple Assault, and Instruction 3-54-2, Assault Consummated by a Battery.

3–54–6. ASSAULT UPON A PERSON IN THE EXECUTION OF LAW ENFORCEMENT DUTIES (ARTICLE 128)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, assault _____, who then was and was then known by the accused to be a person then having and in the execution of (Air Force security police) (military police) (shore patrol) (master at arms) ((military) (civilian) law enforcement) duties, by _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (attempted to do) (offered to do) (did) bodily harm to (state the name and rank of the alleged victim);

(2) That the accused did so by (state the manner alleged);

(3) That the (attempt) (offer) (bodily harm) was done with unlawful force or violence;

(4) That (state the name and rank of the alleged victim) was a person who then had and was in the execution of (military police) (law enforcement) (_____) duties; and

(5) That the accused knew that (state the name and rank of the alleged victim) then had and was in the execution of such duties.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A person is "in the execution of (law enforcement) (police) duties" when doing any law enforcement act or service required or authorized to be done by him/her by (statute) (regulation) (the order of a superior) (military usage) or by (custom of the service).

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 1: Assault by attempt. If the specification alleges an attempt to do bodily harm, give the following instruction:

An “assault” is an attempt with unlawful force or violence to do bodily harm to another with the specific intent to inflict bodily harm. An “attempt to do bodily harm” is an overt act which amounts to more than mere preparation and is done with apparent present ability to do bodily harm to another. Physical injury or offensive touching is not required. (The mere use of threatening words is not an assault.)

NOTE 2: Assault by offer. If the specification alleges assault by offer, give the following instruction:

An “assault” is an offer with unlawful force or violence to do bodily harm to another. An “offer to do bodily harm” is an (intentional) (or) (culpably negligent) (act) (failure to act) which foreseeably causes another to reasonably believe that force will immediately be applied to his/her person. Specific intent to inflict bodily harm is not required. There must be an apparent present ability to bring about bodily harm. Physical injury or offensive touching is not required. (The mere use of threatening words is not an assault.)

NOTE 3: Battery. If the specification alleges a battery, give the following instruction:

An “assault” is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is inflicted is called a battery. A “battery” is an unlawful and (intentional) (or) (culpably negligent) application of force or violence to another. “Bodily harm” means any physical injury to or offensive touching of another person, however slight.

NOTE 4: Culpable negligence. If culpable negligence is mentioned in the instructions, it should be defined as follows:

“Culpable negligence” is a degree of carelessness greater than simple negligence. “Simple negligence” is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; that is what “due care” means. “Culpable negligence,” on the other hand, is a negligent (act) (or) (failure to act) accompanied by a gross, reckless, wanton, or deliberate disregard for

the foreseeable results to others, instead of merely a failure to use due care.

NOTE 5: Knowledge of the victim's status. That the accused did not know the victim was in the execution of law enforcement duties is a defense to this kind of assault, but not to the lesser included assault in which the official position of the victim is immaterial.

NOTE 6: Divestiture defense. If the issue has arisen whether the law enforcement person conducted himself or herself in a manner that divested him or her of the status of a person in the execution of law enforcement duties, the following instruction should be given:

The evidence has raised an issue as to whether (state the name and rank of the alleged victim) conducted himself/herself prior to the charged assault in a manner which took away his/her status as a person acting in the execution of (police) (law enforcement) duties.

A law enforcement person whose own (language) (and) (conduct) under all the circumstances departs substantially from the required standards appropriate for that law enforcement officer's position under similar circumstances is considered to have abandoned that rank and position. In determining this issue you must consider all the relevant facts and circumstances, including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).

You may find the accused guilty of assault on a law enforcement officer in the execution of his/her duties only if you are satisfied beyond a reasonable doubt that (state the name and rank of the alleged victim) by his/her (conduct) (and) (language) did not abandon his/her status as a law enforcement official acting in the execution of his/her duties.

NOTE 7: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable. For the standard instruction on assault and on battery, see Instruction 3-54-1, Simple Assault, and Instruction 3-54-2, Assault Consummated by a Battery.

3–54–7. BATTERY UPON A CHILD UNDER THE AGE OF 16 (ARTICLE 128)

a. MAXIMUM PUNISHMENT: DD, TF, 2 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, unlawfully (strike) (_____) _____, a child under the age of 16 years, (in) (on) the _____ with _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused did bodily harm to (state the name of the alleged victim);

(2) That the accused did so by (state the manner alleged);

(3) That the bodily harm was done with unlawful force or violence; and

(4) That (state the name of the alleged victim) was then a child under the age of sixteen years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is actually inflicted, however, is called a battery. A "battery" is an unlawful and intentional (or) (culpably negligent) application of force or violence to another. The act must be done without legal justification or excuse and without the lawful consent of the victim. "Bodily harm" means any physical injury to or offensive touching of another person, however slight.

NOTE: Culpable negligence. If culpable negligence is mentioned in the instructions, it should be defined as follows:

"Culpable negligence" is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; that is what "due care" means. "Culpable negligence," on the other hand, is a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for

the foreseeable results to others, instead of merely a failure to use due care.

3–54–8. AGGRAVATED ASSAULT—DANGEROUS WEAPON, MEANS, OR FORCE (ARTICLE 128)

a. MAXIMUM PUNISHMENT:

(1) With a loaded firearm: DD, TF, 8 years, E-1.

(2) When committed upon a child under the age of 16 years: DD, TF, 5 years, E-1. (For offenses occurring prior to 1 October 2007, the maximum sentence is DD, TF, 3 years, E-1.)

(3) Other cases: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board location), on or about _____, commit an assault upon _____ (a child under the age of 16 years) by (shooting) (pointing) (striking) (cutting) (_____) (at him/her) (him/her) (in) (on) (the _____) with [a dangerous weapon] [a (means) (force) likely to produce death or grievous bodily harm], to wit: a (loaded firearm) (pickax) (bayonet) (club) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged) the accused (attempted to do) (offered to do) (did) bodily harm to (state the name of the alleged victim);

(2) That the accused did so with a certain (weapon) (means) (force) by (state the manner alleged);

(3) That the (attempt) (offer) (bodily harm) was done with unlawful force or violence; (and)

(4) That the (weapon) (means) (force) was used in a manner likely to produce death or grievous bodily harm. [and]

NOTE 1: Aggravating circumstance alleged. When a loaded firearm is alleged, add element [5] below.

[(5)] That the weapon was a loaded firearm. [and]

NOTE 2: Child under the age of 16 years alleged. When the alleged victim is a child under the age of 16 years, add element below as element (5) or (6) as appropriate.

[(5) or (6)] That at the time of the assault(s), (state the name of the alleged victim) was a child under the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

"Grievous bodily harm" means serious bodily injury. "Grievous bodily harm" does not mean minor injuries, such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

(Means) (Force) may be any means or object not normally considered a weapon.

A (weapon) (means) (force) is likely to produce death or grievous bodily harm when the natural and probable results of its particular use would be death or grievous bodily harm (although this may not be the use to which the object is ordinarily put). It is not necessary that death or grievous bodily harm actually result.

NOTE 3: Further definitions of grievous bodily harm. When there is an issue as to whether the injuries sustained by the victim constituted grievous bodily harm, the following explanatory instructions may be given:

Light pain, minor wounds, and temporary impairment of some organ of the body do not ordinarily individually or collectively establish grievous bodily harm. These results are common to most ordinary assault and battery cases. In making the determination of whether grievous bodily harm resulted, the absence or presence and extent of (the injury and its adverse effects) (degree of pain or suffering) (time of hospitalization or confinement to bed or room) (length and degree of unconsciousness) (amount of force and violence used) (interference with normal activities) (_____) may be taken into consideration.

NOTE 4: Likelihood of death or grievous bodily harm. If there is an issue as to whether the alleged assault is likely to produce death or grievous bodily harm, the following instruction may be appropriate.

The likelihood of death or grievous bodily harm is determined by measuring two factors. Those two factors are (1) the risk of the harm and (2) the magnitude of the harm. In evaluating the risk of the harm, the risk of death or grievous bodily harm must be more than merely a fanciful, speculative, or remote possibility. In evaluating the magnitude of the harm, the consequence of death or grievous bodily harm must be at least probable and not just possible, or in other words, death or grievous bodily harm would be a natural and probable consequence of the accused's act(s). (Where the magnitude of the harm is great, you may find that an aggravated assault exists even though the risk of harm is statistically low. For example, if someone fires a rifle bullet into a crowd and a bystander in the crowd is shot, then to constitute an aggravated assault, the risk of harm of hitting that person need only be more than merely a fanciful, speculative, or remote possibility since the magnitude of harm which the bullet is likely to inflict on that person is great if it hits the person.)

NOTE 5: Assault by attempt. If the specification alleges an attempt to do bodily harm, give the following instruction:

An "assault" is an attempt with unlawful force or violence to do bodily harm to another with the specific intent to inflict bodily harm. An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability to do bodily harm to another. Physical injury or offensive touching is not required. (The mere use of threatening words is not an assault.)

NOTE 6: Assault by offer. If the specification alleges an assault by offer, give the following instruction:

An "assault" is an offer with unlawful force or violence to do bodily harm to another. An "offer to do bodily harm" is an (intentional) (or) (culpably negligent) (act) (failure to act) which foreseeably causes another to reasonably believe that force will immediately be applied to his/her person. Specific intent to inflict bodily harm is not required. There must be an apparent present ability to bring about bodily harm. Physical injury

or offensive touching is not required. (The mere use of threatening words is not an assault.)

NOTE 7: Battery. If the specification alleges a battery, give the following instruction:

An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is inflicted is called a battery. A "battery" is an unlawful and (intentional) (or) (culpably negligent) application of force or violence to another. The term "bodily harm" means any physical injury to or offensive touching of another person, however slight.

NOTE 8: Culpable negligence. If culpable negligence is mentioned in the instructions, give this definition:

"Culpable negligence" is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; this is what "due care" means. "Culpable negligence," on the other hand, is a negligent (act) (or) (failure to act) accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others, instead of merely a failure to use due care.

NOTE 9: Loaded firearm alleged. If a loaded firearm is alleged, the below instruction may be appropriate.

"Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive. A (handgun) (rifle) (shotgun) (_____), when used as a firearm and not as a club, may not be considered a dangerous weapon or means likely to produce death or grievous bodily harm unless it is loaded. (A fully functional revolver with an automatic rotating cylinder is a loaded weapon if there is a round of live ammunition in any chamber.) (A functional (clip) (magazine) fed weapon is a loaded weapon if there has been inserted into it a (clip) (magazine) containing a round of live ammunition, regardless of whether there is a round in the chamber.)

NOTE 10: Assault with an unloaded firearm-as a lesser included offense. If the accused was charged with assault with a loaded firearm by offer or attempt and the evidence raises an issue whether the firearm was loaded, Instruction 3-54-1A, Simple Assault (With an Unloaded Firearm), may be appropriate as to a lesser included offense.

NOTE 11: Accused's knowledge of child's age. When the alleged victim is a child under the age of 16 years, provide the following instruction:

> Knowledge that the person assaulted was under the age of 16 years is not an element of the offense.
>
> Accordingly, if you are convinced beyond a reasonable doubt that (state the name of the alleged victim) was under the age of 16 years at the time of the alleged offense(s), you are advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) was under the age of 16 years at the time of the alleged offense(s), and it is not a defense to aggravated assault upon a child even if the accused reasonably believed that (state the name of the alleged victim) was at least 16 years old.

NOTE 12: Consent as a defense. Under certain circumstances, consent may be a defense to simple assault or assault consummated by a battery. In aggravated assault cases, assault law does not recognize the validity of an alleged victim's consent to an act that is likely to result in grievous bodily harm or death, such as unprotected sexual intercourse with a Human Immunodeficiency Virus (HIV)-positive partner. The following instruction should be given in aggravated assault cases when the evidence raises the consent issue. The law regarding assaults involving Acquired Immune Deficiency Syndrome (AIDS) and HIV positive persons is evolving. See United States v. Bygrave, 46 MJ 491 (CAAF 1997) (CAAF held that an uninfected female service member's informed consent to unprotected sexual intercourse with an HIV-positive accused is not a defense to aggravated assault. CAAF did not address whether its decision would be the same were the act within a marital relationship, with a civilian victim, with a victim who is also HIV-positive, or other than sexual intercourse).

> A victim may not lawfully consent to an assault in which a (weapon) (means) (force) is used in a manner likely to produce death or grievous bodily harm. Consent is not a defense (even if the purported victim was informed of the risk of exposure to HIV prior to the act.)

NOTE 13: Other instructions. Instruction 5-4, Accident, may be raised by the evidence.

e. REFERENCES: Likelihood of death or grievous bodily harm: United States v. Weatherspoon, 49 MJ 209 (CAAF 1998); United States v. Johnson, 30 MJ 53 (CMA 1990); United States v. Outhier, 45 MJ 326 (CAAF 1996); United States v. Klauck, 47 MJ 24 (CAAF 1997).

3–54–9. AGGRAVATED ASSAULT—INTENTIONALLY INFLICTING GRIEVOUS BODILY HARM (ARTICLE 128)

a. MAXIMUM PUNISHMENT:

(1) With a loaded firearm: DD, TF, 10 years, E-1.

(2) When committed upon a child under the age of 16 years: DD, TF, 8 years, E-1. (For offenses occurring prior to 1 October 2007, the maximum sentence is DD, TF, 5 years, E-1.)

(3) Other cases: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit an assault upon _____ (a child under the age of 16 years) by (shooting) (striking) (cutting) (_____) (him/her) (in) (on) the _____ with a (loaded firearm) (club) (rock) (brick) (_____) and did thereby intentionally inflict grievous bodily harm upon him/her, to wit: a (broken leg) (deep cut) (fractured skull) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused inflicted grievous bodily harm, that is, (state the injuries allegedly inflicted), upon (state the name of the alleged victim);

(2) That the accused did so by (state the manner alleged);

(3) That the grievous bodily harm was done with unlawful force or violence; (and)

(4) That the accused, at the time, had the specific intent to inflict grievous bodily harm. [and]

NOTE 1: Aggravating Circumstance Alleged. When it is alleged that a loaded firearm was used, add the following element:

[(5)] That the injury was inflicted with a loaded firearm. [and]

NOTE 2: Child under the age of 16 years alleged. When the alleged victim is a child under the age of 16 years, add element below as element (5) or (6) as appropriate.

[(5) or (6)] That at the time of the assault(s), (state the name of the alleged victim) was a child under the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is actually inflicted is called a "battery." A "battery" is an unlawful and intentional application of force or violence to another. The act must be done without legal justification or excuse and without the lawful consent of the victim. "Bodily harm" means any physical injury to or offensive touching of another person, however slight.

"Grievous bodily harm" means fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

This offense requires the actual infliction of grievous bodily harm.

Additionally, the grievous bodily harm must have been intentionally caused by the accused, that is, the accused must have had, at the time of the assault described in the specification, a specific intent to cause serious bodily injury. When grievous bodily harm has been inflicted, by intentionally using force in a manner likely to achieve that result, you may infer that the grievous bodily harm was intended. The drawing of this inference is not required.

NOTE 3: <u>Further definitions of grievous bodily harm</u>. If there is an issue as to whether the injuries sustained by the victim constituted grievous bodily harm, the following explanatory instruction may be given:

Light pain, minor wounds, and temporary impairment of some organ of the body do not ordinarily individually or collectively establish grievous bodily harm. These results are common to most ordinary assault and battery cases. In making the determination of whether grievous bodily harm resulted, the absence or presence of the injury and the extent of (the injury and its adverse effects) (degree of pain or suffering) (time of hospitalization or confinement to bed or room) (length and degree of unconsciousness) (amount of force or violence used) (interference with normal activities) (_____) may be taken into consideration.

NOTE 4: Loaded firearm alleged. If a loaded firearm is alleged, the below instruction may be appropriate.

"Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive. A (handgun) (rifle) (shotgun) (_____), when used as a firearm and not as a club, may not be considered a dangerous weapon or means likely to produce death or grievous bodily harm unless it is loaded. (A fully functional revolver with an automatic rotating cylinder is a loaded weapon if there is a round of live ammunition in any chamber.) (A functional (clip) (magazine) fed weapon is a loaded weapon if there has been inserted into it a (clip) (magazine) containing a round of live ammunition, regardless of whether there is a round in the chamber.)

NOTE 5: Assault with an unloaded firearm as a lesser included offense. If the lesser included offense of assault with an unloaded firearm is raised by the evidence, Instruction 3- 54-1A, Simple Assault (With an Unloaded Firearm), may be appropriate as to a lesser included offense.

NOTE 6: Accused's knowledge of child's age. When the alleged victim is a child under the age of 16 years, provide the following instruction:

Knowledge that the person assaulted was under the age of 16 years is not an element of the offense.

Accordingly, if you are convinced beyond a reasonable doubt that (state the name of the alleged victim) was under the age of 16 years at the time of the alleged offense(s), you are advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) was under the age of 16 years at the time of the alleged offense(s), and it is not a defense to aggravated assault upon a child even if the accused reasonably believed that (state the name of the alleged victim) was at least 16 years old.

NOTE 7: Consent as a defense. Under certain circumstances, consent may be a defense to simple assault or assault consummated by a battery. In aggravated assault cases, assault law does not recognize the validity of an alleged victim's consent to an act that is likely to result in grievous bodily harm or death, such as unprotected sexual intercourse with a Human Immunodeficiency Virus (HIV)-positive partner. The following instruction should be given in aggravated assault cases when the evidence raises the consent issue. The law regarding assaults involving Acquired Immune Deficiency Syndrome (AIDS) and HIV

positive persons is evolving. See United States v. Bygrave, 46 MJ 491 (CAAF 1997) (CAAF held that an uninfected female service member's informed consent to unprotected sexual intercourse with an HIV-positive accused is not a defense to aggravated assault. CAAF did not address whether its decision would be the same were the act within a marital relationship, with a civilian victim, with a victim who is also HIV-positive, or other than sexual intercourse).

A victim may not lawfully consent to an assault in which a (weapon) (means) (force) is used in a manner likely to produce death or grievous bodily harm. Consent is not a defense (even if the purported victim was informed of the risk of exposure to HIV prior to the act.)

NOTE 8: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. For the standard instructions on assault and on battery, see Instruction 3-54-1, Simple Assault, and Instruction 3-54-2, Assault Consummated by a Battery. If used, however, these instructions must be tailored to reflect the fact that culpable negligence is not sufficient under this specification which requires that grievous bodily harm be intentionally inflicted.

3–55–1. BURGLARY (ARTICLE 129)

a. MAXIMUM PUNISHMENT: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, in the nighttime, unlawfully break and enter the (dwelling house) (_____ within the curtilage) of _____, with intent to commit (murder) (larceny) (_____) therein.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused unlawfully broke and entered the dwelling house of another, namely: (state the name of the person alleged);

(2) That both the breaking and entering were done in the nighttime; and

(3) That the breaking and entering were done with the intent to commit therein the offense of (state the offense allegedly intended).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Unlawfully" means that the alleged breaking and entering were without the consent of any person authorized to consent to the alleged breaking and entering, and without other proper authority.

A breaking may be actual or constructive. Merely to enter through a hole left in the wall or roof, or through an open window or door, will not constitute a breaking. But if a person moves any obstruction to entry of the house, without which movement the person could not have entered, the person has committed a "breaking." Opening a closed door or window or other similar fixture, opening wider a door or window already partly open but insufficient for the entry, or cutting out the glass of a window or the netting of a screening is a sufficient breaking. The breaking of an inner door by one who has entered the house without breaking, or by a person lawfully within the house who has no authority to enter the particular room, is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with the requisite intent, burglary is not committed. There is a constructive breaking when

the entry is gained by a trick, such as concealing oneself in a box; under false pretense, such as impersonating a gas or telephone inspector; by intimidating the occupants through violence or threats into opening the door; through collusion with a confederate, an occupant of the house; or by descending a chimney, even if only a partial descent is made and no room is entered.

To establish the offense of burglary, there must be an entry into the dwelling house. An entry of any part of the body or the insertion of any tool or other device is sufficient.

"Dwelling house" means a residence, that is, a structure where people live. (The term also includes the outbuildings that form part of a group of buildings used as a residence.)

The structure must be a residence at the time of the breaking and entering. Proof that someone was actually in the structure at the time of the burglary is not required.

"Nighttime" means the period of darkness between sunset and sunrise when there is insufficient daylight to see another person's features.

Proof that the accused actually committed or even attempted the offense of (state the offense allegedly intended) is not required, but you must be convinced beyond a reasonable doubt that the accused intended each element of that offense at the time of the unlawful breaking and entering. These elements are: (list here the elements of the allegedly intended offense).

NOTE 1: Elements of the offense allegedly intended. See Instructions 3-43-1 through 3-48-2 and 3-50-1 through 3-54-9 for the elements of the applicable offenses. If murder was the intended offense, the military judge must instruct as to the elements of murder committed with the intent to kill.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, as bearing on the issues of the specific intent to commit the allegedly intended offense, may be applicable.

3–56–1. HOUSEBREAKING (ARTICLE 130)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____, (personal jurisdiction data), did, (at/on board—location), on or about _____, unlawfully enter a (dwelling) (room) (bank) (store) (warehouse) (shop) (tent) (stateroom) (_____), the property of _____, with intent to commit a criminal offense, to wit: _____, therein.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused unlawfully entered (state the building or structure as alleged) the property of (state the name of the owner or other person alleged); and

(2) That the unlawful entry was made with the intent to commit therein the criminal offense of (state the alleged offense).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: Unlawfulness of entry. Whether the accused unlawfully entered the building or structure is a fact for the members to determine based on all the facts and circumstances of the case. Evidence of intent to commit a criminal offense inside the building or structure is merely one of the facts and is not controlling on the issue of whether the entry was unlawful. In outlining this issue the military judge must take into consideration the private, semi-private, or public nature of the structure entered. In the case of public buildings, entries are lawful during the hours it is open to the public absent a clear showing to the contrary. In the case of semi-private structures, e.g., barracks or tents, the unlawfulness of the entry will depend on all the relevant circumstances (see NOTE 2 below). Finally, in the case of a private structure, e.g., a home, it should be sufficient to define "unlawfully entered" as follows:

"Unlawfully enter" means an unauthorized entry without the consent of any person authorized to consent to the entry and without other lawful authority. Proof that the accused actually committed or even attempted to commit the offense of (state the offense allegedly intended) is not required. However, you must be convinced beyond a reasonable doubt that the accused intended each element of that offense at the time of the unlawful entry. These elements are: (list the elements of the offense allegedly intended).

The offense of housebreaking requires an unlawful entry into a building or structure. "Building" includes a (house) (room) (ship) (store) (office)

(or) (apartment in a building). A "structure" includes enclosures that are similar to buildings or dwellings, such as (an inhabitable trailer) (an enclosed goods truck) (or) (a railroad freight car) (a tent) (or) (a houseboat).

NOTE 2: In the case of semi-private structures, e.g., barracks or tents, the following instruction should be given and is based on United States v. Davis, 56 MJ 299 (CAAF 2002) citing United States v. Williams, 15 CMR 241 (CMA 1954).

"Unlawfully enter" means an unauthorized entry without the consent of any person authorized to consent to the entry and without other lawful authority. Whether the accused's entry was "unlawful" is a fact for you to decide based on all of the evidence in this case. In determining whether the entry was unlawful you should consider all the relevant facts and circumstances, including, but not limited to: (the nature and function of the building involved) (the character, status, and duties of the accused) (the conditions of the entry, including time, method, and the accused's ostensible purpose, if any) (the presence or absence of a directive seeking to limit or regulate free ingress) (the presence or absence of an explicit invitation to the accused) (the invitational authority of any purported host) (the presence or absence of a prior course of dealing, if any, by the accused with the structure or its inmates, and its nature); (and) (whether the accused intended to commit a criminal offense inside the building).

Proof that the accused actually committed or even attempted to commit the offense of (state the offense allegedly intended) is not required. However, you must be convinced beyond a reasonable doubt that the accused intended each element of that offense at the time of the unlawful entry. These elements are: (list the elements of the offense allegedly intended).

The offense of housebreaking requires an unlawful entry into a building or structure. "Building" includes a (house) (room) (ship) (store) (office) (or) (apartment in a building). A "structure" includes enclosures which are similar to buildings or dwellings, such as (an inhabitable trailer) (an

enclosed goods truck) (or) (a railroad freight car) (a tent) (or) (a houseboat).

NOTE 3: Lesser included offense commonly raised. When the accused denies intent to commit the alleged offense at the time of the unlawful entry, or there is other evidence which tends to negate such intent, the military judge should instruct on the lesser included offense of unlawful entry. See Instruction 3-111-1, Unlawful Entry.

NOTE 4: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. Instruction 6-5, Partial Mental Responsibility, Instruction 5-1 7, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, as bearing on the issue of specific intent to commit the alleged offense, may be applicable.

3–57–1. PERJURY—FALSE TESTIMONY (ARTICLE 131)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), having taken a lawful (oath) (affirmation) in a (trial by _____ court-martial of _____) (trial by a court of competent jurisdiction, to wit: _____ of _____) (deposition for use in a trial by _____ of _____) (_____) that he/she would (testify) (depose) truly, did, (at/on board—location), on or about _____, willfully, corruptly, and contrary to such (oath) (affirmation), (testify) (depose) falsely in substance that _____, which (testimony) (deposition) was upon a material matter and which he/she did not then believe to be true.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (took an oath) (made an affirmation) in a (state the judicial proceeding or course of justice alleged);

(2) That the (oath) (affirmation) was administered to the accused in a (matter) (_____) in which an (oath) (affirmation) was (required) (authorized) by law;

(3) That the (oath) (affirmation) was administered by a person having the authority to do so;

(4) That upon such (oath) (affirmation) the accused willfully (made) (subscribed) a statement, namely: (set forth the statement alleged);

(5) That the statement was material;

(6) That the statement was false; and

(7) That the accused did not then believe the statement to be true.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

(An “oath” is a formal, outward pledge, coupled with an appeal to the Supreme Being, that the truth will be stated.)

(An “affirmation” is a solemn and formal, external pledge, binding upon one’s conscience, that the truth will be stated.)

("Subscribe" means to write one's name on a document for the purpose of adopting its words as one's own expressions.)

"Material" means important to the issue or matter of inquiry.

NOTE 1: <u>False swearing as a lesser included offense</u>. False swearing (Article 134) is not a lesser included offense of perjury.

NOTE 2: <u>Corroboration instruction</u>. When an instruction on corroboration is requested or otherwise appropriate, the judge should carefully tailor the following to include only instructions applicable to the case. Subparagraphs (1), (2), or a combination of (1) and (2) may be given, as appropriate:

As to the sixth element of this offense, there are special rules for proving the falsity of a statement in perjury trials. Falsity can be proven by testimony or documentary evidence by:

(1) The testimony of a witness which directly contradicts the statement described in the specification, as long as the witness's testimony is corroborated or supported by the testimony of at least one other witness or by some other evidence which tends to prove the falsity of the statement. You may find the accused guilty of perjury only if you find beyond a reasonable doubt that the testimony of (<u>state the name of witness</u>), who has testified as to the falsity of the statement described in the specification is believable and is corroborated or supported by other trustworthy evidence or testimony. To "corroborate" means to strengthen, to make more certain, to add weight. The corroboration required to prove perjury is proof of independent facts or circumstances which, considered together, tend to confirm the testimony of the single witness in establishing the falsity of the statement.

2) Documentary evidence directly disproving the truth of the statement described in the specification, as long as the evidence is corroborated or supported by other evidence tending to prove the falsity of the statement. To "corroborate" means to strengthen, to make more certain, to add weight. The corroboration required to prove perjury is proof of independent facts or circumstances which, considered together, tend to

confirm the information contained in the document in establishing the falsity of the statement.

NOTE 3: Exceptions to documentary corroboration requirement. There are two exceptions to the requirement for corroboration of documentary evidence. Applicable portions of the following should be given when an issue concerning one of the exceptions arises:

An exception to the requirement that documentary evidence must be supported by corroborating evidence is when the document is an official record which has been proven to have been well known to the accused at the time that (he) (she) (took the oath) (made the affirmation).

(Additionally,) (An) (Another) exception to the requirement that documentary evidence must be supported by corroborating evidence is when the document was written or furnished by the accused or had in any way been recognized by (him) (her) as containing the truth at some time before the supposedly perjured statement was made.

If (this exception) (these exceptions) exist(s), the documentary evidence may be sufficient without corroboration to establish the falsity of the statement.

You may find the accused guilty of perjury only if you find that the documentary evidence (and credible corroborative evidence) establish(es) the falsity of the accused's statement beyond a reasonable doubt.

NOTE 4: Proving that the accused did not believe the statement to be true. Once the appropriate corroboration instruction in NOTE 2 above is given, the military judge should give the following instruction:

The fact that the accused did not believe the statement to be true when it was (made) (subscribed) may be proved by testimony of one witness without corroboration or by circumstantial evidence, as long as that testimony or evidence convinces you beyond a reasonable doubt as to this element of the offense.

3–57–2. PERJURY—SUBSCRIBING FALSE STATEMENT (ARTICLE 131)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____, in a (judicial proceeding) (course of justice), and in a (declaration) (certification) (verification) (statement) under penalty of perjury pursuant to section 1746 of title 28, United States Code, willfully and corruptly subscribe a false statement material to the (issue) (matter of inquiry), to wit: _____, which statement was false in that _____, and which statement he/she did not then believe to be true.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused subscribed a certain statement, specifically (set forth the statement alleged) in a (judicial proceeding) (course of justice), specifically (state the proceeding alleged);

(2) That in the (declaration) (certification) (verification) (statement), under penalty of perjury, the accused (declared) (certified) (verified) (stated) the truth of that certain statement;

(3) That the accused willfully subscribed the statement;

(4) That the statement was material;

(5) That the statement was false; and

(6) That the accused did not then believe the statement to be true.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A (declaration) (certification) (verification) (statement) under penalty of perjury is a statement that expressly acknowledges that it is made under penalty of perjury. It need not be made before a notary public or officer authorized to take acknowledgments or administer oaths.

“Subscribe” means to write one’s name on a document for the purpose of adopting its words as one’s own statement.

“Material” means important to the issue or matter of inquiry.

NOTE 1: <u>False swearing as a lesser included offense</u>. False swearing (Article 134) is not a lesser included offense of perjury.

NOTE 2: <u>Corroboration instruction</u>. When an instruction on corroboration is requested or otherwise appropriate, the judge should carefully tailor the following to include only instructions applicable to the case. Subparagraphs (1) or (2) or a combination of (1) and (2) may be given, as appropriate:

As to the fifth element of this offense, you are advised that there are special rules for proving the falsity of a statement in perjury trials. Falsity can be proven by testimony or documentary evidence by:

(1) The testimony of a witness which directly contradicts the statement described in the specification, as long as the witness's testimony is corroborated or supported by the testimony of at least one other witness, or by some other evidence which tends to prove the falsity of the statement. You may find the accused guilty of perjury only if you find beyond a reasonable doubt that the testimony of (<u>state the name of witness</u>), who has testified as to the falsity of the statement described in the specification is believable and is corroborated or supported by other trustworthy evidence or testimony. To "corroborate" means to strengthen, to make more certain, to add weight. The corroboration required to prove perjury is proof of independent facts or circumstances which, considered together, tend to confirm the testimony of the single witness in establishing the falsity of the statement.

(2) Documentary evidence directly disproving the truth of the statement described in the specification, as long as the evidence is corroborated or supported by other evidence tending to prove the falsity of the statement. To "corroborate" means to strengthen, to make more certain, to add weight. The corroboration required to prove perjury is proof of independent facts or circumstances which, considered together, tend to confirm the information contained in the document in establishing the falsity of the statement.

NOTE 3: <u>Exceptions to documentary corroboration requirement</u>. There are two exceptions to the requirement for corroboration of documentary evidence. Applicable portions of the following should be given when an issue concerning one of the exceptions arises:

An exception to the requirement that documentary evidence must be supported by corroborating evidence is when the document is an official record which has been proven to have been well known to the accused at the time that (he) (she) (took the oath) (made the affirmation).

(Additionally,) (An) (Another) exception to the requirement that documentary evidence must be supported by corroborating evidence is when the document was written or furnished by the accused or had in any way been recognized by (him) (her) as containing the truth at some time before the supposedly perjured statement was made.

If (this exception) (these exceptions) exist(s), the documentary evidence may be sufficient without corroboration to establish the falsity of the statement.

You may find the accused guilty of perjury only if you find that the documentary evidence (and credible corroborative evidence) establish(es) the falsity of the accused's statement beyond a reasonable doubt.

NOTE 4: <u>Proving that the accused did not believe the statement to be true</u>. Once the appropriate corroboration instruction in NOTE 2 above is given, the military judge should give the following instruction:

The fact that the accused did not believe the statement to be true when it was (made) (subscribed) may be proved by testimony of one witness without corroboration or by circumstantial evidence, as long as that testimony or evidence convinces you beyond a reasonable doubt as to this element of the offense.

3–58–1. MAKING FALSE CLAIM (ARTICLE 132)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (by preparing (a voucher) (_____) for presentation for approval or payment) (_____), make a claim against the (United States) (finance officer at _____) (_____) in the amount of $_____ for (private property alleged to have been (lost) (destroyed) in the military service) (_____), which claim was (false) (fraudulent) (false and fraudulent) in the amount of $_____ in that _____ and was then known by the said _____ to be (false) (fraudulent) (false and fraudulent).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused made a certain claim against (the United States) (_____, an officer of the United States) for (state the nature and amount of the alleged claim);

(2) That the accused did so by (state the manner alleged);

(3) That the claim was (false) (fraudulent) (false and fraudulent) in the (state the particulars alleged); and

(4) That, at the time the accused made the claim, (he) (she) knew it was (false) (fraudulent) (false and fraudulent).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “claim” is a demand for a transfer of ownership of money or property.

(“False”) (“Fraudulent”) (“False and fraudulent”) means intentionally deceitful. (It) (They) refer(s) to an untrue representation of a material fact, that is, an important fact, made with knowledge of its untruthfulness and with the intent to defraud another. The test of whether a fact is material is whether it was capable of influencing the approving authority to pay the claim.

“Making” a claim means the preparation of a claim and taking some action to get it started in official channels. It is an action by the accused which becomes a demand against the United States or one of its officers. “Making” a claim is ordinarily a separate act from presenting it. (A claim

may be made in one place and presented in another.) (It is not necessary that the claim be approved or paid or that it be made by the person to be benefited by the allowance or payment.)

NOTE: Other instructions. Instruction 5-11, Ignorance or Mistake of Fact or Law, may be applicable. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

3–58–2. PRESENTING FALSE CLAIM (ARTICLE 132)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, by presenting (a voucher) (_____) to _____, an officer of the United States duly authorized to approve) (pay) (approve and pay) such claim, present for (approval) (payment) (approval and payment) a claim against the (United States) (finance officer at _____) (_____) in the amount of $_____ for (services alleged to have been rendered to the United States by _____ during _____) (_____), which claim was (false) (fraudulent) (false and fraudulent) in the amount of $_____ in that _____, and was then known by the accused to be (false) (fraudulent) (false and fraudulent).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused presented for (approval) (payment) (approval and payment) a certain claim against (the United States) (_____), to a person in the (civil) (military) service of the United States having authority to (approve) (pay) (approve and pay) such a claim for (state the nature and amount of the alleged claim);

(2) That the accused did so by (state the manner alleged);

(3) That the claim was (false) (fraudulent) (false and fraudulent) in that (state the particulars alleged); and

(4) That, at the time the accused presented the claim, (he) (she) knew it was (false) (fraudulent) (false and fraudulent).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A "claim" is a demand for a transfer of ownership of money or property.

("False") ("Fraudulent") ("False and fraudulent") mean intentionally deceitful. (It) (They) refer(s) to an untrue representation of a material fact, that is, an important fact, made with knowledge of its untruthfulness and with the intent to defraud another. The test of whether a fact is material is whether it was capable of influencing the approving authority to (pay) (approve) (approve and pay) the claim.

"Intent to defraud" means an intent to obtain something of value through a misrepresentation and to apply it to one's own use and benefit or to the use and benefit of another, either temporarily or permanently.

NOTE: Other instructions. Instruction 5-11, Ignorance or Mistake of Fact or Law, may be applicable. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

3–58–3. MAKING OR USING FALSE WRITING IN CONNECTION WITH A CLAIM (ARTICLE 132)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States in the amount of $ _____, did (at/on board—location), on or about _____, (make) (use) (make and use) a certain (writing) (paper), to wit: _____, which said (writing) (paper), the accused then knew, contained a statement that _____, which statement was (false) (fraudulent) (false and fraudulent) in that _____, and was then known by the accused to be (false) (fraudulent) (false and fraudulent).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (made) (used) (made and used), a certain (writing) (paper), namely, (state the writing or paper alleged);

(2) That this (writing) (paper) contained (a) certain material statement(s) that (state the contents of the statement(s) alleged);

(3) That (this) (these) statement(s) (was) (were) (false) (fraudulent) (false and fraudulent) in that (state the particulars alleged);

(4) That, at the time the accused (made) (used) (made and used) the (writing) (paper), (he) (she) knew that it contained (this) (such) (a) statement(s) which (was) (were) (false) (fraudulent) (false and fraudulent); and

(5) That the (making) (using) (making and using) of the (writing) (paper) (was) (were) for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against (the United States) (_____, an officer of the United States).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “claim” is a demand for a transfer of ownership of property or money. (“False”) (“Fraudulent”) (“False and fraudulent”) mean intentionally deceitful. (It) (They) refer(s) to an untrue representation of a material

fact, that is, an important fact, made with knowledge of its untruthfulness and with the intent to defraud another.

"Intent to defraud" means an intent to obtain something of value through a misrepresentation and to apply it to one's own use and benefit or to the use and benefit of another either temporarily or permanently.

NOTE: Other instructions. Instruction 5-11, Ignorance or Mistake of Fact or Law, may be applicable. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

3–58–4. MAKING FALSE OATH IN CONNECTION WITH A CLAIM (ARTICLE 132)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), for purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at/on board—location), on or about _____, make an oath (to the fact that _____) (to a certain (writing) (paper), to wit: _____, to the effect that _____), which said oath was false in that _____, and was then known by the accused to be false.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused made an oath (to the fact that (state fact alleged)) or (on a certain (writing) (paper), namely, (state the writing or paper alleged)), to the effect that (state the matter alleged);

(2) That the oath was false in that (state the particulars alleged);

(3) That the accused knew at the time that the oath was false; and

(4) That the oath was made for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against (the United States) (_____, an officer of the United States).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “claim” is a demand for transfer of ownership of property or money.

“False” means a deliberate misrepresentation of a material fact, that is, an important fact that is made with the intent to defraud another.

“Intent to defraud” means an intent to obtain an article or thing of value through a misrepresentation and to apply it to one’s own use and benefit or to the use and benefit of another, either temporarily or permanently.

An “oath” is a formal, open pledge, coupled with an appeal to the Supreme Being, that a certain statement is true.

NOTE 1: Corroboration instruction. When an instruction on corroboration is requested or otherwise advisable, the military judge should carefully tailor the following to include only instructions applicable to the case, giving subparagraphs (1), (2), or a combination, as necessary:

As to the second element for this offense, there are special rules for proving the falsity of an oath. The falsity of an oath can be proved by testimony or documentary evidence by:

(1) The testimony of a witness which directly contradicts the oath described in the specification, as long as the witness's testimony is corroborated or supported by the testimony of at least one other witness or by some other evidence which tends to prove the falsity of the oath. You may find the accused guilty of making a false oath only if you find beyond a reasonable doubt that the testimony of (state the name of the witness), who has testified as to the falsity of the oath described in the specification is believable and is corroborated or supported by other trustworthy evidence or testimony. To "corroborate" means to strengthen, to make more certain, to add weight. The corroboration required to prove making a false oath is proof of independent facts or circumstances which, considered together, tend to confirm the testimony of the single witness to establish the falsity of the oath.

(2) Documentary evidence directly disproving the truth of the oath described in the specification as long as the evidence is corroborated or supported by other evidence tending to prove the falsity of the oath. To "corroborate" means to strengthen, to make more certain, to add weight. The corroboration required to prove a false oath is proof of independent facts or circumstances which, considered together, tend to confirm the information contained in the document to establish the falsity of the oath.

NOTE 2: Exceptions to documentary corroboration requirement. There are two exceptions to the requirement for corroboration of documentary evidence. Applicable portions of the following should be given when an issue concerning one of the exceptions arises:

An exception to the requirement that documentary evidence must be supported by corroborating evidence is when the document is an official

record which has been proven to have been well known to the accused at the time (he) (she) (took the oath) (made the affirmation).

(Additionally,) (An) (Another) exception to the requirement that documentary evidence must be supported by corroborating evidence is when the document was written or furnished by the accused or had in any way been recognized by (him) (her) as containing the truth at some time before this supposedly perjured oath was made. If (this exception) (these exceptions) exist(s), the documentary evidence may be sufficient without corroboration to establish the falsity of the oath.

You may find the accused guilty of making a false oath only if you find that the documentary evidence (and credible corroborative evidence) establish(es) the falsity of the accused's oath beyond a reasonable doubt.

NOTE 3: Proving that the accused did not believe the statement to be true. Once the appropriate corroboration instruction in NOTE 1 above is given, the military judge should give the following instruction:

The fact that the accused did not believe the oath to be true when it was (made) (subscribed) may be proved by testimony of one witness without corroboration or by circumstantial evidence, if the testimony convinces you beyond a reasonable doubt as to this element of the offense.

NOTE 4: Other instructions. Instruction 5-11, Ignorance or Mistake of Fact or Law, may be applicable. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–58–5. FORGING OR COUNTERFEITING SIGNATURE IN CONNECTION WITH A CLAIM (ARTICLE 132)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at/on board—location), on or about _____, (forge) (counterfeit) (forge and counterfeit) the signature of _____ upon a _____ in words and figures as follows:

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (forged) (counterfeited) (forged and counterfeited) the signature of (state the person alleged) upon a certain (writing) (paper), namely (state the writing or paper alleged); and

(2) That this (forging) (counterfeiting) (forging and counterfeiting) was done for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against (the United States) (_____, an officer of the United States).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A "claim" is a demand for a transfer of ownership of money or property.

A ("forged") ("counterfeited") signature is any fraudulently made signature of another whether or not an attempt was made to imitate the handwriting of the other person.

"Intent to defraud" means an intent to obtain something of value through a misrepresentation and to apply it to one's own use and benefit or to the use and benefit of another, either temporarily or permanently.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–58–6. USING FORGED SIGNATURE IN CONNECTION WITH A CLAIM (ARTICLE 132)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at/on board—location), on or about _____, use the signature of _____ on a certain (writing) (paper), to wit: _____, such signature being (forged) (counterfeited) (forged and counterfeited), and then known by the accused to be (forged) (counterfeited) (forged and counterfeited).

c. ELEMENTS:

(1) That the signature of (state the name of the person alleged), on a certain (writing) (paper), namely, (state the writing or paper alleged) was (forged) counterfeited) (forged and counterfeited);

(2) That the accused knew that this signature was (forged) (counterfeited) (forged and counterfeited); and

(3) That (state the time and place alleged), the accused used the signature for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against (the United States) (_____, an officer of the United States).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “claim” is a demand for a transfer of ownership of money or property.

A (“forged”) (“counterfeited”) signature is any fraudulently made signature of another whether or not an attempt was made to imitate the handwriting of the other person.

“Intent to defraud” means an intent to obtain something of value through a misrepresentation and to apply it to one’s own use and benefit or to the use and benefit of another, either temporarily or permanently.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

3–58–7. PAYING AMOUNT LESS THAN CALLED FOR BY RECEIPT (ARTICLE 132)

a. MAXIMUM PUNISHMENT:

(1) $500 or less: BCD, TF, 6 months, E-1.

(2) Over $500: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____, (personal jurisdiction data), having (charge) (possession) (custody) (control) of (money) (_____) of the United States, (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at/on board—location), on or about _____, knowingly deliver to _____, the said _____ having authority to receive the same, (an amount) (_____), which, as he/she, _____, then knew, was ($_____) (_____) less than the (amount) (_____) for which he/she received a (certificate) (receipt) from the said _____.

c. ELEMENTS:

(1) That the accused had (charge) (possession) (custody) (control) of certain (money) (property) (_____) of the United States (furnished) (intended) (furnished and intended) for the armed forces;

(2) That the accused received a (receipt) (certificate) for a certain (amount) (quantity) of this (money) (property) (_____) from (state the name of the person alleged);

(3) That for the (receipt) (certificate), the accused (state the time and place alleged), knowingly delivered to (state the name of the person alleged) (an amount) (a quantity) of this (money) (property) which (he) (she) knew was less than the (amount) (quantity) specified in the (receipt) (certificate);

(4) That (state the name of the person who allegedly received the money or property) was a person who had authority to receive the (money) (property) (_____); and

(5) That the undelivered (money) (property) (_____) was of the value of (state the value alleged) (or of some lesser value, in which case the finding should be in the lesser amount).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE: Other instructions. Instruction 5-11, Ignorance or Mistake of Fact or Law, may be applicable. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable. Instruction 7-16, Variance - Value, Damage, or Amount, is ordinarily applicable.

3–58–8. MAKING RECEIPT WITHOUT KNOWLEDGE OF THE FACTS (ARTICLE 132)

a. MAXIMUM PUNISHMENT:

(1) $500 or less: BCD, TF, 6 months, E-1.

(2) Over $500: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), being authorized to (make) (deliver) (make and deliver) a paper certifying that receipt of property of the United States (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at/on board—location), on or about _____, without having full knowledge of the statement therein contained and with intent to defraud the United States, (make) (deliver) (make and deliver) to _____ such a writing, in words and figures as follows: _____, the property therein certified as received being of a value of (about) $_____.

c. ELEMENTS:

(1) That (state the time and place alleged) the accused (signed) produced) (delivered) (signed, produced, and delivered) to (state the name of person alleged) a certificate of receipt, in the following words and figures: (state the alleged description of the writing);

(2) That the accused was authorized to (sign) (produce) (deliver) (sign, produce, and deliver) a paper certifying the receipt from (state the name of the person to whom the receipt was allegedly made or delivered) of certain property of the United States (furnished) (intended) (furnished and intended) for the armed forces;

(3) That, at the time the accused (signed) (produced) (delivered) (signed, produced, and delivered) the certificate of receipt, (he) (she) did so without having full knowledge of the truth of (certain of) the material statements contained in this certificate of receipt (that is, (set out those statements as to the truth of which the accused did not have full knowledge, if specifically alleged));

(4) That the accused (signed) (produced) (delivered) (signed, produced and delivered) the certificate of receipt with intent to defraud the United States; and

(5) That the property certified as being received was of the value of (state the value alleged) (or of some lesser value, in which case the finding should be in the lesser amount).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Material statements" refer to important statements in the receipt that describe the quantity or quality of the receipted items.

"Intent to defraud" means an intent to obtain something of value through a misrepresentation and to apply it to one's own use and benefit or to the use and benefit of another, either temporarily or permanently.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge and Intent),is ordinarily applicable. Instruction 7-16, Variance - Value, Damage, or Amount, is ordinarily applicable. Instruction 5-11, Ignorance or Mistake of Fact or Law, may be applicable.

3–59–1. COPYING OR USING EXAMINATION PAPER (ARTICLE 133)

a. MAXIMUM PUNISHMENT: Dismissal, TF, confinement for a period not in excess of that authorized for the most analogous offense prescribed in the MCM, or if none is prescribed, for one year.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, while undergoing a written examination on the subject of _____, wrongfully and dishonorably (receive) (request) unauthorized aid by [(using) (copying) the examination paper of _____] [_____].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was undergoing a written examination on the subject of (state the subject alleged);

(2) That the accused wrongfully and dishonorably (received) (requested) unauthorized aid by (using) (copying) the examination paper of _____; and

(3) That, under the circumstances, the accused's conduct was unbecoming an officer and a (gentleman) (gentlewoman).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct unbecoming an officer and a (gentleman) (gentlewoman)" means (behavior in an official capacity which, in dishonoring or disgracing the individual as a (commissioned officer) (cadet) (midshipman), seriously detracts from (his) (her) character as a (gentleman) (gentlewoman) or (behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously detracts from (his) (her) standing as a (commissioned officer) (cadet) (midshipman)). "Unbecoming conduct" means misbehavior more serious than slight, and of a material and pronounced character. It means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior which is more than opposed to good taste or propriety.

3–59–2. DRUNK OR DISORDERLY (ARTICLE 133)

a. MAXIMUM PUNISHMENT: Dismissal, TF, confinement for a period not in excess of that authorized for the most analogous offense prescribed in the MCM, or if none is prescribed, for one year.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), was, (at/on board—location), on or about _____, in a public place, to wit: _____, (drunk) (disorderly) (drunk and disorderly) while in uniform, to the disgrace of the armed forces.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was in a public place, that is: (state the location alleged);

(2) That the accused was (drunk) (disorderly) (drunk and disorderly) while in uniform, to the disgrace of the armed forces; and

(3) That, under the circumstances, the accused's conduct was unbecoming an officer and a (gentleman) (gentlewoman).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct unbecoming an officer and a (gentleman) (gentlewoman)" means (behavior in an official capacity which, in dishonoring or disgracing the individual as a (commissioned officer) (cadet) (midshipman), seriously detracts from (his) (her) character as a (gentleman) (gentlewoman)) or (behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously detracts from (his) (her) standing as a (commissioned officer) (cadet) (midshipman)). "Unbecoming conduct" means misbehavior more serious than slight and of a material and pronounced character. It means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior which is more than opposed to good taste or propriety.

"Public place" means a (place frequented by the public) (place open to public view).

“Disorderly” means any disturbance of a quarrelsome, combative, or turbulent nature.

“Drunkenness” means any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties.

NOTE: Further instructions on drunkenness. If further clarification is needed, the military judge may instruct as follows:

A person is "drunk" who is under the influence of an intoxicant so that the use of (his) (her) faculties is impaired. Such impairment did not exist unless the accused’s conduct due to intoxicating (liquors) (drugs) was such as to create the impression within the minds of observers that (he) (she) was unable to act like a normal, rational person.

3–59–3. FAILING, DISHONORABLY, TO PAY DEBT (ARTICLE 133)

a. MAXIMUM PUNISHMENT: Dismissal, TF, confinement for a period not in excess of that authorized for the most analogous offense prescribed in the MCM, or if none is prescribed, for one year.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), being indebted to _____ in the sum of $_____ for _____, which amount became due and payable (on) (on or about) _____, did, (at/on board—location) from _____ to _____, dishonorably fail to pay said debt.

c. ELEMENTS:

(1) That the accused was indebted to (state the name of the alleged victim) in the sum of (state the amount of the alleged debt) for (state the basis of the alleged debt);

(2) That this debt became due and payable (on) (on or about) (state the date alleged);

(3) That (state the place alleged), from about _____ to about _____ while the debt was still due and payable, the accused dishonorably failed to pay this debt; and

(4) That, under the circumstances, the accused's conduct was unbecoming an officer and a (gentleman) (gentlewoman).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct unbecoming an officer and a (gentleman) (gentlewoman)" means (behavior in an official capacity which, in dishonoring or disgracing the individual as a (commissioned officer) (cadet) (midshipman), seriously detracts from (his) (her) character as a (gentleman) (gentlewoman)) (or) (behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously detracts from (his) (her) standing as a (commissioned officer) (cadet) (midshipman)). "Unbecoming conduct" means misbehavior more serious than slight and of a material and pronounced character. It means conduct morally unfitting and unworthy rather than merely

inappropriate or unsuitable misbehavior which is more than opposed to good taste or propriety.

A failure to pay a debt is “dishonorable” if the failure is (fraudulent) (deceitful) (a willful evasion) (in bad faith) (based on false promises) (a grossly indifferent attitude toward one’s just debts) (_____).

NOTE: History of specification. This specification, as an example of conduct unbecoming an officer and a gentleman, was deleted from the MCM, 1984, solely in the interest of brevity. Analysis, paragraph 59f, Appendix 23, MCM.

3–59–4. FAILURE TO KEEP PROMISE TO PAY DEBT (ARTICLE 133)

a. MAXIMUM PUNISHMENT: Dismissal, TF, confinement for a period not in excess of that authorized for the most analogous offense prescribed in the MCM, or if none is prescribed, for one year.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), having on or about _____, become indebted to _____ in the sum of $_____ for _____, and having failed without due cause to liquidate said indebtedness, and having, on or about _____, promised said _____ (in writing), that on or about _____ the accused would (settle such indebtedness in full) (pay on such indebtedness the sum of $_____), did, without due cause, (at/on board—location) on or about _____, dishonorably fail to keep said promise.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused became indebted to (state the name of the alleged victim) in the sum of (state the amount of the alleged debt) for (state the basis of the alleged debt);

(2) That the accused failed without due cause to liquidate this indebtedness;

(3) That the accused, on or about (state the time alleged) promised (state the name of the alleged victim or other person alleged) (in writing) that on or about (state the time and place alleged), (he) (she) would (settle this indebtedness in full) (pay on this indebtedness the sum of (state the amount alleged));

(4) That (state the time and place alleged), the accused, without due cause, dishonorably failed to keep this promise; and

(5) That, under the circumstances, the accused's conduct was unbecoming an officer and a (gentleman) (gentlewoman).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct unbecoming an officer and a (gentleman) (gentlewoman)" means (behavior in an official capacity which, in dishonoring or disgracing the individual as a (commissioned officer) (cadet) (midshipman), seriously detracts from (his) (her) character as a (gentleman) (gentlewoman)) or (behavior in an unofficial or private

capacity which, in dishonoring or disgracing the individual personally, seriously detracts from (his) (her) standing as a (commissioned officer) (cadet) (midshipman)). "Unbecoming conduct" means misbehavior more serious than slight and of a material and pronounced character. It means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior which is more than opposed to good taste or propriety.

A failure to keep a promise to pay a debt is "dishonorable" if the failure is characterized by (fraud) (deceit) (willful evasion) (demonstrable bad faith) (false promises) (a grossly indifferent attitude toward one's just debts).

NOTE: History of specification. This specification, as an example of conduct unbecoming an officer and a gentleman, was deleted from the MCM, 1984, solely in the interest of brevity. Analysis, paragraph 59f, Appendix 23, MCM.

3–60–1. GENERAL ARTICLE (ARTICLE 134)

The instructions for Article 134 offenses are in four sections. Paragraph 3-60-2A contains instructions for offenses that are not specifically listed in the MCM and which are disorders and neglects to the prejudice of good order and discipline in the armed forces (Clause 1, Article 134) or conduct of a nature to bring discredit upon the armed forces (Clause 2, Article 134). Paragraph 3-60-2B contains instructions for violations of Federal statutes other than the UCMJ (Clause 3, Article 134). Paragraph 3-60-2C contains instructions for violations of State law made punishable under Federal law through the Assimilative Crimes Act (Clause 3, Article 134). Those Article 134 offenses that are specifically listed in the MCM are contained in Instructions 3-61-1 through 3-113-1.

3–60–2A. DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE OR OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES—OFFENSES NOT LISTED IN THE MCM (ARTICLE 134, CLAUSES 1 AND 2.)

NOTE 1: Limitations on offenses under Clauses 1 and 2, Article 134. A capital offense may not be tried under Article 134. The General Article should not be charged when the offense is prohibited by Articles 80-132. Under the preemption doctrine, the General Article also may not be used to charge a residuum of the elements of an Article 80-132 offense, such as charging larceny less the element of intent. See MCM, Part IV, Paragraph 60(c)(5)(a) and United States v. McGuinnes, 35 MJ 149 (CMA 1992).

a. MAXIMUM PUNISHMENT:

RCM 1003(c)(1)(B)(i) provides: "For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however, if an offense not listed is included in a listed offense, and is closely related to another or is equally related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses."

b. MODEL SPECIFICATION:

NOTE 2: The MCM does not provide a model specification for violations of unlisted offenses under Clauses 1 or 2 of Article 134, but general guidance may be found in MCM, Part IV, Paragraph 60b and 60c(5)(a). Ordinarily a specification alleging an unlisted offense in violation of Article 134 substantially as below should be sufficient provided that the specification on its face, if true, would be prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. While there appears to be no MCM requirement to allege that the charged act or omission be "prejudicial to good order and discipline" or "of a nature to bring discredit upon the Armed Forces," specifications alleging offenses not specifically listed in the MCM might benefit by adding such language.

In that _____ (personal jurisdiction data), did at/on board—location, on or about _____, (here state the act, conduct, or omission alleged) (such (disorder) (conduct) (neglect) (omission) (_____) (being prejudicial to good order and discipline in the armed forces) (and) (being of a nature to bring discredit upon the armed forces)).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (here state the act, conduct, or omission alleged) and

(2) That, under the circumstances, the conduct of the accused (was to the prejudice of good order and discipline in the armed forces) (and) (was of a nature to bring discredit upon the armed forces.)

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 3: <u>Optional instructions applicable to Clause 1 or 2 offenses</u>. The evidence may raise an issue whether the conduct alleged constitutes conduct proscribed under Article 134. In such cases, some or all of the following instructions, properly tailored, may be appropriate. Where alleged or otherwise pertinent, an instruction on the meaning of "wrongful" or "wrongfully," which typically means without legal justification or excuse, may be appropriate.

(With respect to "prejudice to good order and discipline," the law recognizes that almost any irregular or improper act on the part of a service member could be regarded as prejudicial in some indirect or remote sense; however, only those acts in which the prejudice is reasonably direct and palpable is punishable under this Article.)

(With respect to "service discrediting," the law recognizes that almost any irregular or improper act on the part of a service member could be regarded as service discrediting in some indirect or remote sense; however, only those acts which would have a tendency to bring the service into disrepute or which tend to lower it in public esteem are punishable under this Article.)

(Not every act of (_____) constitutes an offense under the UCMJ. The government must prove beyond a reasonable doubt, either by direct evidence or by inference, that the accused's conduct (was prejudicial to good order and discipline in the armed forces) (and) (was of a nature to bring discredit upon the armed forces.) In resolving this issue, you should consider all the facts and circumstances (to include (where the conduct occurred) (the nature of the official and personal relationship between the persons who were involved) (who may have known of the conduct) (the effect, if any, upon the accused's or another's ability to perform his/her/their duties) (the effect the conduct may have had upon the morale or efficiency of a military unit) (_____.))

e. REFERENCES: United States v. Mayo, 12 MJ 286 (CMA 1982); United States v. Sellars, 5 MJ 814 (ACMR 1977); United States v. Perez, 33 MJ 1050 (ACMR 1991).

3–60–2B. CRIMES AND OFFENSES NOT CAPITAL—VIOLATIONS OF FEDERAL LAW (ARTICLE 134, CLAUSE 3)

NOTE 1: Limitations on crimes and offenses not capital. A capital offense may not be tried under Article 134. The General Article should not be charged when the offense is prohibited by Articles 80-132. Under the preemption doctrine, the General Article may not be used to charge a residuum of the elements of an Article 80-132 offense, such as charging larceny less the element of intent. See MCM, Part IV, Paragraph 60(c)(5) and United States v. McGuinnes, 35 MJ 149 (CMA 1992).

a. MAXIMUM PUNISHMENT:

Based on the Federal statute allegedly violated. If the U.S. Code provides for confinement for 1 year or more, DD and TF are also authorized; if 6 months or more, BCD and TF are also authorized; if less than 6 months, 2/3 forfeitures per month for the maximum period of confinement is authorized. See RCM 1003(c)(1)(B)(ii).

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did at/on board—location (jurisdictional nature of the location, if necessary), on or about _____, (allege all elements of federal offense) in violation of (18) (21) (_) U.S. Code Section _____.

NOTE 2: Pleading jurisdiction. Some Federal statutes apply everywhere; others apply only within the special territorial and maritime jurisdiction of the United States. Where jurisdiction of the Federal statute is not universal, jurisdiction should be pled.

c. ELEMENTS:

NOTE 3: Identifying elements and applicable definitions. The military judge should ordinarily seek the position of counsel as to the elements and applicable definitions and hold an Article 39(a) session early in the trial to clarify generally what instructions may be given. The West Corporation and other legal publishers have Federal pattern instructions available.

NOTE 4: Jurisdiction as an element of the offense. When the offense alleged is one that can be committed only at locations under exclusive or concurrent federal jurisdiction, or areas within the territorial or maritime jurisdiction of the United States, such jurisdiction is an element and must be determined by the fact finder. In appropriate cases, judicial notice may substitute for other evidence. See Instruction 7-6. Allege all the elements of the federal statute violated, including any required data as to the location of the alleged offense.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Provide all pertinent definitions.

e. REFERENCES: United States v. Mayo, 12 MJ 286 (CMA 1982); United States v. Perry, 12 MJ 112 (CMA 1981).

3–60–2C. CRIMES AND OFFENSES NOT CAPITAL—VIOLATIONS OF STATE LAW AS VIOLATIONS OF FEDERAL LAW UNDER THE ASSIMILATIVE CRIMES ACT (ARTICLE 134, CLAUSE 3)

NOTE 1: The Assimilative Crimes Act. Violations of State law that occur within areas of exclusive or concurrent Federal jurisdiction within the State become violations of Federal law under the Assimilative Crimes Act, 18 U.S.C. Section 13, provided other Federal criminal law, including the UCMJ, has not defined an applicable offense for the alleged misconduct. Accordingly, a specification alleging violations of State law, as assimilated into Federal law, at a location not under Federal exclusive or concurrent jurisdiction does not ordinarily state an offense.

NOTE 2: Limitations on crimes and offenses not capital. A capital offense may not be tried under Article 134. The General Article should not be charged when the offense is prohibited by Articles 80-132. Under the preemption doctrine, the General Article may not be used to charge a residuum of the elements of an Article 80-132 offense, such as charging larceny less the element of intent. See MCM, Part IV, Paragraph 60(c)(5) and United States v. McGuinnes, 35 MJ 149 (CMA 1992).

a. MAXIMUM PUNISHMENT:

Based on the assimilated state statute allegedly violated. If the assimilated state statute provides for confinement for 1 year or more, DD and TF are also authorized; if 6 months or more, BCD and TF are also authorized; if less than 6 months, 2/3 forfeitures per month for the maximum period of confinement is authorized. See 18 U.S.C. section 13(a) (last phrase) and RCM 1003(c)(1)(B)(ii).

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did at _____, a place under exclusive or concurrent federal jurisdiction, on or about _____, (allege all elements of state offense), in violation of (Article 27, Section 35A, of the Code of Maryland) (_____) assimilated into Federal law by 18 U.S. Code Section 13.

NOTE 3: Alleging state statutes. The specification should cite the official statute of the state, not a commercial compilation. For example, allege a violation of the Texas Penal Code, not Vernon's Annotated Texas Penal Code.

c. ELEMENTS:

NOTE 4: Identifying elements and applicable definitions. The military judge should ordinarily seek the position of counsel as to the elements and applicable definitions and hold an Article 39(a) session early in the trial to clarify generally what instructions may be given. Allege all the elements of the state statute violated, including any required data as to location of offense.

NOTE 5: Jurisdiction as an element of the offense. Exclusive or concurrent federal jurisdiction—not merely a possessory interest or military control—is an element of an Assimilative Crimes Act specification and must be determined by the fact finder, although

in an appropriate case judicial notice may substitute for other evidence. See Instruction 7-6.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Provide all pertinent definitions.

e. REFERENCES: United States v. Irvin, 21 MJ 184 (CMA 1986); United States v. Perry, 12 MJ 112 (CMA 1981); United States v. Sellars, 5 MJ 814 (ACMR 1977).

3–60–3. UNLAWFULLY TRANSPORTING A VEHICLE OR AIRCRAFT IN INTERSTATE OR FOREIGN COMMERCE (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

In that _____ did, (at/on board—location), (between _____ and _____) on or about _____, unlawfully transport (a motor vehicle) (an aircraft) in (interstate) (foreign) commerce, then knowing the said (motor vehicle) (aircraft) to have been stolen.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully transported (a motor vehicle) (an aircraft) in (interstate) (foreign) commerce;

(2) That the (motor vehicle) (aircraft) had been stolen;

(3) That, at the time the accused transported the (motor vehicle) (aircraft) (he) (she) then knew it had been stolen; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 1: Incorporating the elements of larceny. The military judge should list here the elements of the offense of larceny, including pertinent definitions and supplemental instructions. See Instruction 3-46-1, Larceny.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

e. REFERENCES: This specification alleges a violation of the Dyer Act, 18 USC 2312 (1964).

3–60–4. UNCLEAN ACCOUTERMENT, ARMS, OR UNIFORM (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 1 month, 1 month, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) was, (at/on board—location), on or about _____, found with an unclean (rifle) (uniform) (_____), he/she being at fault in failing to maintain such property in a clean condition.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was found with an unclean (rifle) (uniform) (_____);

(2) That the accused had a duty to maintain the (rifle) (uniform) (_____) in a clean condition;

(3) That the accused was at fault in failing to maintain the (rifle) (uniform) (_____) in a clean condition; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

3–60–5. UNIFORM—APPEARING IN UNCLEAN OR IMPROPER (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 1 month, 1 month, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, on or about _____, wrongfully appear (at/on board—location), (without his/her _____) (in an unclean) (with an unclean) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused appeared (without (his) (her) _____) (in an unclean uniform) (with an unclean _____) (_____); and

(2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

3–61–1. ABUSING PUBLIC ANIMAL (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, wrongfully (kick a public drug detector dog in the nose) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully (state the manner of abuse of a public animal alleged); and

(2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A "public animal" is any animal owned or used by (the United States) (any local or state government) (any territory or possession of the United States) (any wild animal located on public land in the United States, its territories or possessions).

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

3–62–1. ADULTERY (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), _____, (a married man/a married woman), did, (at/on board—location), on or about _____, wrongfully have sexual intercourse with _____, a (married) man/woman not her husband/his wife.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully had sexual intercourse with (state the name of the man/woman alleged);

(2) That, at the time, (the accused was married to another) (and) (state the name of the man/woman alleged) was married to another); and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Sexual intercourse" is any penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.

NOTE 1: Lack of penetration in issue. If lack of penetration is in issue, the military judge should further define what is meant by the female sex organ. The instruction below may be helpful. See also United States v. Williams, 25 MJ 854 (AFCMR 1988), pet. denied, 27 MJ 166 (CMA 1988) and United States v. Tu, 30 MJ 587 (ACMR 1990).

The "female sex organ" includes not only the vagina, which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. "Labia" is the Latin and medically correct term for "lips."

NOTE 2: Prejudicial or service discrediting nature of the offense. To constitute an offense under the UCMJ, the adultery must either be directly prejudicial to good order and discipline or service discrediting. When this element is in issue, the following instruction should be given:

Not every act of adultery constitutes an offense under the Uniform Code of Military Justice. To constitute an offense, the government must prove beyond a reasonable doubt that the accused's adultery was either directly prejudicial to good order and discipline or service discrediting.

"Conduct prejudicial to good order and discipline" includes adultery that has an obvious and measurably divisive effect on the discipline, morale, or cohesion of a military unit or organization, or that has a clearly detrimental impact on the authority, stature, or esteem of a service member.) ("Service discrediting conduct" includes adultery that has a tendency, because of its open or notorious nature, to bring the service into disrepute, to make it subject to public ridicule, or to lower it in public esteem.

Under some circumstances, adultery may not be prejudicial to good order and discipline but, nonetheless, may be service discrediting, as I have explained those terms to you. Likewise, depending on the circumstances, adultery can be prejudicial to good order and discipline but not be service discrediting.

In determining whether the alleged adultery in this case is prejudicial to good order and discipline or is of a nature to bring discredit upon the armed forces, you should consider all the facts and circumstances offered on this issue, including, but not limited to:

(the accused's marital status, military rank, grade, or position);

(the co-actor's marital status, military rank, grade, or position, or relationship to the armed forces);

(the military status of the accused's spouse or the co-actor's spouse, or their relationship to the armed forces);

(the impact, if any, of the adulterous relationship on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces);

(the misuse, if any, of government time and resources to facilitate the commission of the adultery);

(whether the adultery persisted despite counseling or orders to desist; the flagrancy of the adulterous relationship, such as whether any notoriety ensued; and whether the adultery was accompanied by other violations of the UCMJ);

(the impact of the adultery, if any, on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency);

(whether the accused or co-actor was legally separated);

(whether the adultery involves an ongoing or recent relationship or is remote in time);

(where the adultery occurred);

(who may have known of the adultery);

(the nature, if any, of the official and personal relationship between the accused and (state the name of co-actor));

(_____).

NOTE 3: Marriage. If the evidence raises the issue whether either the accused or the co-actor are actually married, instruct as follows:

A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction.

NOTE 4: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), may be applicable as to the manner of proof that the accused knew of the marital status of his/her co-actor or the prejudicial or service discrediting nature or effect of the conduct.

NOTE 5: Mistake of fact. If the evidence raises the issue that the accused may have mistakenly believed either that the accused and the co-actor were both unmarried or that they were lawfully married to each other, Instruction 5-11-2, Ignorance or Mistake of Fact-General Intent, may be applicable.

3–63–1. INDECENT ASSAULT (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____, commit an indecent assault upon _____, a person not his/her wife/husband by _____, with intent to gratify his/her (lust) (sexual desires).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (attempted to do) (offered to do) (did) bodily harm to (state the name of the alleged victim);

(2) That the accused did so by (state the alleged manner of the assault or battery);

(3) That the act(s) (was) (were) done with unlawful force or violence;

(4) That (state the name of the alleged victim) was not the husband/wife of the accused;

(5) That the accused's acts were done without the consent of (state the name of the alleged victim) and against his/her will;

(6) That the acts were done with the intent to gratify the (lust) (and) (or) (sexual desires) of the accused; and

(7) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim. "Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service

discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 1: Applicability of this instruction after 1 October 2007. Use this instruction only for offenses occurring prior to 1 October 2007 (including any indecent assault charged under Article 134(1) or Article 134(2)).

NOTE 2: Nature of the offense of indecent assault. Based upon the elements in the MCM and United States v. Hoggard, 43 MJ 1 (CAAF 1995), there is no requirement that the assault underlying the offense of indecent assault be indecent. The following instruction is appropriate to inform the court members that although the term "indecent" was used during trial to describe this offense, the manner of the actual assault need not be indecent. (The MCM unnecessarily refers the user to a definition for the term "indecent" when describing the offense of indecent assault.) A definition of "indecent" is unnecessary, confusing, and inappropriate and should not be given for the offense of indecent assault. The instruction below should only be given when necessary to avoid confusion caused by reference to the word "indecent."

Although the word "indecent" is in the charged specification, the elements of this offense do not require that the manner of the assault be "indecent." However, as I have instructed you, what is required as an element is that the act(s) (was) (were) done with the intent to gratify the (lust) and/or (sexual desires) of the accused.

NOTE 3: Assault by attempt. If the specification alleges an attempt to do bodily harm, give the following instruction:

An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability and specific intent to do bodily harm to another. Physical injury or offensive touching is not required. (The mere use of threatening words is not an attempt to do bodily harm.)

NOTE 4: Assault by offer. If the specification alleges an assault by offer, give the following instruction:

An "offer to do bodily harm" is an intentional act which foreseeably causes another to reasonably believe that force will immediately be applied to his/her person. Specific intent to inflict bodily harm is not required. There must be an apparent present ability to bring about bodily harm. Physical injury or offensive touching is not required. (The mere use of threatening words is not an offer to do bodily harm.)

NOTE 5: Battery. If the specification alleges a battery, give the following instruction:

An assault in which bodily harm is inflicted is called a "battery." A "battery" is an unlawful and intentional application of force or violence to another. "Bodily harm" means any physical injury to or offensive touching of another person, however slight.

NOTE 6: Lesser included offense. The military judge should be prepared to give Instruction 3-90-1, Indecent Acts with Another, if the accused's intent, marital status of the parties, or consent of the victim is in issue.

NOTE 7: Other instructions. The accused must have had the specific intent to gratify his/her lust or sexual desires. Accordingly, Instruction 7-3, Circumstantial Evidence (Intent), is normally applicable. Instruction 5-12, Voluntary Intoxication, may be raised by the evidence.

3–64–1. ASSAULT WITH INTENT TO COMMIT CERTAIN OFFENSES (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) With intent to commit murder or rape: DD, TF, 20 years, E-1.

(2) With intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary: DD, TF, 10 years, E-1.

(3) With intent to commit housebreaking: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent to commit (murder) (voluntary manslaughter) (rape) (robbery) (sodomy) (arson) (burglary) (housebreaking), commit an assault upon _____ by _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (attempted to do) (offered to do) (did) bodily harm to (state the name of the alleged victim);

(2) That the accused did so by (state the manner of the assault or battery alleged);

(3) That the (attempt) (offer) (bodily harm) was done with unlawful force or violence;

(4) That at the time, the accused intended to commit (murder) (voluntary manslaughter) (rape) (robbery) (sodomy) (arson) (burglary) (housebreaking); and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and

discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 1: Assault by attempt. If the specification alleges an attempt to do bodily harm, give the following instruction:

An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with apparent present ability and specific intent to do bodily harm to another. Physical injury or offensive touching is not required. (The mere use of threatening words is not an "attempt to do bodily harm.")

NOTE 2: Assault by offer. If the specification alleges assault by offer give the following three instructions. Do not give the third instruction if the accused is charged with assault with intent to commit murder or voluntary manslaughter.

(1) An "offer to do bodily harm" is an intentional act which foreseeably causes another to reasonably believe that force will immediately be applied to his/her person.

(2) There must be an apparent present ability to bring about bodily harm. Physical injury or offensive touching is not required. (The mere use of threatening words is not an "offer to do bodily harm.")

(3) Specific intent to inflict bodily harm is not required.

NOTE 3: Battery. If the specification alleges a battery, give the following instruction:

An assault in which bodily harm is inflicted is called a "battery." A "battery" is an unlawful and intentional application of force or violence to another. "Bodily harm" means any physical injury to or offensive touching of another person, however slight.

NOTE 4: Elements of offense allegedly intended. Give the following instruction in each case:

Proof that the offense of (state the offense allegedly intended) occurred or was committed by the accused is not required. However, you must be

convinced beyond a reasonable doubt that, at the time of the assault described in the specification, the accused had the specific intent to commit (state the offense allegedly intended).

The elements of that offense are: (state the elements of the offense intended).

NOTE 5: Intent to commit murder or voluntary manslaughter. If the accused is charged with assault to commit murder or voluntary manslaughter, the military judge must instruct that the accused must have had the specific intent to kill; an intent to only inflict great bodily harm is not sufficient. United States v. Roa, 12 MJ 210 (CMA 1982). The following instruction should be given after the elements of the offense intended when the intended offense is murder or voluntary manslaughter:

To convict the accused of this offense, proof that the accused only intended to inflict great bodily harm upon the alleged victim is not sufficient. The prosecution must prove beyond a reasonable doubt that the accused specifically intended to kill (state the name of the alleged victim).

NOTE 6: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–65–1. BIGAMY (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 2 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully and bigamously marry _____, having at the time of his/her said marriage to _____ a lawful husband/wife then living, to wit: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused married (state the name of the person the accused allegedly bigamously married);

(2) That this marriage was wrongful in that the accused then had living a lawful husband/wife, namely, (state the name of the alleged lawful spouse); and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE: Mistake or ignorance raised. If any issue of ignorance or mistake of fact arises concerning the accused's marital status at the time of the alleged offense, Instruction 5-11, Ignorance or Mistake of Fact or Law, is ordinarily applicable.

3–66–1. BRIBERY AND GRAFT—ASKING, ACCEPTING, OR RECEIVING (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) Bribery: DD, TF, 5 years, E-1.

(2) Graft: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), being at the time (a contracting officer for _____) (the personnel officer of _____) (_____), did (at/on board—location), on or about _____, wrongfully (ask) (accept) (receive) from _____, (a contracting company engaged in _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____), [with intent to have his/her (decision) (action) influenced with respect to _____] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by him/her _____ in relation to _____], an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from _____) (the transfer of _____ to duty with _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully and unlawfully (asked for) (accepted) (received) (the sum of_____ dollars) (_____, of a value of (about) _____ dollars) (_____) from (state the name of the person or organization alleged);

(2) That, at that time, the accused (occupied an official position) (had official duties), namely, (state the official position or official duties, as alleged);

(3) That the accused (asked for) (accepted) (received) this (sum) (_____)

(a) (with intent to have (his) (her) (decision) (action) influenced with respect to (state the matter alleged), or

(b) (as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by (him) (her) in relation to (state the matter alleged);

(4) That (state the matter alleged) was an official matter in which the United States was and is interested; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 1: Distinction between bribery and graft. The distinction between bribery and graft is that bribery involves an "intent to influence" whereas graft involves "compensation for services" when no compensation is due. To allege the offense of bribery, the pleading must contain the language "with intent to have his or her (decision) (action) influenced with respect to _____." To allege the offense of graft, the pleading should contain the language "(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by him/her in relation to _____," or other appropriate language.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), may be applicable.

3–66–2. BRIBERY AND GRAFT—PROMISING, OFFERING, OR GIVING (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) Bribery: DD, TF, 5 years, E-1.

(2) Graft: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did (at/on board location), on or about _____, wrongfully (promise) (offer) (give) to _____, (his/her commanding officer) (the claims officer of _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____), [with intent to influence the (decision) (action) of the said _____ with respect to _____] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by the said _____ in relation to _____)], an official matter in which the United States was and is interested, to wit: (the granting of leave to _____) (the processing of a claim against the United States in favor of _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully and unlawfully (promised) (offered) (gave) (the sum of _____ dollars) (_____ of a value of about _____ dollars) to (state the name of the person alleged);

(2) That, at that time, (state the name of the person alleged) (occupied an official position) (had official duties), namely, (state the official position or official duties as alleged);

(3) That this (sum) (_____) was (promised) (offered) (given)

(a) with the intent to influence the (decision) (action) of (state the name of the person alleged) with respect to (state the matter alleged); or

(b) (as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by the said (state the name of the person alleged) in relation to (state the matter alleged);

(4) That (state the matter alleged) was an official matter in which the United States was and is interested; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

b. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 1: Distinction between bribery and graft. The distinction between bribery and graft is that bribery involves an "intent to influence" whereas graft involves "compensation for services" when no compensation is due. To allege the offense of bribery, the pleading must contain the language "with intent to have his or her (decision) (action) influenced with respect to _____." To allege the offense of graft, the pleading should contain the language "(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by him/her in relation to _____," or other appropriate language.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), may be applicable.

3–67–1. BURNING WITH INTENT TO DEFRAUD (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

In that _____(personal jurisdiction data), did (at/on board—location), on or about _____, willfully and maliciously (burn) (set fire to) (a dwelling) (a barn) (an automobile), the property of _____, with intent to defraud (the insurer thereof, to wit: _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused willfully and maliciously (burned) (set fire to) (state the property alleged), the property of (state the name of the owner or other person alleged);

(2) That such (burning) (setting of fire) was with the intent to defraud (state the name of the person alleged); and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

An act is done "willfully" if it is done intentionally or on purpose.

"Maliciously" means deliberately and without justification or excuse. The malice required for the offense does not have to amount to ill will or hostility. It is sufficient if a person deliberately and without justification or excuse burns or sets fire to property with intent to defraud another.

"Intent to defraud" means an intent to obtain an article or thing of value through a misrepresentation and to apply it to one's own use and benefit or to the use and benefit of another, either temporarily or permanently.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–68–1. CHECK—WORTHLESS—MAKING AND UTTERING—BY DISHONORABLY FAILING TO MAINTAIN SUFFICIENT FUNDS (ARTICLE 134)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1 (if "mega-spec" alleged, *see* United States v. Mincey, 42 MJ 376 (CAAF 1995)).

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, make and utter to _____ a certain check, in words and figures as follows, to wit: _____, (for the purchase of _____) (in payment of a debt) (for the purpose of _____), and did thereafter dishonorably fail to (place) (maintain) sufficient funds in the _____ Bank for payment of such check in full upon its presentment for payment.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused made and uttered to (state the name of the person alleged) a certain check, to wit: (here describe the check, or, if it is set forth in the specification, refer to it);

(2) That the check was made and uttered (for the purchase of _____) (in payment of a debt) (for the purpose of _____), as alleged;

(3) That the accused subsequently failed to (place) (maintain) sufficient (funds in) (credit with) the (state the name of the bank or other depository) for payment of the check in full upon its presentment for payment;

(4) That this failure was dishonorable; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Made" means the act of writing and signing the check. "Uttered" means to have used a check in some way with a representation by either words or actions that the check will be paid in full by the (bank) (depository) when presented for payment by a (person) (organization) entitled to payment. "Upon its presentment" means the time when the check is presented for payment to the (bank) (depository) which on the face of the check has the responsibility to pay the sum indicated.

Mere negligence, that is the absence of due care in maintaining one's bank account, is not enough to convict of this offense. The accused's conduct in maintaining (his) (her) bank account must have been "dishonorable," that is, a failure which (is (fraudulent) (deceitful) (a willful evasion) (made in bad faith) (deliberate) (based on false promises)) (indicates a grossly indifferent attitude toward the status of one's bank account and just obligations) (_____).

NOTE 1: Gambling debts and checks for gambling funds. In United States v. Falcon, 65 MJ 386 (CAAF 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's defense"). See United States v. Wallace, 36 CMR 148 (CMA 1966), United States v. Allberry, 44 MJ 226 (CAAF 1996); United States v. Green, 44 MJ 828 (ACCA 1996).

Note that the CAAF in Falcon declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. Id., at footnote 4.

The CAAF also specifically declined to address the ongoing validity of United States v. Walter, 23 CMR 275 (CMA 1957), and United States v. Lenton, 25 CMR 194 (CMA 1958), because Falcon dealt with legal gambling and Walter and Lenton dealt with illegal gambling. Falcon, at footnote 6. Until the CAAF specifically addresses the ongoing validity of Walter and Lenton, if there is an issue whether the check was used to pay a debt from illegal gambling or the check was used to obtain funds to gamble illegally, the first paragraph of the instruction below should be given. If there is an issue that some but not all of the check arose from an illegal gambling debt or was used to obtain funds for illegal gambling, the fourth paragraph of the instruction below should also be given.

The evidence has raised the issue whether the check(s) in question (was) (were) written to (pay a debt from gambling illegally) (obtain funds

with which to gamble illegally). The Uniform Code of Military Justice may not be used to enforce worthless checks used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally) when the purported victim (or payee of the check) was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in (The) Specification(s) (___) of (The) (Additional) Charge(s) (___), you must be convinced beyond reasonable doubt that the check(s) in question (was) (were) not used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). Even if the check(s) (was) (were) used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally), if you are convinced beyond reasonable doubt that the purported victim (or payee of the check) was not a party to and did not actively facilitate the illegal gambling, and otherwise did not have knowledge of the illegal gambling-related purpose of the check, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(Also, if you find beyond reasonable doubt that the accused intentionally, that is, purposely, avoided the check-cashing facility's efforts to discover that (he) (she) was on a dishonored or "bad check" list, you may find the accused guilty notwithstanding the UCMJ limitation I mentioned, when all other elements of the offense have been proven beyond a reasonable doubt.)

(The evidence has also raised the issue whether all or only part of the check(s) in question (was) (were) used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). The UCMJ limitation I mentioned only extends to that part of the check's(s') proceeds that (was) (were) used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the check(s) which you are convinced

beyond a reasonable doubt was not used to (pay a debt from gambling illegally) (obtain funds with which to gamble illegally). You do this by excepting the value(s) alleged in the specification(s) and substituting that/those value(s) of which you are convinced beyond a reasonable doubt (was) (were) not used to (pay a debt from gambling illegally) (obtain proceeds to gamble illegally).)

NOTE 2: Mistake of fact—criminal state of mind and satisfaction on the instrument. The accused must have had a "criminal mind" in the sense that the accused must have had a grossly indifferent attitude toward the state of the accused's bank account and just obligations to be guilty of this offense. The military judge should, therefore, be alert to evidence inconsistent with such "criminal mind," such as a redemption or an attempt to redeem worthless checks, an accord with the payee, or a mistake as to the balance of the account. On the other hand, ultimate "satisfaction" of the payee in the sense that the instrument has been paid at the time of trial does not necessarily mean "satisfaction" with the accused's conduct while the instrument remained unpaid. United States v. Moseley, 35 MJ 481 (CMA 1992). Instruction 5-11, Mistake of Fact, may be applicable.

3–68A–1. CHILD ENDANGERMENT (ARTICLE 134)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007.

a. MAXIMUM PUNISHMENT:

(1) By design resulting in grievous bodily harm: DD, TF, 8 years, E-1.

(2) By design resulting in harm: DD, TF, 5 years, E-1.

(3) Other cases by design: DD, TF, 4 years, E-1.

(4) By culpable negligence resulting in grievous bodily harm: DD, TF, 3 years, E-1.

(5) By culpable negligence resulting in harm: BCD, TF, 2 years, E-1.

(6) Other cases by culpable negligence: BCD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____(personal jurisdiction data), (at/on board–location), on or about _____, had a duty for the care of _____, a child under the age of 16 years and did endanger the (mental health) (physical health) (safety) (welfare) of said _____, by _____, and that such conduct (was by design) (constituted culpable negligence) [which resulted in (grievous bodily harm, to wit: (broken leg) (deep cut) (fractured skull) (_____)) (harm, to wit: _____)].

c. ELEMENTS:

(1) That the accused had a duty for the care of (state the name of the alleged victim);

(2) That (state the name of the alleged victim) was under the age of 16 years;

(3) That the accused endangered (state the name of the alleged victim)'s (mental health) (physical health) (safety) (welfare) through (design) (culpable negligence); (and)

[(4)] That the accused's conduct resulted in (harm) (grievous bodily harm) to (state the name of the alleged victim); (and)

[(4) or (5)] That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Endanger" means to subject one to reasonable probability of harm.

"Duty of care" is determined by the totality of the circumstances and may be established by statute, regulation, legal parent-child relationship, mutual agreement, or assumption of control or custody by affirmative act. When there is no duty of care of a child, there is no offense under this paragraph. Thus, there is no offense when a stranger makes no effort to feed a starving child or an individual, such as a neighbor, not charged with the care of a child does not prevent the child from running and playing in the street.

("Design" means on purpose, intentionally, or according to plan and requires specific intent to endanger the child.)

("Culpable negligence" is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequences of such acts. In this regard, the age and maturity of the child, the conditions surrounding the neglectful conduct, the proximity of assistance available, the nature of the environment in which the child may have been left, the provisions made for care of the child, and the location of the parent or adult responsible for the child relative to the location of the child, among others, may be considered in determining whether the conduct constituted culpable negligence. (While this offense may be committed against any child under 16, the age of the victim is a factor in the culpable negligence determination. Leaving a teenager alone for an evening may not be culpable (or even simple) negligence; leaving an infant or toddler for the same period might constitute culpable negligence. On the other hand, leaving a teenager without supervision

for an extended period while the accused was on temporary duty outside commuting distance might constitute culpable negligence.))

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 2: If actual harm not alleged. If the endangerment is not alleged to have resulted in actual harm, give the following instruction:

Actual physical or mental harm to the child is not required. The offense requires that the accused's actions reasonably could have caused physical or mental harm or suffering.

NOTE 3: If harm is alleged. If the endangerment is alleged to have resulted in harm, give the following instruction:

"Harm" means actual physical or mental injury to the child.

NOTE 4: If grievous bodily harm is alleged. If the endangerment is alleged to have resulted in grievous bodily harm, give the following instruction:

"Grievous bodily harm" means serious bodily injury. It does not include minor injuries such as a black eye or a bloody nose, but it does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries.

NOTE 5: Other Instructions. If "by design" is alleged, Instruction 7-3, Circumstantial Evidence (Intent), is normally applicable; Instruction 5-12, Voluntary Intoxication, may be raised by the evidence.

3–69–1. WRONGFUL COHABITATION (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 4 months, 4 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), from about _____, to about _____, wrongfully cohabit with _____, a woman not his wife/a man not her husband.

c. ELEMENTS:

(1) That, from about (state the initial date alleged) to about (state the terminal date alleged), the accused and (state the name of the male/female participant alleged) openly and publicly lived together as husband and wife, holding themselves out as such;

(2) That (state the name of the male/female participant alleged) was a male/female not the husband/wife of the accused;

(3) That this living together occurred at (state the place(s) alleged); and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Holding themselves out as husband and wife" means conduct or language which leads others to believe that a husband and wife relationship exists.

3–70–1. CORRECTIONAL CUSTODY—ESCAPE FROM (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), while undergoing the punishment of correctional custody imposed by a person authorized to do so, did, (at/on board—location), on or about _____, escape from correctional custody.

c. ELEMENTS:

(1) That the accused was duly placed in correctional custody at (state the place of correctional custody alleged) by a person authorized to do so;

(2) That, while in such correctional custody, the accused was under physical restraint imposed thereunder;

NOTE 1: When accused's knowledge of correctional custody status is in issue. Element 3 below must be given if there is any evidence from which it may justifiably be inferred that the accused may not have known of his/her correctional custody status and its limits. If given, Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable. See also Instruction 5-11-1, Ignorance or Mistake of Fact, for additional instructions which may be appropriate when such issue arises.

[(3)] That the accused knew of this correctional custody and the limits of the physical restraint imposed upon (him) (her);

(3) or (4) That (state the time and place alleged), the accused freed (himself) (herself) from the physical restraint of this correctional custody before (he) (she) had been released therefrom by proper authority; and

(4) or (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Correctional custody" describes the physical restraint of a person during duty or nonduty hours (or both) imposed as a punishment under Article 15, Uniform Code of Military Justice. Any completed casting off of this restraint before being set free by proper authority is escape from correctional custody. An escape is not complete until a person has, at least momentarily, freed (himself) (herself) from the restraint of the custody (so, if the movement toward an escape is opposed, or if immediate pursuit follows before the escape is actually completed, there will be no escape until the opposition is overcome or the pursuit is shaken off).

(An escape may be accomplished either with or without force or trickery, and either with or without the consent of the custodian.)

NOTE 2: Proof of underlying offense prohibited. It is not permissible to introduce evidence of the offense for which correctional custody or any other punishment was imposed. Proof that the accused was in the status of correctional custody is sufficient. When documentary evidence is used to establish that correctional custody was properly imposed, it should be masked to avoid reference to the offense for which the accused was originally punished. In such cases, the following instruction should be given:

The (Article 15 correspondence) (stipulation) (testimony of _____) (_____) was admitted into evidence only for the purpose of its tendency, if any, to show the accused may have been in correctional custody at the time and place referred to in the specification. You must disregard any evidence of possible misconduct which may have resulted in the accused's punishment to correctional custody, and you should not speculate about the nature of that possible misconduct.

NOTE 3: Status of person ordering correctional custody. Whether the status of the person ordering correctional custody authorized that person to impose correctional custody is a question of law to be decided by the military judge. Whether the person who imposed correctional custody had such status is a question of fact to be decided by the fact finder. The following instruction may be appropriate:

Any commander in the accused's chain of command whose authority has not been restricted by higher authority is authorized to impose correctional custody under Article 15, Uniform Code of Military Justice. Whether the person who allegedly imposed correctional custody in this

case, (state the name and rank of the person alleged), was in such a position of authority is a question of fact which you must decide.

NOTE 4: Other instructions. See Instruction 3-102-1 for standard instructions on the related offense of breaking restriction.

3–70–2. CORRECTIONAL CUSTODY—BREACH OF RESTRAINT DURING (ARTICLE 134)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), while duly undergoing the punishment of correctional custody imposed by a person authorized to do so, did, (at/on board—location), on or about _____, breach the restraint imposed thereunder by _____.

c. ELEMENTS:

(1) That the accused was duly placed in correctional custody at (state the place of correctional custody) by a person authorized to do so;

(2) That, while in such correctional custody, the accused was duly restrained by proper authority to the limits of (state the limits alleged);

NOTE 1: When accused's knowledge of correction custody status is in issue. Element 3 below must be given if there is any evidence from which it may justifiably be inferred that the accused may not have known of his/her correctional custody status and its limits or of the restraint and its limits. If given, Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable. Instruction 5-11-1, Ignorance or Mistake of Fact, may be appropriate when such issue arises.

[(3)] That the accused knew of this correctional custody and the limits of the restraint;

(3) or (4) That (state the time and place alleged), the accused went beyond the limits of the restraint before (he) (she) had been (released from the correctional custody) (relieved of the restraint) by proper authority;

(4) or (5) That the accused did so by (state the manner alleged);

(5) or (6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Correctional custody" is the physical restraint of a person during duty or nonduty hours (or both) imposed as a punishment under Article 15, Uniform Code of Military Justice. Although a person in correctional custody is always under physical restraint, this offense involves the breach of other specific limitations upon a person's freedom of movement while under the physical restraint. The specific limitations do not have to be enforced by physical means, and may include restraint imposed upon a person by oral or written orders from competent authority, directing that person to remain within specified limits, or to go to a certain place or to return therefrom, at a designated time or under specified circumstances. The specific restraint imposed is binding upon the person restrained, not by physical force, but because of (his) (her) moral and legal obligation to obey the orders given (him) (her).

NOTE 2: Proof of underlying offense prohibited. It is not permissible to introduce evidence of the offense for which the correctional custody or any additional punishment was imposed. Proof that the accused was in the status of correctional custody and the specific restraint imposed while in such status is sufficient. When documentary evidence is used to establish that correctional custody was properly imposed, it should be masked to avoid reference to the offense for which the accused was originally punished. In such cases, the following instruction should be given:

The (Article 15 correspondence) (stipulation) (testimony of _____) (_____) was admitted into evidence only for the purpose of its tendency, if any, to show the accused may have been in correctional custody at the time and place referred to in the specification. You must disregard any evidence of possible misconduct which may have resulted in the accused's punishment to correctional custody, and you should not speculate about the nature of that possible misconduct.

NOTE 3: Status of person ordering correctional custody. Whether the status of the person ordering correctional custody authorized that person to impose correctional custody is a

question of law to be decided by the military judge. Whether the person who imposed correctional custody had such status is a question of fact to be decided by the fact finder. The following instruction may be appropriate:

> Any commander in the accused's chain of command whose authority has not been restricted by higher authority is authorized to impose correctional custody under Article 15, Uniform Code of Military Justice. Whether the person who allegedly imposed correctional custody in this case, (state the name and rank of the person alleged), was in such a position of authority is a question of fact which you must decide.

NOTE 4: Other instructions. Instructions 3-19-3 and 3-19-4 contain standard instructions on related "escape" offenses.

3–71–1. DEBT, DISHONORABLY FAILING TO PAY (ARTICLE 134)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, and E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), being indebted to _____ in the sum of $_____ for _____, which amount became due and payable (on) (about) (on or about) _____, did, (at/on board—location), from _____ to _____, dishonorably fail to pay said debt.

c. ELEMENTS:

(1) That the accused was indebted to (state the name of the person alleged) in the sum of (state the amount alleged) for (state the alleged debt);

(2) That this debt became due and payable (on) (about) (on or about) (state the date alleged);

(3) That (state the place alleged), from about _____ to about _____ while the debt was still due and payable, the accused dishonorably failed to pay this debt; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem. The failure to pay the debt must have been the result of more than mere negligence, that is, the absence of due care. The failure to pay must be dishonorable. A failure to pay is "dishonorable" if it (is (fraudulent) (deceitful) (a willful evasion) (in bad faith) (deliberate) (based on false promises)) (results from a grossly indifferent attitude toward one's just obligations) (_____).

NOTE 1: Gambling debts. In United States v. Falcon, 65 MJ 386 (CAAF 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's defense"). See United States v. Wallace, 36 CMR 148 (CMA 1966), United States v. Allberry, 44 MJ 226 (CAAF 1996); United States v. Green, 44 MJ 828 (ACCA 1996).

Note that the CAAF in Falcon declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. Id., at footnote 4.

The CAAF also specifically declined to address the ongoing validity of United States v. Walter, 23 CMR 275 (CMA 1957), and United States v. Lenton, 25 CMR 194 (CMA 1958), because Falcon dealt with legal gambling and Walter and Lenton dealt with illegal gambling. Falcon, at footnote 6. Until the CAAF specifically addresses the ongoing validity of Walter and Lenton, if there is an issue whether the debt arose from illegal gambling, the first two paragraphs of the instruction below should be given. If there is an issue that some but not all of the debt(s) arose from illegal gambling, the third paragraph of the instruction below should also be given.

The evidence has raised the issue whether the debt(s) in question (was) (were) from gambling illegally. The Uniform Code of Military Justice may not be used to enforce debts from gambling illegally when the purported victim was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in (The) Specification(s) (___) of (The) (Additional) Charge(s) (___), you must be convinced beyond reasonable doubt that the debt(s) in question (was) (were) not debt(s) from gambling illegally. Even if the debt(s) (was) (were) from gambling illegally, if you are convinced beyond reasonable doubt that the purported victim was not a party to and did not actively facilitate the illegal gambling, and otherwise did not have knowledge of the illegal gambling-related purpose of the debt, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(The evidence has also raised the issue whether all or only part of the debt(s) in question (was) (were) from gambling illegally. The UCMJ limitation I mentioned only extends to that part of the debt(s) that (was)

(were) from gambling illegally. If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the debt(s) which you are convinced beyond a reasonable doubt (was) (were) not from gambling illegally. You do this by excepting the value(s) alleged in the specification(s) and substituting that/those value(s) of which you are convinced beyond a reasonable doubt (was) (were) not a debt from gambling illegally.)

NOTE 2: Mistake of fact—criminal state of mind and satisfaction on the obligation. The accused must have had a "criminal mind" in the sense that the accused must have had a grossly indifferent attitude toward the state of the accused's just obligations to be guilty of this offense. The military judge should, therefore, be alert to evidence inconsistent with such "criminal mind," such as a satisfaction of the debt, an accord with the creditor, or a mistake as to the terms of the debt. On the other hand, ultimate "satisfaction" of the creditor in the sense that the obligation has been paid at the time of trial does not necessarily mean "satisfaction" with the accused's conduct while the obligation remained unpaid. See United States v. Moseley, 35 MJ 481 (CMA 1992) with respect to this issue in a worthless check prosecution. Instruction 5-11, Mistake of Fact, may be applicable.

e. REFERENCES: United States v. Gardner, 35 MJ 300 (CMA 1992).

3–72–1. DISLOYAL STATEMENTS (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, with intent to [promote (disloyalty) (disaffection) (disloyalty and disaffection) among (the troops) (the civilian populace) (the troops and the civilian populace)] [(interfere with) (impair) the (loyalty,) (morale) (and) (discipline) of members of the Armed Forces of the United States], communicate to _____ the following statement, to wit: "_____, "or words to that effect, which statement was disloyal to the United States.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused made the statement "(quote the statement alleged)";

(2) That the statement was made in public;

(3) That the statement was disloyal to the United States;

(4) That the statement was made with the intent to:

(a) Promote (disloyalty) (disaffection) (disloyalty and disaffection) toward the United States among (the troops) (the civilian populace) (the troops and civilian populace), or

(b) (Interfere with) (Impair) the (loyalty to the United States) (morale) (and) (discipline) of any member of the armed forces of the United States), or

(c) (_____); and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and

discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

A statement is "made" by a person if it is spoken, uttered, written, published, printed, issued, put forth, or circulated by that person. A statement is made "in public" if it is made openly or known to many.

("Disloyalty" means not being true or faithful to the United States. Being unfaithful or untrue to the United States Army, or any other department of government or to any particular person is not necessarily disloyalty toward the United States.)

("Disaffection" means disgust, discontent with, ill will or hostility toward the United States. Disgust or discontent with, ill will or hostility toward the United States Army or other department of government or to any particular person is not necessarily disaffection toward the United States.) (Therefore, willful disobedience by the accused of (an) order(s) or urging by the accused that other members of the military willfully disobey (an) order(s) is not the equivalent of (disloyalty) (disaffection) (disloyalty and disaffection) toward the United States.) Additionally, the mere disagreement with or objection to a policy of the government is not necessarily indicative of (disloyalty) (disaffection) (disloyalty and disaffection) to the United States.)

NOTE: Possible lesser included offense. See Instruction 3-105-1, Soliciting Another to Commit an Offense.

3–73–1. DISORDERLY CONDUCT—DRUNKENNESS (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) Disorderly conduct.

(a) Bringing discredit upon the military: 2/3 x 4 months, 4 months, E-1.

(b) Other cases: 2/3 x 1 month, 1 month, E-1.

(2) Drunkenness.

(a) Aboard ship or bring discredit upon the military: 2/3 x 3 months, 3 months, E-1.

(b) Other cases: 2/3 x 1 month, 1 month, E-1.

(3) Drunk and disorderly.

(a) Aboard ship: BCD, TF, 6 months, E-1.

(b) Bringing discredit upon the military: 2/3 x 6 months, 6 months, E-1.

(c) Other cases: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), was, (at/on board—location), on or about _____, (drunk) (disorderly) (drunk and disorderly) (which conduct was of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was (drunk) (disorderly) (drunk and disorderly) (on board ship); and

(2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

("Disorderly" refers to conduct which is of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character.)

("Drunk" means any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties.)

NOTE 1: Further definitions of "drunk". If further clarification is needed, the military judge may instruct as follows:

A person is drunk who is under the influence of an intoxicant so that the use of (his) (her) faculties is impaired. Such impairment did not exist unless the accused's conduct due to intoxicating (liquors) (drugs) was such as to create the impression within the minds of observers that (he) (she) was unable to act like a normal, rational person.

NOTE 2: Service discrediting conduct pled. When service discrediting conduct is pled in the specification, the following instruction should be given:

The government has alleged that the conduct in question in the specification(s) of (The) (Additional) Charge was of a nature to bring discredit upon the armed forces. To convict the accused of the offense charged, you must be convinced beyond a reasonable doubt of all the elements, including that of the service discrediting nature of the conduct. If you are convinced of all the elements except the element of the service discrediting nature of the conduct, you may still convict the accused of drunk and disorderly conduct provided you are convinced beyond a reasonable doubt that the conduct was to the prejudice of good order and discipline in the armed forces. In this event you must make appropriate findings by excepting the language "which conduct was of a nature to bring discredit upon the armed forces." Of course, if you are convinced beyond a reasonable doubt that the conduct in question was both to the prejudice of good order and discipline in the armed forces, and was of a nature to bring discredit upon the armed forces, then you may convict the accused as (he) (she) is charged provided you are

convinced beyond a reasonable doubt as to the other elements of the specification(s) of (The) (Additional) Charge.

3–74–1. DRINKING LIQUOR WITH PRISONER (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), a (sentinel) (_____) in charge of prisoners, did, (at/on board—location), on or about _____, unlawfully drink intoxicating liquor with _____, a prisoner under his/her charge.

c. ELEMENTS: \

(1) That (state the time and place alleged), the accused was a (sentinel) (_____) in charge of prisoners;

(2) That, while in such capacity, the accused unlawfully drank intoxicating liquor with (state the name of the prisoner);

(3) That (state the name of the prisoner) was a prisoner under the charge of the accused;

(4) That the accused knew that (state the name of the prisoner) was a prisoner under (his) (her) charge; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Prisoner" means a person who is under apprehension, pretrial restraint, or in pretrial confinement. ("Pretrial restraint" includes conditions on liberty, restriction in lieu of arrest, or arrest.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–75–1. PRISONER FOUND DRUNK (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), a prisoner, was (at/on board—location), on or about _____, found drunk.

c. ELEMENTS:

(1) That the accused was a prisoner;

(2) That (state the time and place alleged), and while in such status, (he/she) was found drunk; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Prisoner" means a person who is under apprehension, pretrial restraint, or in pretrial confinement. ("Pretrial restraint" includes conditions on liberty, restriction in lieu of arrest, or arrest.)

"Drunkenness" means any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties.

NOTE: Further definition of drunkenness. If further clarification is needed, the military judge may instruct as follows:

A person is drunk who is under the influence of an intoxicant so that the use of (his) (her) faculties is impaired. Such impairment did not exist unless the accused's conduct due to intoxicating (liquors) (drugs) was such as to create the impression within the minds of observers that (he) (she) was unable to act like a normal, rational person.

3–76–1. DRUNKENNESS—INCAPACITATION FOR PERFORMANCE OF DUTIES THROUGH PRIOR INDULGENCE IN INTOXICATING LIQUORS OR ANY DRUG (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), was, (at/on board—location), on or about _____, as a result of wrongful previous overindulgence in intoxicating liquor or drugs, incapacitated for the proper performance of his/her duties.

c. ELEMENTS:

(1) That the accused had certain duties to perform, to wit: (state the duties alleged);

(2) That (state the time and place alleged), the accused was incapacitated for the proper performance of such duties;

(3) That such incapacitation was the result of previous wrongful overindulgence in (intoxicating liquor) (drugs); (and)

NOTE 1: Accused's lack of knowledge of duties raised. Element (4) below must be given if there is any evidence from which it may justifiably be inferred that the accused did not have knowledge, prior to the time of the incapacitation, that he/she had duties to perform. If given, Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

[(4)] That the accused knew or reasonably should have known prior to the time of (his) (her) incapacitation that (he) (she) had such duties to perform; and

(4) or (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Incapacitated" means unfit or unable to perform properly. A person is "unfit" to perform duties if at the time the duties are to commence, the person is drunk, even though physically able to perform the duties. Illness resulting from previous overindulgence is an example of being "unable" to perform duties.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–77–1. FALSE OR UNAUTHORIZED PASS—MAKING, ALTERING, COUNTERFEITING, TAMPERING (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully and falsely (make) (forge) (alter by _____) (counterfeit) (tamper with by _____) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____) in words and figures as follows: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully and falsely (made) (altered by _____) (counterfeited) (tampered with by _____) (_____) (a certain instrument purporting to be) (a) (an) (another's) (military) (naval) (official) (permit) (pass) (discharge certificate) (identification card) (_____), to wit: (state the terms of the instrument as alleged); and

(2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

A military document is wrongfully and falsely made if there is no authorization for its making and it contains intentionally false and important information which is known to be false. "Wrongfully and falsely made" means counterfeited or forged.) ("Altered" means to change or make different.)

3–77–2. FALSE OR UNAUTHORIZED PASS—WRONGFUL SALE, GIFT, OR LOAN (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) Sale: DD, TF, 3 years, E-1.

(2) Giving, loaning, disposing: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully (sell to _____) (give to _____) (loan to _____) (dispose of by _____) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____) in words and figures as follows: _____, the accused then well knowing the same to be (false) (unauthorized).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully (sold) (gave) (loaned) (disposed of) (_____) to (state the name of the person alleged) (a certain instrument purporting to be) (a) (an) (another's) (military) (naval) (official) (pass) (permit) (discharge certificate) (identification card) (_____), to wit: (state the terms of the instrument alleged);

(2) That the (pass) (permit) (_____) was (false) (and) (unauthorized);

(3) That the accused knew that the (pass) (permit) (_____) was (false) (and) (unauthorized); and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–77–3. WRONGFUL USE OR POSSESSION OF FALSE OR UNAUTHORIZED PASS (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) With intent to deceive or defraud: DD, TF, 3 years, E-1.

(2) Other cases: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____, wrongfully (use) (possess) (with intent to (defraud) (deceive)) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____), the accused then well knowing the same to be (false) (unauthorized).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully (used) (possessed) (a certain instrument purporting to be) (a) (an) (another's) (military) (naval) (official) (pass) (permit) (discharge certificate) (identification card) (order) (_____), to wit: (state the terms of the instrument as alleged);

(2) That the (pass) (permit) (discharge certificate) (identification card) (_____) was false or unauthorized;

(3) That the accused then knew that the (pass) (permit) (discharge certificate) (identification card) (_____) was false or unauthorized; (and)

NOTE 1: Intent to defraud or deceive alleged. If alleged, add the following element:

[(4)] That the accused (used) (possessed) such instrument with an intent to (defraud) (deceive); and

(4) or (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 2: Intent to deceive or defraud alleged. If alleged, give one or both of the below definitions as applicable.

"Intent to defraud" means an intent to obtain an article or thing of value through a misrepresentation and to apply it to one's own use and benefit or the use and benefit of another either temporarily or permanently.

"Intent to deceive" means an intent to mislead, cheat, or trick another by means of a misrepresentation made for the purpose of gaining an advantage for oneself or for a third person, or of bringing about a disadvantage to the interests of the person to whom the representation was made or to interests represented by that person.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

3–78–1. OBTAINING SERVICES UNDER FALSE PRETENSES (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) $500.00 or less: BCD, TF, 6 months, E-1.

(2) Over $500.00: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent to defraud, falsely pretend to _____ that _____, then knowing that the pretenses were false, and by means thereof did wrongfully obtain from _____ services, of a value of (about) $_____, to wit: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully and unlawfully obtained certain services, to wit: (describe the services alleged) from (state the name of the alleged victim);

(2) That the obtaining was by falsely pretending to (state the name of the alleged victim) that (state what the accused allegedly falsely pretended);

(3) That at the time of the obtaining the accused had knowledge of the falsity of the pretenses;

(4) That the obtaining was with the intent to defraud;

(5) That the services were of a value of (state the value alleged) (or of some lesser value, in which case the finding should be in the lesser amount); and

(6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Falsely pretending" means to use a false pretense. A "false pretense" is any misrepresentation of a (past) (or) (existing) fact by a person who knows it to be untrue. The misrepresentation must be an important factor in obtaining the services.

"Intent to defraud" means an intent to obtain a service of value through a misrepresentation and to apply it to one's own use and benefit or to the use and benefit of another, either temporarily or permanently.

NOTE 1: Similar or related offenses. This offense is similar to the offenses of larceny and wrongful appropriation by false pretenses, except that the object of the obtaining is "services" instead of "money, personal property, or article of value of any kind," as under Article 121. It evolved to provide a charge in those cases where Article 121 is inapplicable only because the object of the obtaining is not money, personal property, or an article of value. It is, therefore, appropriate to refer to Instruction 3-46-1, Larceny, in tailoring instructions to this offense. For elements tailored to theft of telephone service, see United States v. Roane, 43 MJ 93 (CAAF 1995).

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable. Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, as bearing on the issues of intent to defraud and knowledge, may be applicable.

3–79–1. FALSE SWEARING (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (in an affidavit) (in _____), wrongfully and unlawfully (make) (subscribe) under lawful (oath) (affirmation) a false statement in substance as follows: _____, which statement (he/she) did not then believe to be true.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused ((took an oath) (made an affirmation)) ((to an affidavit) (in _____));

(2) That such (oath) (affirmation) was administered to the accused in a (matter) (_____) in which an (oath) (affirmation) was (required) (authorized) by law;

(3) That the (oath) (affirmation) was administered by a person having the authority to do so;

(4) That upon such (oath) (affirmation) the accused willfully (made) (subscribed) a statement, to wit: (set forth the statement as alleged);

(5) That such statement was false;

(6) That the accused did not then believe the statement to be true; and

(7) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

(An "oath" is a formal pledge, coupled with an appeal to the Supreme Being, that the truth will be stated.)

(An "affirmation" is a solemn and formal pledge, binding upon one's conscience, that the truth will be stated.)

("Subscribe" means to write one's name on a document for the purpose of adopting its words as one's own expressions.)

NOTE 1: Corroboration instruction. When an instruction on corroboration is requested or otherwise appropriate, the judge should carefully tailor the following to include only instructions applicable to the case. Subparagraphs (1), (2), or a combination of (1) and (2) may be given, as appropriate:

As to the 5th element of this offense, there are special rules for proving the falsity of a statement. The falsity of a statement can be proven by testimony or documentary evidence by:

(1) The testimony of a witness which directly contradicts the statement described in the specification, as long as the witness's testimony is corroborated or supported by the testimony of at least one other witness or by some other evidence which tends to prove the falsity of the statement. You may find the accused guilty of false swearing only if you find beyond a reasonable doubt that the testimony of (state the name of the witness), who has testified as to the falsity of the statement described in the specification, is believable and is corroborated or supported by other trustworthy evidence or testimony. To "corroborate" means to strengthen, to make more certain, to add weight. The corroboration required to prove false swearing is proof of independent facts or circumstances which, considered together, tend to confirm the testimony of the single witness in establishing the falsity of the oath.

(2) Documentary evidence directly disproving the truth of the statement described in the specification as long as the evidence is corroborated or supported by other evidence tending to prove the falsity of the statement. To "corroborate" means to strengthen, to make more certain, to add weight. The corroboration required to prove false swearing is proof of

independent facts or circumstances which, considered together, tend to confirm the information contained in the document in establishing the falsity of the oath.

NOTE 2: Exceptions to documentary corroboration requirement. There are two exceptions to the requirement for corroboration of documentary evidence. Applicable portions of the following should be given when an issue concerning one of these exceptions arises:

An exception to the requirement that documentary evidence must be supported by corroborating evidence exists when the document is an official record which has been proven to have been well known to the accused at the time (he) (she) (took the oath) (made the affirmation).

(Additionally) (An) (Another) exception to the requirement that documentary evidence must be supported by corroborating evidence exists when the document was written or furnished by the accused or had in any way been recognized by (him) (her) as containing the truth at some time before the supposedly falsely sworn statement was made.

If (this exception) (these exceptions) exist(s), the documentary evidence may be sufficient without corroboration to establish the falsity of the statement.

You may find the accused guilty of false swearing only if you find that the documentary evidence (and credible corroborative evidence) establish(es) the falsity of the accused's statement beyond a reasonable doubt.

NOTE 3: Proving that the accused did not believe the statement to be true. Once the appropriate corroboration instruction in NOTE 1, above, is given, the military judge should give the following instruction:

The fact that the accused did not believe the statement to be true when it was (made) (subscribed) may be proved by testimony of one witness without corroboration or by circumstantial evidence, if the testimony or evidence convinces you beyond a reasonable doubt as to this element of the offense.

NOTE 4: Applicability of this offense. The offense of false swearing does not apply in a judicial proceeding or course of justice.

NOTE 5: False swearing as a lesser included offense. False swearing is not a lesser included offense of Article 131, Perjury.

3–80–1. FIREARM—DISCHARGING THROUGH NEGLIGENCE (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, through negligence discharge a (service rifle) (_____) in the (squadron) (tent) (barracks) (_____) of (Company A) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused discharged a firearm, to wit: (a service rifle) (_____);

(2) That such discharge was caused by the negligence of the accused; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Negligence" means the absence of ordinary care. It is (an act) (or) (failure to act) of a person who is under a duty to use due care which demonstrates a lack of care which a reasonably careful person would have used under the same or similar circumstances.

3–81–1. FIREARM—WILLFUL DISCHARGE UNDER CIRCUMSTANCES TO ENDANGER HUMAN LIFE (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully and willfully discharge a firearm, to wit: _____, (in the mess hall of _____) (_____), under circumstances such as to endanger human life.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused discharged a firearm, to wit: (a service rifle) (_____);

(2) That such discharge was willful and wrongful;

(3) That this discharge was under circumstances such as to endanger human life; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

An act is done "willfully" if it is done intentionally or on purpose.

"Under circumstances such as to endanger human life" means that there must be a reasonable possibility of harm to human beings. Proof that human life was actually endangered is not required.

NOTE: Lesser included offense. Negligent discharge of a firearm, Instruction 3-80-1, is a lesser included offense.

3–82–1. FLEEING THE SCENE OF AN ACCIDENT—DRIVER OR PASSENGER CHARGED AS A PRINCIPAL (ARTICLE 134)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), (the driver of) (a passenger in) (_____ in) a vehicle at the time of (an accident) (a collision) in which said vehicle was involved, and having knowledge of said accident, did, at _____, on or about _____, (wrongfully and unlawfully leave) (by _____, assist the driver of the said vehicle in wrongfully leaving) the scene of the (accident) (collision) without [providing assistance to _____, who had been struck (and injured) by the said vehicle] [making (his/her) (the driver's) identity known].

NOTE 1: Passenger or other charged as a principal. This model specification provides sample language for charging a passenger or other as a principal. A passenger other than a senior passenger (see Instruction 3-82-2) may be liable under this paragraph. Instruction 7-1, Law of Principals, should be given as appropriate. If the accused is charged as a principal, the elements below will have to be carefully tailored.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was the driver of a vehicle which was involved in (an accident) (a collision);

(2) That the accused knew the vehicle had been involved in (an accident) (a collision);

(3) That the accused left the scene of the (accident) (collision) without:

(a) providing assistance to (state the name of the alleged victim), who had been struck (and injured) by the said vehicle), or

(b) making (his) (her) identity known;

(4) That the accused's departure was wrongful and unlawful; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), modified as appropriate, may be given.

3–82–2. FLEEING THE SCENE OF AN ACCIDENT—SENIOR PASSENGER (ARTICLE 134)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), being (the senior officer/noncommissioned officer in) (_____ in) a vehicle at the time of (an accident) (a collision) in which said vehicle was involved, and having knowledge of said accident, did, at _____, on or about _____, wrongfully order, cause, or permit the driver to leave the scene of the (accident) (collision) without [providing assistance to _____, who had been struck (and injured) by the said vehicle] [making (his/her) (the driver's) identity known].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was a passenger in a vehicle that was involved in (an accident) (a collision);

(2) That the accused knew that the vehicle had been in (an accident) (a collision);

(3) That the accused was the [superior (commissioned) (warrant) (noncommissioned) officer of the driver] [commander of the vehicle] and wrongfully (ordered) (caused) (permitted) the driver to leave the scene of the accident without:

(a) providing assistance to the victim(s) who had been struck (and injured) by the vehicle, or

(b) providing identification; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), may be given as appropriate.

3–83–1. FRATERNIZATION (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD or Dismissal, TF, 2 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, knowingly fraternize with _____, an enlisted person, on terms of military equality, to wit: _____, in violation of the custom of (the Naval Service of the United States) (the United States Army) (the United States Air Force) (the United States Coast Guard) that (officers) (noncommissioned officers) shall not fraternize with enlisted persons on terms of military equality.

c. ELEMENTS:

(1) That, on (state the date alleged), the accused was a (commissioned) (warrant) (noncommissioned) officer;

(2) That (state the time and place alleged), the accused fraternized on terms of military equality with (state the name(s) of the enlisted member(s) alleged) by (state the manner in which the fraternization is alleged to have occurred);

(3) That the accused then knew (state the name(s) of the enlisted member(s) alleged) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the (Navy) (Army) (Marine Corps) (Air Force) (Coast Guard) that (officers) (noncommissioned officers) shall not fraternize with enlisted members on terms of military equality; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

Not all contact or association between (officers) (noncommissioned officers) and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors that you should consider include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The facts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that good order and discipline in the armed forces have been prejudiced by the tendency of the accused's conduct to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of (an officer) (a noncommissioned officer).

NOTE: Fraternization by noncommissioned officers. The offense of fraternization was added to the MCM in 1984, although officers had been successfully prosecuted for fraternization under Articles 133 and 134 prior to that. In adding the offense to the MCM, the drafters indicated that there was no intent to preclude prosecution of noncommissioned officer—enlisted member or senior officer—junior officer fraternization offenses. The Army Court of Criminal Appeals has recognized that, under certain circumstances, conduct between noncommissioned officers and enlisted members, as well as conduct between officers, could be an Article 134 offense. Although paragraph 83, by its terms, limits its application to officers and warrant officers, the elements of fraternization would be the same for a noncommissioned officer accused with an enlisted member, or an officer with another officer. See United States v. March, 32 MJ 740 (ACMR 1991); United States v. Clarke, 25 MJ 631 (ACMR 1987); United States v. Callaway, 21 MJ 770 (ACMR 1986). The Army's fraternization policy is in Army Regulation 600-20.

3–84–1. GAMBLING WITH SUBORDINATE (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____, gamble with _____, then knowing that the said _____ was not a (noncommissioned) (petty) officer and was subordinate to the accused.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused gambled with (state name and rank or grade of the person alleged);

(2) That the accused was a noncommissioned officer at the time;

(3) That (state name and rank or grade of the person alleged) was not then a noncommissioned officer and was subordinate to the accused;

(4) That the accused knew that (state name and rank or grade of the person alleged) was not then a noncommissioned officer and was subordinate to (him) (her); and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge) is ordinarily applicable.

3–85–1. NEGLIGENT HOMICIDE (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.4

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, unlawfully kill _____, (by negligently _____ the said _____ (in) (on) the _____ with a _____) (by driving a (motor vehicle) (_____) against the said _____ in a negligent manner) (_____).

c. ELEMENTS:

(1) That (state the name or description of the alleged victim) is dead;

(2) That his/her death resulted from the (act) (failure to act) of the accused, to wit: (state the act or failure to act alleged), (state the time and place alleged);

(3) That the killing by the accused was unlawful;

(4) That the (act) (failure to act) of the accused which caused the death amounted to simple negligence; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

Killing of a human being is unlawful when done without legal justification or excuse.

"Simple negligence" is the absence of due care, that is, (an act) (or) (failure to act) by a person who is under a duty to use due care which demonstrates a lack of care for the safety of others which a reasonably

careful person would have used under the same or similar circumstances.

NOTE 1: Proximate cause. In an appropriate case, the following instruction on proximate cause should be given:

The (act) (failure to act) alleged must not only amount to simple negligence but it must also be a proximate cause of the death. This means that the death of (state the name of the alleged victim) must have been the natural and probable result of the accused's negligent (act) (failure to act). In determining this issue, you must consider all relevant facts and circumstances, (including, but not limited to, (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

NOTE 2: Two or more persons involved in injury to the victim. Give the following instruction where two or more persons caused the injury to the deceased.

It is possible for the conduct of two or more persons to contribute, each as a proximate or direct cause, to the death of another. If the accused's conduct was a proximate or direct cause of the victim's death the accused will not be relieved of criminal responsibility just because some other person's conduct was also a proximate or direct cause of the death. The accused will, however, be relieved of criminal responsibility for the death of the victim if the death was the result of some unforeseeable, independent, intervening cause which did not involve the accused. If the victim died only because of the independent, intervening cause, the (act) (failure to act) of the accused was not the proximate cause of the death, and the accused cannot be found guilty of negligent homicide. The burden is on the prosecution to establish beyond a reasonable doubt that (there was no independent, intervening cause) (and) (that the accused's negligence was a proximate cause of the death of the victim).

NOTE 3: Contributory negligence of victim. In an appropriate case, the following instruction relating to contributory negligence of the deceased should be given:

There is evidence in this case raising the issue of whether the deceased failed to use reasonable care and caution for his/her own safety. If the accused's negligence was a proximate cause of the death, the accused is not relieved of criminal responsibility just because the negligence of the deceased may have contributed to his/her death. The conduct of the deceased is, however, important on the issue of whether the accused's negligence, if any, was a proximate cause of the death. Accordingly, a certain (act) (failure to act) may be a proximate cause of death even if it is not the only cause, as long as it is a direct or contributing cause and plays an important role in causing the death. (An act) (A failure to act) is not the proximate cause of the death if some other force independent of the accused's (act) (failure to act) intervened as a cause of death.

e. REFERENCES: United States v. Kick, 7 MJ 82 (CMA 1979); United States v. Martinez, 42 MJ 327 (CAAF 1995).

3–86–1. IMPERSONATING A COMMISSIONED, WARRANT, NONCOMMISSIONED, OR PETTY OFFICER OR AGENT OR OFFICIAL (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) With intent to defraud: DD, TF, 3 years, E-1.

(2) Other cases: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully and willfully impersonate [a (commissioned officer) (warrant officer) (noncommissioned officer) (petty officer) (agent of superior authority) of the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)] [an official of the Government of _____] by [publicly wearing the uniform and insignia of rank of a (lieutenant of the _____) (_____)] [showing the credentials of _____] [_____] (with intent to defraud _____ by _____) (and (exercised) (asserted) the authority of _____ by _____.

c. ELEMENTS:

NOTE 1: Variations in the offense pled. Great caution must be used in selecting and tailoring the elements depending on the specification pled and the evidence presented. There are several variations of this offense. First, if the offense is impersonation by publicly wearing the rank and insignia of a commissioned, warrant, noncommissioned or petty officer, or of a person within that category of persons "who cannot be impersonated with impunity," the government needs to prove the accused publicly wore the rank or insignia of the position impersonated and not that there was an assertion or exercise of that authority. In such cases, give element (3a). Second, if the accused is not charged with impersonation by publicly wearing the rank and insignia of persons listed in the first part of this NOTE, then the government is required to prove the accused exercised or asserted the authority of the position impersonated. In such cases, give element (3b). Third, regardless of the prosecution theory advanced, the government may have pled an intent to defraud to take advantage of the enhanced punishment provisions. In such cases, element (5) must be given. Element (4) is given in every case. See the cases cited in the REFERENCES.

(1) That (state the time and place alleged), the accused impersonated (a) (an) [(commissioned officer) (warrant officer) (noncommissioned officer) (petty officer) (agent of superior authority) (of the) (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)] [_____] [(official of the Government of _____];

(2) That this impersonation was wrongful and willful;

NOTE 2: Impersonating by wearing rank and insignia. If impersonation by wearing rank and insignia is alleged, give element (3a) below, then give element (4) in every case:

[(3a)] That the impersonation alleged was by wearing in public (the rank and insignia) (_____) of a (petty) (noncommissioned) (warrant) (commissioned) (officer) (_____); (and)

NOTE 3: Exercising or asserting a certain position. If exercising or asserting a certain position is alleged, give element (3b) below, then give element (4) in every case:

[(3b)] That the accused (exercised) (asserted) the authority of the office the accused claimed to have by _____; (and)

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces; [and]

NOTE 4: Intent to defraud alleged. If the aggravating factor of intent to defraud is alleged, give element (5) below.

[(5)] That the accused did so with the intent to defraud (state the name of the alleged victim) by (state the manner in which the victim was allegedly defrauded).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Impersonate" means to assume or to act the person or role of another.

"Willful" means with the knowledge that one is falsely holding one's self out as such.

NOTE 5: Intent to defraud alleged. Give the following definition if intent to defraud is alleged:

"Intent to defraud" means an intent to obtain an article or thing of value through a misrepresentation and to apply it to one's own use and benefit or the use and benefit of another, either temporarily or permanently.

NOTE 6: Actual deception or derivation of a benefit not required. As the crime of impersonation does not require either the actual deception of others or the accused deriving a benefit from the impersonation (United States v. Messenger, 6 CMR 21 (CMA 1952)), the following instruction may be helpful:

> (There is no requirement that the accused or anyone else benefit from (his) (her) impersonation.) (There is (also) no requirement that anyone actually be deceived by the accused's actions.)

NOTE 7: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable when intent to defraud is alleged.

e. REFERENCES:

(1) Paragraph 49c(14), Part IV, MCM.

(2) Cases discussing when overt acts, or asserting or exercising the office must be pled and proved: United States v. Pasha, 24 MJ 87 (CMA 1987); United States v. Yum, 10 MJ 1 (CMA 1980) (concurring opinion); United States v. Frisbie, 29 MJ 974 (AFCMR 1990).

3–87–1. INDECENT ACTS WITH A CHILD—PHYSICAL CONTACT (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 7 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit an indecent act (upon) (with) the body of _____, a male/female under 16 years of age, not the husband/wife of the accused, by (fondling him/her and placing his/her hands upon his/her leg and private parts) (_____), with intent to (arouse) (appeal to) (gratify) the (lust) (passion) (sexual desires) of the accused (and _____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed (a) certain act(s) (upon) (with) the body of (state the name of the alleged victim) by (state the act and manner alleged);

(2) That, at the time of the alleged act(s), (state the name of the alleged victim) was a male/female under the age of 16 years;

(3) That the act(s) of the accused (was) (were) indecent;

(4) That (state the name of the alleged victim) was a person not the spouse of the accused;

(5) That the accused committed the act(s) with the intent to (arouse) (appeal to) (gratify) the (lust) (passions) (sexual desires) of (the accused) (state the name of the alleged victim) (the accused and (state the name of the alleged victim)); and

(6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Indecent acts" signify that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

NOTE 1: Applicability of this instruction after 1 October 2007. Use this instruction only for offenses occurring prior to 1 October 2007 (including any indecent acts (liberties) with a child—physical contact charged under Article 134(1) or Article 134(2)).

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–87–2. INDECENT ACTS (LIBERTIES) WITH A CHILD—NO PHYSICAL CONTACT (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 7 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, [take (indecent) liberties with] [commit an indecent act with] _____, a male/female under 16 years of age, not the husband/wife of the accused, by _____, with intent to (arouse) (appeal to) (gratify) the (lust) (passion) (sexual desires) of the accused (and _____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed (a) certain act(s) by (state the act(s) and manner alleged);

(2) That, at the time of the alleged act(s), (state the name of the alleged victim) was a male/female under the age of 16 years;

(3) That (state the name of the alleged victim) was a person not the spouse of the accused;

(4) That the act(s) of the accused amounted to the taking of indecent liberties with (state the name of the alleged victim);

(5) That the accused committed the act(s) with the intent to (arouse) (appeal to) (gratify) the (lust) (passions) (sexual desires) of (the accused) (state the name of the alleged victim) (the accused and (state the name of the alleged victim));

(6) That the accused committed the act(s) in the presence of (state the name of the alleged victim); and

(7) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and

discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

("Indecent acts") ("Indecent liberties") signify that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

NOTE 1: Applicability of this instruction after 1 October 2007. Use this instruction only for offenses occurring prior to 1 October 2007 (including any indecent acts (liberties) with a child—no physical contact charged under Article 134(1) or Article 134(2)).

NOTE 2: Consent not a defense. Lack of consent by the child to the act or liberties is not essential to this offense; consent is not a defense.

NOTE 3: Act in presence of child required. When a person is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but physical contact is not required. Thus, one who with the requisite intent exposes one's private parts to a child under 16 years of age may be found guilty of this offense. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child.

3–88–1. INDECENT EXPOSURE (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, while (at a barracks window) (_____) willfully and wrongfully expose in an indecent manner to public view his/her _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused while (at a barracks window) (_____) exposed (his) (her) (state the part of the body exposed) to public view in an indecent matter;

(2) That the exposure was willful and wrongful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Indecent" means a form of exhibition of a person's private parts which signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations. An exposure becomes "indecent" when it occurs at such time and place that a person reasonably knows or should know that (his) (her) act will be open to the observation of (another) (others).

"Willful" means an intentional exposure to public view. The exposure must be done with the intent to be observed by one or more members of the public.

NOTE 1: Applicability of this instruction after 1 October 2007. Use this instruction only for offenses occurring prior to 1 October 2007 (including any indecent exposure charged under Article 134(1) or Article 134(2)).

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, as bearing on the issue of specific intent to be observed by the public, may be applicable.

3–89–1. INDECENT LANGUAGE COMMUNICATED TO ANOTHER (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) To a child under 16: DD, TF, 2 years, E-1.

(2) Other cases: DD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (orally) (in writing) communicated to _____, (a child under the age of 16 years), certain indecent language, to wit: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (orally) (in writing) communicated to (state the name of the alleged victim), (a child under the age of 16 years), certain language, to wit: (state the language alleged);

(2) That the language was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: Language communicated to and in the presence of a child under the age of 16 years. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order established that "indecent liberty" (UP Article 120) may consist of indecent language as long as the communication is made in the physical presence of the child. Accordingly, as of 1 October 2007, indecent language that is communicated to and in the physical presence of a child may not be prosecuted as a violation of this provision of Article 134. Indecent language communicated to, but not in the physical presence of a child, may continue to be prosecuted under this provision of Article 134.

"Communicated to" means that the language was actually made known to the person to whom it was directed.

"Indecent language" is that which is grossly offensive to the community sense of modesty, decency, or propriety, or shocks the moral sense of the community because of its vulgar, filthy, or disgusting nature.

NOTE 2: Language with a tendency to incite lustful thought. When the language used may not meet the above definition, such as when the language is innocuous on its face, but the circumstances or nuances reflect a tendency to incite lustful thought, provide the following definition as well:

(Language is also indecent if it is grossly offensive to the community sense of modesty, decency, or propriety, or shocks the moral sense of the community, because of its tendency to incite lustful thought. Language is, therefore, indecent if it tends reasonably to corrupt morals or incite lustful thought, either expressly or by implication from the circumstances under which it was spoken. Seemingly chaste or innocuous language can constitute this offense if the context in which it is used sends an indecent message, as reasonably interpreted by commonly accepted community standards.)

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

Not every use of language that is indecent constitutes an offense under the UCMJ. The government must prove beyond a reasonable doubt, either by direct evidence or inference, that the accused's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(You should consider all the relevant facts and circumstances (to include (where the conduct occurred) (the nature of the relationship between the accused and (state the name of the alleged victim) (the effect, if any, upon the accused's (or (state the name of the alleged victim or other individual alleged to have been affected) ability to perform military duties) (the effect the conduct may have had upon the morale or efficiency of the unit) (_____).)

"Community," as used in this instruction, means the standards that are applicable to the military as a whole, and not the accused's unit.

(However, the standards used in the accused's unit may be considered for the purpose of deciding whether, under the facts and circumstances presented, the accused's conduct was prejudicial to good order and discipline.)

e. *REFERENCES:* United States v. Negron, 60 MJ 136 (CAAF 2004); United States v. Brinson, 49 MJ 360 (CAAF 1998); United States v. Hullett, 40 MJ 189 (CMA 1994); United States v. French, 31 MJ 57 (CMA 1990).

3–90–1. INDECENT ACTS WITH ANOTHER (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully commit an indecent act with _____ by _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed a certain wrongful act with (state the name of the alleged victim) by (state the act and manner alleged);

(2) That the act was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Indecent act" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

NOTE 1: Applicability of this instruction after 1 October 2007. Use this instruction only for offenses occurring prior to 1 October 2007 (including any indecent acts with another (other than a child) charged under Article 134(1) or Article 134(2)).

3–91–1. JUMPING FROM VESSEL INTO THE WATER (ARTICLE 134)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, on board _____, at (location), on or about _____, wrongfully and intentionally jump from _____, a vessel in use by the armed forces, into the (sea) (lake) (river).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused jumped from (state the name or description of the vessel), a vessel in use by the armed forces, into the water;

(2) That such act by the accused was wrongful and intentional; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"In use by" means any vessel operated by or under the control of the armed forces. This offense may be committed at sea, at anchor, or in port.

"Wrongful" means without legal justification or excuse.

"Intentional" means deliberately or on purpose.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3–92–1. KIDNAPPING (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, life without eligibility for parole, E-1.

b. MODEL SPECIFICATION:
In that _____, (personal jurisdiction data), did, (at/on board—location), on or about _____, willfully and wrongfully (seize) (confine) (inveigle) (decoy) (carry away) and hold _____ (a minor whose parent or legal guardian the accused was not) (a person not a minor) against his/her will.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (seized) (confined) (inveigled) (decoyed) (carried away) (state the name of the alleged victim);

(2) That the accused then held (state the name of the alleged victim) against that person's will;

(3) That the accused did so willfully and wrongfully; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

("Inveigle" means to lure, lead astray, or entice by false representations or other deceitful means. For example, a person who entices another to ride in a car with a false promise to take the person to a certain designation has inveigled the passenger into the car.)

("Decoy" means to entice or lure by means of some fraud, trick, or temptation. For example, one who lures a child into a trap with candy has decoyed the child.)

("Seized," "carried away," and "confined" mean(s) to forcibly and unlawfully carry away another person and detain, keep, or confine that person against his/her will.)

"Held" means detained. The holding must be more than a momentary or incidental detention. For example, a robber who holds the victim at gunpoint while the victim hands over a wallet, or a rapist who throws his victim to the ground, does not, by such acts, commit kidnapping. On the other hand, if, for example, before or after such robbery or rape, the victim is involuntarily transported some substantial distance, as from a housing area to a remote area of the base or post, this may be kidnapping, in addition to robbery or rape.

"Against the person's will" means that the victim was held involuntarily. The involuntary nature of the detention may result from force, mental or physical coercion, or from other means, including false representations. If the victim is incapable of having a recognizable will, as in the case of a very young child or a mentally incompetent person, the holding must be against the will of the victim's parents or legal guardian. Evidence of the availability or nonavailability to the victim of some means of exit or escape is relevant to the voluntariness of the detention, as is evidence of threats or force, or lack thereof, by the accused to detain the victim.

The accused must have specifically intended to hold the victim against the victim's will to be guilty of kidnapping. An accidental detention will not suffice. The holding need not have been for financial or personal gain or for any other particular purpose. (It may be an aggravating circumstance that the kidnapping was for ransom, however.)

"Wrongfully" means without justification or excuse. (For example, a law enforcement official may justifiably apprehend and detain, by force if necessary, a person reasonably believed to have committed an offense.)

3–93–1. MAIL—TAKING (ARTICLE 134)

NOTE 1: Relation to the offense of stealing mail. Stealing mail is addressed in Instruction 3- 93-3.

NOTE 2: Scope of the offense and relation to the Federal Code. This offense extends the protection afforded mail matter under 18 U.S.C. section 1702 beyond the time mail matter is within the custody of the U.S. Postal Service. Under Article 134, mail matter is given special protection when it is within military mail channels. In United States v. Lorenzen, 20 CMR 228 (CMA 1955), the court held that the UCMJ offense may include military channels that do not operate under the U.S. Post Office. The MCM in effect at the time (1951) did not have a discussion of mail matter offenses. Paragraph 93c, Part IV, MCM, states, however, that mail matter includes "any matter deposited in a postal system of any government or any authorized depository thereof or in official mail channels of the United States or an agency thereof including the armed forces." See also United States v. Scioli, 22 CMR 292 (CMA 1957) and United States v. Manausa, 30 CMR 37 (CMA 1960).

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully and unlawfully take certain mail matter, to wit: (a) (letter(s)) (postal card(s)) (package(s)), addressed to _____, (out of the (_____ Post Office _____) (orderly room of _____) (unit mailbox of _____) (_____)) (from _____) before (it) (they) (was) (were) (delivered) (actually received) (to) (by) the (addressee) with intent to (obstruct the correspondence) (pry into the (business) (secrets)) of _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused took certain mail matter, to wit: (letter(s)) (postal card(s)) (package(s)) (_____) addressed to (state the name of the addressee);

(2) That such taking was wrongful and unlawful;

(3) That the (letter(s)) (postal card(s)) (package(s)) (_____) (was) (were) taken out of the (post office) (orderly room of _____) (unit mail box of _____) (_____) before (it) (they) (was) (were) (delivered to) (actually received by) the (person(s)) (_____) to whom (it) (they) (was) (were) directed;

(4) That such taking was with the intent to (obstruct the correspondence) (pry into the (business) (secrets) (_____)) of (state the addressee's name); and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Wrongful" means without legal justification or excuse.

"Mail matter" means any matter deposited in a postal system of any government or any authorized depository thereof or in official mail channels of the United States or any agency thereof, including the armed forces. The value of mail matter is not an element of the offense.

NOTE 3: "Mail matter" and the postal system. An item loses its character as "mail matter" when it is no longer in the postal system. If the evidence raises the issue whether the item was in the postal system when it was taken, or had already been delivered to or received by the addressee, the following instructions may be appropriate.

There has been evidence that raises an issue of whether the item(s) in question (was) (were) still in the postal system or had been delivered to, or received by, the addressee at the time the item(s) (was) (were) allegedly taken. An item loses its character as "mail matter" when it ceases to be in the postal system. Mail is in the postal system once it is placed there by the sender and until such time it is in fact received by, or actually delivered to, the addressee or an individual specifically designated by the addressee. Once an item placed into the postal system has been received by or actually delivered to the addressee or an authorized agent, it ceases to be mail matter.

(When an item that is placed into the postal system is returned by the postal system to the sender as undeliverable, the sender becomes the addressee. In such a case, the item remains in the postal system until it has been delivered to or received by the sender.)

(A person whose military duty it is to deliver mail is part of the postal system, so if the accused was in possession of mail matter as part of (his) (her) official duties, the mail remained in the postal system. On the other hand, when an individual specifically designates another to receive mail on his/her behalf, mail ceases to be in the postal system when delivered to the designated individual. If one is designated to receive official mail on a "blanket" authorization, however, mail in that person's custody remains mail matter until actually delivered to the addressee.)

The burden is on the prosecution to prove beyond a reasonable doubt the item(s) in question (was) (were) in the postal system when (it) (they) (was) (were) allegedly taken.

NOTE 4: Exceptions to wrongfulness. The burden of going forward with evidence with respect to any exception is upon the person claiming the benefit. If the evidence presented raises such an issue, then the burden of proof is upon the prosecution to establish beyond a reasonable doubt that the taking was wrongful. See United States v. Cuffee, 10 MJ 381 (CMA 1981). In such cases, a carefully tailored instruction substantially as follows should be given:

Evidence has been introduced raising the issue of whether the accused's taking of the item(s) in question was wrongful in light of the fact that (the accused was assigned duties as a mail clerk) (_____). In determining this issue, you must consider all relevant facts and circumstances (including, but not limited to (_____)).

The burden is on the prosecution to establish the accused's guilt beyond reasonable doubt. Unless you are satisfied beyond reasonable doubt that the accused's taking of the item(s) (was) (were) not (in the performance of (his) (her) duties) (_____), you may not find the accused guilty.

e. REFERENCES:

(1) Paragraph 93, Part IV, MCM.

(2) When matter is in the "postal system." United States v. Rayfield, 30 CMR 307 (CMA 1961); United States v. Manausa, 30 CMR 37 (CMA 1960); United States v. McCline, 32 MJ 356 (CMA 1991); United States v. Smith, 27 MJ 914 (ACMR 1989); United States v. Sullivan, 25 MJ 635 (ACMR 1987); United States v. Scioli, 22 CMR 292 (CMA 1957).

(3) Value is not an element. United States v. Gaudet, 29 CMR 488 (CMA 1960).

(4) Intent to obstruct correspondence. United States v. Rayfield, 30 CMR 307 (CMA 1961); United States v. Robinson, 39 MJ 903 (ACMR 1994) *pet. denied* 41 MJ 122.

3–93–2. MAIL—OPENING, SECRETING, OR DESTROYING (ARTICLE 134)

NOTE 1: Stealing mail. Stealing mail is a separate instruction, 3-93-3.

NOTE 2: Scope of the offense and relation to the Federal Code. This offense extends the protection afforded mail matter under 18 U.S.C. section 1702 beyond the time mail matter is within the custody of the U.S. Postal Service. Under Article 134, mail matter is given special protection when it is within military mail channels. In United States v. Lorenzen, 20 CMR 228 (CMA 1955), the court held that the UCMJ offense may include military channels that do not operate under the U.S. Post Office. The MCM in effect at the time (1951) did not have a discussion of mail matter offenses. Paragraph 93c, Part IV, MCM, states, however, that mail matter includes "any matter deposited in a postal system of any government or any authorized depository thereof or in official mail channels of the United States or an agency thereof including the armed forces." See also United States v. Scioli, 22 CMR 292 (CMA 1957) and United States v. Manausa, 30 CMR 37 (CMA 1960).

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

NOTE 3: The below specification differs slightly from the MCM Model Specification to omit pleading stealing mail matter.

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully (open) (secret) (destroy) certain mail matter, to wit: (a) (letter(s)) (postal card(s)) (package(s)) addressed to _____, which said (letter(s)) (_____) (was) (were) then ((in the (_____ Post Office _____) (orderly room of _____) (unit mailbox of _____) (custody of _____) (_____)) (had previously been committed to _____, (a representative of _____), (an official agency for the transmission of communications)) before said (letter(s)) (_____) (was) (were) (delivered) (actually received) (to) (by) the (addressee).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (opened) (secreted) (destroyed) certain mail matter, to wit: (letters) (postal cards) (packages) (_____), addressed to (state the name of the addressee);

(2) That the (opening) (secreting) (destroying) was wrongful;

(3) That the mail matter was (opened) (secreted) (destroyed) by the accused before it was delivered to or received by (state the name of the addressee); and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Wrongful" means without legal justification or excuse.

"Mail matter" means any matter deposited in a postal system of any government or any authorized depository thereof or in official mail channels of the United States or any agency thereof including the armed forces. The value of mail matter is not an element of the offense.

NOTE 4: "Mail matter" and the postal system. An item loses its character as "mail matter" when it is no longer in the postal system. If the evidence raises the issue whether the item was in the postal system when it was opened, secreted, or destroyed, or had already been delivered to or received by the addressee, the following instructions may be appropriate.

Evidence has raised an issue of whether the item(s) in question (was) (were) still in the postal system or had been delivered to, or received by, the addressee at the time the item(s) (was) (were) allegedly (opened) (secreted) (destroyed). An item loses its character as "mail matter" when it ceases to be in the postal system. Mail is in the postal system once it is placed there by the sender and until such time it is in fact received by, or actually delivered to, the addressee or an individual specifically designated by the addressee. Once an item placed into the postal system has been received by or actually delivered to the addressee or an authorized agent, it ceases to be mail matter.

(When an item that is placed into the postal system is returned by the postal system to the sender as undeliverable, the sender becomes the addressee. In such a case, the item remains in the postal system until it has been delivered to or received by the sender.)

(A person whose military duty it is to deliver mail is part of the postal system, so if the accused was in possession of mail matter as part of (his) (her) official duties, the mail remained in the postal system. On the other hand, when an individual specifically designates another to receive mail on his/her behalf, mail ceases to be in the postal system when delivered to the designated individual. If one is designated to receive official mail on a "blanket authorization," however, mail in that person's custody remains mail matter until actually delivered to the addressee.)

The burden is on the prosecution to prove beyond a reasonable doubt the item(s) in question (was) (were) in the postal system when (it) (they) (was) (were) allegedly (opened) (secreted) (destroyed).

NOTE 5: Exceptions to wrongfulness. The burden of going forward with evidence with respect to any exception is upon the person claiming the benefit. If the evidence presented raises such an issue, then the burden of proof is upon the prosecution to establish beyond a reasonable doubt that the taking was wrongful. See United States v. Cuffee, 10 MJ 381 (CMA 1981). In such cases, a carefully tailored instruction substantially as follows should be given:

The evidence has raised the issue of whether the accused's allegedly (opening) (secreting) (destroying) of the item(s) in question was wrongful in light of the fact that (the accused was assigned duties as a mail clerk) (_____). In determining this issue, you must consider all relevant facts and circumstances (including, but not limited to (_____)).

The burden is on the prosecution to establish the accused's guilt beyond reasonable doubt. Unless you are satisfied beyond reasonable doubt that the accused's (opening) (secreting) (destroying) of the item(s) (was) (were) not (in the performance of (his) (her) duties) (_____), you may not find the accused guilty.

e. REFERENCES:

(1) Paragraph 93, Part IV, MCM.

(2) When matter is in the "postal system." United States v. Rayfield, 30 CMR 307 (CMA 1961); United States v. Manausa, 30 CMR 37 (CMA 1960); United States v. McCline, 32 MJ 356 (CMA 1991); United States v. Smith, 27 MJ 914 (ACMR 1989); United States v. Sullivan, 25 MJ 635 (ACMR 1987); United States v. Scioli, 22 CMR 292 (CMA 1957).

(3) Value is not an element. United States v. Gaudet, 29 CMR 488 (CMA 1960).

3–93–3. MAIL—STEALING (ARTICLE 134)

NOTE 1: Scope of the offense and relation to the Federal Code. This offense extends the protection afforded mail matter under 18 U.S.C. section 1702 beyond the time mail matter is within the custody of the U.S. Postal Service. Under Article 134, mail matter is given special protection when it is within military mail channels. In United States v. Lorenzen, 20 CMR 228 (CMA 1955), the court held that the UCMJ offense may include military channels that do not operate under the U.S. Post Office. The MCM in effect at the time (1951) did not have a discussion of mail matter offenses. Para 93c, Part IV, MCM, states, however, that mail matter includes "any matter deposited in a postal system of any government or any authorized depository thereof or in official mail channels of the United States or an agency thereof including the armed forces." See also United States v. Scioli, 22 CMR 292 (CMA 1957) and United States v. Manausa, 30 CMR 37 (CMA 1960).

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

This specification has been modified to allege stealing mail. In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, steal certain mail matter, to wit: (a) (letter(s)) (postal card(s)) (package(s)) addressed to _____, which said (letter(s)) (_____) (was) (were) then (in the (_____ Post Office _____) (orderly room of _____) (unit mail box of _____) (custody of _____) (_____)) (had previously been committed to _____, (a representative of _____), (an official agency for the transmission of communications)) before said (letter(s)) (_____) (was) (were) (delivered) (actually received) (to) (by) the (addressee).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused stole certain mail matter, to wit: (letters) (postal cards) (packages) (_____), addressed to (state the name of the addressee);

(2) That the mail matter was stolen by the accused before it was delivered to or received by (state the name of the addressee); and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Mail matter" means any matter deposited in a postal system of any government or any authorized depository thereof or in official mail channels of the United States or any agency thereof including the armed forces. The value of mail matter is not an element of the offense.

"Stealing" is the wrongful taking of mail matter, the property of another, with the intent to permanently deprive the owner of the use and benefit of the property or the intent to permanently appropriate the property to the accused's own use or the use of anyone other than the lawful owner. A taking is wrongful only when done without the consent of the owner and with a criminal state of mind.

NOTE 2: <u>"Mail matter" and the postal system</u>. An item loses its character as "mail matter" when it is no longer in the postal system. If the evidence raises the issue whether the item was in the postal system when it was stolen, or had already been delivered to or received by the addressee, the following instructions may be appropriate.

Evidence has raised an issue of whether the item(s) in question (was) (were) still in the postal system or had been delivered to, or received by, the addressee at the time the item(s) (was) (were) allegedly stolen. An item loses its character as 'mail matter' when it ceases to be in the postal system. Mail is in the postal system once it is placed there by the sender and until such time it is in fact received by, or actually delivered to, the addressee or an individual specifically designated by the addressee. Once an item placed into the postal system has been received by or actually delivered to the addressee or an authorized agent, it ceases to be mail matter.

(When an item that is placed into the postal system is returned by the postal system to the sender as undeliverable, the sender becomes the addressee. In such a case, the item remains in the postal system until it has been delivered to or received by the sender.)

(A person whose military duty it is to deliver mail is part of the postal system, so if the accused was in possession of mail matter as part of (his) (her) official duties, the mail remained in the postal system. On the other hand, when an individual specifically designates another to receive

mail on his/her behalf, mail ceases to be in the postal system when delivered to the designated individual. If one is designated to receive official mail on a "blanket authorization," however, mail in that person's custody remains mail matter until actually delivered to the addressee.)

The burden is on the prosecution to prove beyond a reasonable doubt the item(s) in question (was) (were) in the postal system when (it) (they) (was) (were) allegedly stolen.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

e. REFERENCES:

(1) Paragraph 93, Part IV, MCM.

(2) When matter is in the "postal system." United States v. Rayfield, 30 CMR 307 (CMA 1961); United States v. Manausa, 30 CMR 37 (CMA 1960); United States v. McCline, 32 MJ 356 (CMA 1991); United States v. Smith, 27 MJ 914 (ACMR 1989); United States v. Sullivan, 25 MJ 635 (ACMR 1987); United States v. Scioli, 22 CMR 292 (CMA 1957).

(3) Value is not an element of stealing mail matter as charged under Article 134. United States v. Gaudet, 29 CMR 488 (CMA 1960); Part IV, paragraph 93c, MCM. If larceny of mail under Article 121 is a charged offense, or in the unusual case that the evidence raises Article 121 as a lesser included offense to stealing mail under Article 134, value would be an element.

3–94–1. MAIL—DEPOSITING OR CAUSING TO BE DEPOSITED OBSCENE MATTER IN (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location) on or about _____, wrongfully and knowingly (deposit) (cause to be deposited) in the (United States) (_____) mails for mailing and delivery to (state the addressee) a (letter) (picture) (_____) (containing) (portraying) (suggesting) (_____) certain obscene matters, to wit: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (deposited) (caused to be deposited) in the (United States) (_____) mails, for mailing and delivery to (state the name of the addressee), a (letter) (picture) (_____) (containing) (portraying) (suggesting) (_____) certain matter, to wit: (state the matter alleged);

(2) That the (depositing) (_____) was done wrongfully and knowingly;

(3) That the matter deposited was obscene; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Obscene matter" is that which is grossly offensive to the community sense of modesty, decency, or propriety, or shocks the moral sense of the community because of its vulgar, filthy, or disgusting nature.

NOTE 1: Language with a tendency to incite lustful thought. When the language used may not meet the above definition, such as when the language is innocuous on its face but the

circumstances or nuances reflect a tendency to incite lustful thought, provide the following definition as well:

(Matter is also obscene if it is grossly offensive to the community sense of modesty, decency, or propriety, or shocks the moral sense of the community, because of its tendency to incite lustful thought. Matter is, therefore, obscene if it tends reasonably to corrupt morals or incite lustful thought, either expressly or by implication, as reasonably interpreted by commonly accepted community standards.)

The matter must violate community standards of decency or obscenity and must go beyond customary limits of expression. The community standards of decency or obscenity are to be judged according to a reasonable person in the military community as a whole, rather than the most prudish or the most tolerant members of the military community.

NOTE 2: Knowledge by the accused of the contents in issue. If an issue arises as to the accused's knowledge of the contents of the matter, the following instruction may be applicable:

Proof that the accused believed the matter to be obscene is not required. It is sufficient if the accused knew the contents of the matter at the time of the depositing.

e. *REFERENCE:* United States v. Negron, 60 MJ 136 (CAAF 2004).

3–95–1. MISPRISION OF SERIOUS OFFENSE (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), having knowledge that _____ had actually committed a serious offense to wit: (the murder of _____) (_____), did, (at/on board—location) from about _____, to about _____, wrongfully conceal such serious offense by _____ and fail to make the same known to the civil or military authorities as soon as possible.

c. ELEMENTS:

(1) That the felony of (the murder of _____) (_____) was actually committed by (state the name of the person who committed the offense) at (state the place alleged);

(2) That the accused knew that the said (state the name of the person who committed the offense) had committed this serious offense;

(3) That, subsequently, (state the time and place alleged), the accused concealed this serious offense and failed to make it known to the civil or military authorities at the earliest possible time;

(4) That such concealing was wrongful and unlawful; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

This offense requires an actual act of concealment. "Concealment" is any statement or conduct which prevents another from acquiring knowledge of a fact. This offense is not committed by the mere failure or refusal to disclose the serious offense.

Additionally, to find that the offense of (state the serious offense alleged) was committed by another person, you must be satisfied beyond a reasonable doubt that: (here list the elements of the pertinent serious offense, tailored to the facts and the perpetrator's identity).

NOTE 1: Serious offense defined. A serious offense is an offense of a civil or military nature punishable under the Code by death or confinement for a term exceeding one year. Whether an offense allegedly concealed is a serious offense is ordinarily a question of law. If the military judge makes such determination, the military judge may inform the members as follows:

As a matter of law, the crime of (state the serious offense alleged) is a serious offense.

NOTE 2: When the offense concealed is not serious or its nature is in dispute. If the military judge determines that, as a matter of law, the offense allegedly concealed does not constitute a serious offense, a motion for a finding of not guilty should be granted. See RCM 917. If the evidence discloses a factual dispute as to the felonious nature of the offense allegedly concealed, (e.g., dispute concerning value of alleged larceny) the factual issue should be submitted to the members with appropriate instructions.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–96A–1. WRONGFUL INTERFERENCE WITH AN ADVERSE ADMINISTRATIVE PROCEEDING (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully (endeavor to) [impede (an adverse administrative proceeding) (an investigation) (_____)] [influence the actions of _____, (an officer responsible for making a recommendation concerning the adverse administrative action) (an individual responsible for making a decision concerning an adverse administrative proceeding) (an individual responsible for processing an adverse administrative proceeding) (_____)] [(influence) (alter) the testimony of _____ as a witness before (a board established to consider an administrative proceeding or elimination) (an investigating officer) (_____)] in the case of _____, by [(promising) (offering) (giving) to the said _____, (the sum of $_____) _____, of a value of about $_____)] [communicating to the said _____ a threat to _____] [_____], (if) (unless) the said _____, would [recommend Dismissal of the action against said _____] [(wrongfully refuse to testify) (testify falsely concerning _____) (_____)] [(at such administrative proceeding) (before such investigating officer) (before such administrative board)] [_____].

c. ELEMENTS:

(1) That (state the time and date alleged), the accused wrongfully did (a) certain act(s), that is, (state the act(s) alleged);

(2) That the accused did so in the case of (himself) (herself) (_____) against whom the accused had reason to believe there were or would be (an) adverse administrative proceeding(s) pending;

(3) That the act(s) (was) (were) done with the intent to (influence) (impede) (obstruct) the conduct of the administrative proceedings, or otherwise obstruct the due administration of justice; (and)

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces; [and]

NOTE 1: When the accused's actions involve a potential witness. When it is alleged that the accused's acts involve a potential witness, give the fifth element below:

[(5)] The accused had reason to believe that (state the name of the person alleged) would be called upon to provide evidence as a witness.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Wrongfully" means without legal justification or excuse.

("Communicated" means that the language was actually made known to the person to whom it was directed.)

(One can wrongfully interfere with an adverse administrative proceeding in relation to an administrative proceeding involving (himself) (herself).)

(While the prosecution is required to prove beyond a reasonable doubt the accused had the specific intent to (influence) (impede) (obstruct) the adverse administrative proceeding, there need not be an actual obstruction of the administrative proceeding.)

("Adverse administrative proceeding" includes any administrative proceeding or action, initiated against a service member by the Department of the Army, the Department of Defense, or an agency of the Department of Defense, that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification.)

(Proceedings initiated by non-Department of Defense or Department of the Army agencies are not adverse administrative proceedings.)

NOTE 2: When proceeding has not begun. For wrongful interference with an adverse administrative proceeding to occur, administrative proceedings need not be pending nor an investigation begun. However, the accused must have had reason to believe there were or would be adverse administrative proceedings. See United States v. Athey, 34 MJ 44 (CMA 1992); and United States v. Finsel, 36 MJ 441 (CMA 1993). See also the cases and discussion in NOTE 4, below. The following instruction should be given when proceedings were not yet pending or the investigation not yet begun:

It is not necessary that administrative proceedings be pending or even that an investigation be underway.

(The accused (also) does not have to know that administrative proceedings have been initiated or begun.) The government must, however, prove beyond a reasonable doubt that the accused had reason to believe there were or would be adverse administrative proceedings against (himself) (herself) (_____) or that some official of the military would be investigating (the accused's) (_____'s) actions with the purpose of determining the appropriateness of an adverse administrative proceeding.

NOTE 3: Communication with victims or witnesses. Whether communication with a victim or witness constitutes a wrongful interference with an adverse administrative proceeding may depend on what the authorities knew of the matter under investigation at the time and whether the contact or words spoken are unlawful. (NOTE 4, infra, also addresses issues where the accused may have advised a witness to exercise a right to remain silent.) See United States v. Guerrero, 28 MJ 223 (CMA 1989) (guilty plea to obstruction of justice upheld where accused told witnesses to lie to criminal investigators after the accused committed an assault); United States v. Kirks, 34 MJ 646 (ACMR 1992) (begging parent of child sexual abuse victim to take back charges in return for information about the extent of the abuse was not obstructing justice; parent was not asked to lie or engage in unlawful activity); United States v. Asfeld, 30 MJ 917 (ACMR 1990) (saying to a victim "Don't report me" is not an obstruction of justice as failing to report was neither unlawful nor would it have an impact on the due administration of justice); and United States v. Hullet, 36 MJ 938 (ACMR 1993), rev'd on other grounds, 40 MJ 189 (CMA 1994) (accused who apologizes to his/her victim of past indecent language, asks for a truce, and offers to throw out prior counseling statements and give victim a clean slate with which to work does not commit obstruction of justice when there was no evidence accused knew or had reason to believe that the victim had initiated criminal proceedings). Compare United States v. Barner, 56 MJ 131 (CAAF 2001) (a request "not to tell" after victim had reported incident, in an attempt to dissuade victim from pursuing complaint, was sufficient to support a finding of obstructing justice). When this issue is raised by the evidence, the following may be given:

Asking that one not reveal or report that an incident occurred is not a wrongful interference with an adverse administrative proceeding unless it is proven beyond reasonable doubt that the accused knew or had reason to believe that there were or would be adverse administrative proceedings pending and the accused's acts were done with the intent to interfere with those proceedings.

NOTE 4: Advising a witness to exercise a right to remain silent. When the evidence raises that the accused advised a prospective witness to exercise an Article 31 or Fifth Amendment right to remain silent, the military judge should give the instruction immediately following this NOTE on how the accused's motivation relates to the specific intent element of the offense. See Cole v. United States, 329 F.2d 437, 443 (9th Cir.), cert.

denied, 377 U.S. 954 (1964) "We hold the constitutional privilege against self-incrimination is an integral part of the due administration of justice. A witness violates no duty to claim it, but one who...advises with corrupt motive to take it, can and does himself obstruct or influence the due administration of justice." As to a mistake of fact defense on this issue, see NOTE 6.

If the accused advised a potential witness of his/her legal right to remain silent merely to inform the witness about possible self-incrimination, that would not amount to a specific intent to interfere with an adverse administrative proceeding. However, if this advice was given for a corrupt purpose, such as a desire to protect (himself) (herself) or others from the prospective witness's possibly damaging statements, you may infer a corrupt motive exists and that the accused had a specific intent to interfere with an adverse administrative proceeding. The drawing of this inference is not required.

NOTE 5: Knowledge of the pendency of the proceedings. The accused must not only have the specific intent to obstruct a potential administrative proceeding, he/she must also have reason to believe that proceedings had begun or would begin. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

NOTE 6: Specific intent, mens rea, and mistake of fact. The accused must have had a specific intent to wrongfully interfere with an adverse administrative proceeding. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-11, Mistake of Fact, may also be applicable. When evaluating a possible mistake of fact defense, the military judge must be mindful that if the accused has a corrupt purpose (See NOTE 4 supra), mistake of fact may not be a defense even if the accused thought he/she was advising another to do a lawful act. See Cole v. United States, supra, at 443.

NOTE 7: Relation to 18 USC section 1501-1518. An accused may be prosecuted under clauses 1 and 2 of Article 134 for wrongfully interfering with an adverse administrative proceeding notwithstanding the existence of 18 USC sections 1501-1518. Wrongful interference with an adverse administrative proceeding under Article 134 is not preempted by the Title 18 offenses and the elements of these offenses are not controlling. United States v. Jones, 20 MJ 38 (CMA 1985); United States v. Williams, supra; and United States v. Athey, supra.

NOTE 8: Accomplices and grants of immunity. Trials of wrongful interference with adverse administrative action cases may involve the testimony of accomplices or testimony under a grant of immunity. When an accomplice testifies, Instruction 7-10, Accomplice Testimony, must be given upon request. Instruction 7-19, Witness Testifying Under Grant of Immunity or Promise of Leniency, should be given when an immunized witness testifies.

e. REFERENCES: United States v. Turner, 33 MJ 40 (CMA 1991); United States v. Athey, 34 MJ 44 (CMA 1992); United States v. Finsel, 36 MJ 441 (CMA 1993); United States v. Guerrero, 28 MJ 223 (CMA

1989); United States v. Kirks, 34 MJ 646 (ACMR 1992); United States v. Asfeld, 30 MJ 917 (ACMR 1990); United States v. Hullet, 36 MJ 938 (ACMR 1993), *rev'd on other grounds*, 40 MJ 189 (CMA 1994); Cole v. United States, 339 F.2d 437 (9th Cir.), *cert. denied*, 377 U.S. 954 (1964); United States v. Williams, 29 MJ 41 (CMA 1989); United States v. Jones, 20 MJ 38 (CMA 1985); United States v. Barner, 56 MJ 131 (CAAF 2001).

3–96–1. OBSTRUCTING JUSTICE (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully (endeavor to) [impede (a trial by court-martial) (an investigation) (_____)] [influence the actions of _____, (a trial counsel of the court-martial) (a defense counsel of the court-martial) (an officer responsible for making a recommendation concerning disposition of charges) (_____)] [(influence) (alter) the testimony of _____ as a witness before (a court-martial) (an investigating officer) (_____)] in the case of _____, by [(promising) (offering) (giving) to the said _____, (the sum of $_____) _____, of a value of about $_____)] [communicating to the said _____ a threat to _____] [_____], (if) (unless) he/she, the said _____, would [recommend Dismissal of the charges against said _____] [(wrongfully refuse to testify) (testify falsely concerning _____) (_____)] [(at such trial) (before such investigating officer)] [_____].

c. ELEMENTS:

(1) That (state the time and date alleged), the accused wrongfully did (a) certain act(s), that is, (state the act(s) alleged);

(2) That the accused did so in the case of (himself) (herself) (_____) against whom the accused had reason to believe there were or would be criminal proceedings pending;

(3) That the act(s) (was) (were) done with the intent to (influence) (impede) the due administration of justice; (and)

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces; [and]

NOTE 1: When the accused's actions involve a potential witness. When it is alleged that the accused's acts involve a potential witness, give the fifth element below:

[(5)] The accused had reason to believe that (state the name of the person alleged) would be called upon to provide evidence as a witness.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and

discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Wrongfully" means without legal justification or excuse.

("Communicated" means that the language was actually made known to the person to whom it was directed.)

(One can obstruct justice in relation to a criminal proceeding involving (himself) (herself).)

(While the prosecution is required to prove beyond a reasonable doubt the accused had the specific intent to (influence) (impede) the due administration of justice, there need not be an actual obstruction of justice.)

("Criminal proceedings" includes (lawful searches) (criminal investigations conducted by police or command authorities) (Article 15 nonjudicial punishment proceedings) (Article 32 investigations) (courts-martial) (state and federal criminal trials) (_____).)

NOTE 2: Administrative process as "criminal proceedings." Criminal proceedings do not include administrative processes. United States v. Turner, 33 MJ 40 (CMA 1991) (Presenting a false urine sample during a unit, command-directed urinalysis inspection does not constitute obstruction of justice. Acts of the accused were intended to preclude discovery of her offense by impeding an inspection, not a criminal investigation. Administrative inspections to determine the readiness and fitness of a unit are unlike searches and not part of the criminal justice process.) If there is an issue whether the proceeding allegedly obstructed or intended to be obstructed was criminal, the following may be given:

Criminal proceedings do not include administrative (proceedings) (inspections) (_____), such as ((elimination) (reduction) (show cause) (flying status) (_____) hearings)) (health and welfare inspections) (routine and random urinalysis tests) (inspections to determine and ensure security, military fitness, or good order and discipline) (_____).

NOTE 3: When charges not pending or investigation not begun. For an obstruction of justice to occur, charges need not have been preferred nor an investigation begun. However, the accused must have had reason to believe there were or would be criminal

proceedings. United States v. Athey, 34 MJ 44 (CMA 1992); and United States v. Finsel, 36 MJ 441 (CMA 1993). See also the cases and discussion in NOTE 4 below. The following instruction should be given when charges were not yet preferred or the investigation not yet begun:

> It is not necessary that charges be pending or even that an investigation be underway. (The accused (also) does not have to know that charges have been brought or proceedings begun.) The government must, however, prove beyond a reasonable doubt that the accused had reason to believe there were or would be criminal proceedings against (himself) (herself) (_____) or that some law enforcement official of the military would be investigating (the accused's) (_____'s) actions.

NOTE 4: Communication with victims or witnesses. Whether communication with a victim or witness constitutes an obstruction of justice may depend on what law enforcement authorities knew of the offense at the time and whether the contact or words spoken are unlawful. (NOTE 5, infra, also addresses issues where the accused may have advised a witness to exercise a right to remain silent.) See United States v. Guerrero, 28 MJ 223 (CMA 1989) (guilty plea to obstruction of justice upheld where accused told witnesses to lie to criminal investigators after the accused committed an assault); United States v. Kirks, 34 MJ 646 (ACMR 1992) (begging parent of child sexual abuse victim to "take back" charges in return for information about the extent of the abuse was not obstructing justice; parent was not asked to lie or engage in unlawful activity); United States v. Asfeld, 30 MJ 917 (ACMR 1990) (saying to a victim "Don't report me," is not an obstruction of justice as failing to report was neither unlawful nor would it have an impact on the due administration of justice); and United States v. Hullet, 36 MJ 938 (ACMR 1993), rev'd on other grounds, 40 MJ 189 (CMA 1994) (accused who apologizes to his/her victim of past indecent language, asks for a truce, and offers to throw out prior counseling statements "and give [victim] a clean slate to work with" does not commit obstruction of justice when there was no evidence accused knew or had reason to believe that the victim had initiated criminal proceedings). Compare United States v. Barner, 56 MJ 131 (CAAF 2001) (a request "not to tell" after victim had reported incident, in an attempt to dissuade victim from pursuing complaint, was sufficient to support a finding of obstructing justice). When this issue is raised by the evidence, the following may be given:

> Asking that one not reveal or report that an offense occurred is not an obstruction of justice unless it is proven beyond reasonable doubt that the accused knew or had reason to believe that there were or would be criminal proceedings pending and the accused's acts were done with the intent to obstruct justice.

NOTE 5: Advising a witness to exercise a right to remain silent. When the evidence raises that the accused advised a prospective witness to exercise an Article 31 or Fifth Amendment right to remain silent, the military judge should give the instruction

immediately following this NOTE on how the accused's motivation relates to the specific intent element of the offense. See Cole v. United States, 329 F.2d 437, 443 (9th Cir.), cert. denied, 377 U.S. 954 (1964) ("We hold the constitutional privilege against self-incrimination is an integral part of the due administration of justice. A witness violates no duty to claim it, but one who...advises with corrupt motive to take it, can and does himself obstruct or influence the due administration of justice."). As to a mistake of fact defense on this issue, see NOTE 8.

If the accused advised a potential witness of his/her legal right to remain silent merely to inform the witness about possible self-incrimination, that would not amount to a specific intent to (impede) (influence) the due administration of justice. However, if this advice was given for a corrupt purpose, such as a desire to protect (himself) (herself) or others from the prospective witness' possibly damaging statements, you may infer a corrupt motive exists and that the accused had a specific intent to (impede) (influence) the due administration of justice. The drawing of this inference is not required.

NOTE 6: What constitutes obstruction of justice—acts embraced in the "original" offense. When an accused commits, plans to commit, or conspires to commit an offense in such a way that it embraces activity designed to conceal the commission of the offense or avoid detection, a separate charge of obstruction of justice is neither automatically triggered nor normally appropriate. For example, where individuals conspire to rob a bank and leave the country after the robbery, conspiracy and robbery charges would be appropriate but a separate charge of obstruction of justice by leaving the country would not. United States v. Williams, 29 MJ 41 (CMA 1989). The line separating the end of the principal offense from the beginning of obstruction of justice is often difficult to discern. Each offense must be considered on a case by case basis. United States v. Finsel, supra. When the issue of whether the acts of the accused are part of the original offense or a separate act amounting to obstruction of justice is raised by the evidence, the following may be appropriate:

To constitute an obstruction of justice the acts alleged to be the obstruction must be separate and not part of the commission of another offense alleged to have been committed by the accused.

When there is a (conspiracy) (plan) (_____) to commit an offense other than obstruction of justice itself, and the (conspiracy) (plan) (_____) contemplates that the parties will take affirmative actions to obstruct justice in relation to the offense(s) which is/are the object of the conspiracy, obstruction of justice is not a separate offense. Consequently, unless you believe beyond a reasonable doubt that the

alleged obstruction of justice was not part of the (conspiracy) (plan) (_____) to commit the offense of (_____), the accused may not be convicted of obstruction of justice. (Committing an offense in such a way as to avoid detection does not amount to obstruction of justice.)

NOTE 7: Knowledge of the pendency of the proceedings. The accused must not only have the specific intent to obstruct a potential criminal proceeding, he/she must also have reason to believe that proceedings had begun or would begin. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

NOTE 8: Specific intent, mens rea, and mistake of fact. The accused must have had a specific intent to impede the due administration of justice. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-11, Mistake of Fact, may also be applicable. When evaluating a possible mistake of fact defense, the military judge must be mindful that if the accused has a corrupt purpose (See NOTE 5 supra), mistake of fact may not be a defense even if the accused thought he/she was advising another to do a lawful act. See Cole v. United States, supra, at 443.

NOTE 9: Relation to 18 USC section 1501-1518. An accused may be prosecuted under clauses 1 and 2 of Article 134 for obstructing justice notwithstanding the existence of 18 USC sections 1501-1518. Obstruction of justice under Article 134 is not preempted by the Title 18 offenses and the elements of these offenses are not controlling. United States v. Jones, 20 MJ 38 (CMA 1985); United States v. Williams, supra; and United States v. Athey, supra.

NOTE 10: Accomplices and grants of immunity. Trials of obstruction of justice cases often involve the testimony of accomplices or testimony under a grant of immunity. When an accomplice testifies, Instruction 7-10, Accomplice Testimony, must be given upon request. Instruction 7-19, Witness Testifying Under Grant of Immunity or Promise of Leniency, should be given when an immunized witness testifies.

e. REFERENCES: United States v. Turner, 33 MJ 40 (CMA 1991); United States v. Athey, 34 MJ 44 (CMA 1992); United States v. Finsel, 36 MJ 441 (CMA 1993); United States v. Guerrero, 28 MJ 223 (CMA 1989); United States v. Kirks, 34 MJ 646 (ACMR 1992); United States v. Asfeld, 30 MJ 917 (ACMR 1990); United States v. Hullet, 36 MJ 938 (ACMR 1993), *rev'd on other grounds*, 40 MJ 189 (CMA 1994); Cole v. United States, 339 F.2d 437 (9th Cir.), *cert. denied*, 377 U.S. 954 (1964); United States v. Williams, 29 MJ 41 (CMA 1989); United States v. Jones, 20 MJ 38 (CMA 1985); United States v. Barner, 56 MJ 131 (CAAF 2001).

3–97–1. PROSTITUTION (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully engage in (an act) (acts) of sexual intercourse with _____, a person not his/her spouse, for the purpose of receiving (money) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused had sexual intercourse with _____, a person not the accused's spouse;

(2) That the accused did so for the purpose of receiving (money) (_____);

(3) That the act(s) of sexual intercourse (was) (were) wrongful; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

("Wrongful" means without legal justification or excuse.)

"Sexual intercourse" is any penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.

(The "female sex organ" includes not only the vagina which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. "Labia" is the Latin and medically correct term for "lips.")

NOTE: Requirement for compensation. In a broad opinion discussing the sufficiency of a guilty plea for the offense of pandering, the CAAF observed that the offense of prostitution in some jurisdictions does not require receiving compensation. United States v. Gallegos, 41 MJ 446 (CAAF 1995). Under the UCMJ, however, receipt of money or other compensation is an element. See MCM, Part IV, Paragraph 97b(1)(b).

3–97–2. PROSTITUTION—PATRONIZING (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location) on or about _____,wrongfully (induce) (entice) (procure) _____, a person not his/her spouse, to engage in (an act) (acts) of sexual intercourse with the accused in exchange for (money) (compensation, to wit: _____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused had sexual intercourse with [((state the name of the person alleged), a person) (a person whose name is unknown)], not the accused's spouse;

(2) That the accused (induced) (enticed) (procured) such person to engage in (an act) (acts) of sexual intercourse in exchange for (money) (compensation, to wit: _____);

(3) That the act(s) of sexual intercourse (was) (were) wrongful; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Wrongful" means without legal justification or excuse.

"Sexual intercourse" is any penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.

(The "female sex organ" includes not only the vagina, which is the canal that connects the uterus to the external opening of the genital canal, but

also the external genital organs, including the labia majora and the labia minora. “Labia” is the Latin and medically correct term for “lips.”)

3–97–3. PANDERING BY INDUCING, ENTICING, OR PROCURING ACT OF PROSTITUTION (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully (induce) (entice) (procure) _____ to engage in (an act) (acts) of sexual intercourse for hire and reward with persons to be directed to him/her by the accused.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (induced) (enticed) (procured) (state the name of the person alleged) to engage in sexual intercourse for hire and reward with persons to be directed to him/her by the accused;

(2) That this (inducing) (enticing) (procuring) by the accused was wrongful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

("Induce" means to lead on, to influence, to prevail upon, to persuade, to bring about or to cause.) ("Entice" means to solicit, to persuade, to procure, to allure, to attract, to coax, or to seduce.) ("Procure" means to cause, to obtain, or to bring about.) ("For hire and reward" means for the purpose of receiving money or other compensation.)

("Wrongful" means without legal justification or excuse.)

‘Sexual intercourse” is any penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.

(The “female sex organ” includes not only the vagina which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. “Labia” is the Latin and medically correct term for “lips.”)

NOTE 1: Pandering as requiring three persons. Pandering requires three persons. If only two are involved, the evidence may raise the offense of solicitation to commit prostitution. United States v. Miller, 47 MJ 352 (CAAF 1997).

NOTE 2: Definition of prostitution. Prior editions of the Military Judge’s Benchbook provided a definition of prostitution as follows: “The word prostitution describes the practice of a male/female offering his/her body to indiscriminate sexual intercourse with men or women for hire and reward.” That definition is unnecessary and may be confusing. While the name of the offense uses the word “prostitution,” the elements do not. Furthermore, the nature of compensation is included in the elements and definitions. The MCM does not define prostitution except through the elements.

3–97–4. PANDERING BY ARRANGING OR RECEIVING COMPENSATION FOR ARRANGING FOR SEXUAL INTERCOURSE OR SODOMY (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully [arrange for] [receive valuable consideration, to wit: _____ on account of arranging for] _____ to engage in (an act) (acts) of (sexual intercourse) (sodomy) with _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused [arranged for] [received valuable consideration, to wit: (state the consideration received) on account of arranging for] (state the name of the alleged prostitute) (unnamed person s) to engage in (sexual intercourse) (sodomy) with _____;

(2) That the arranging (and receipt of consideration) was wrongful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

("Wrongful" means without legal justification or excuse.)

("Sexual intercourse" is any penetration, however slight, of the female sex organ by the penis. An ejaculation is not required.) (The "female sex organ" includes not only the vagina which is the canal that connects the uterus to the external opening of the genital canal, but also the external genital organs including the labia majora and the labia minora. "Labia" is the Latin and medically correct term for "lips.")

("Sodomy" is unnatural carnal copulation. "Unnatural carnal copulation" occurs when a person (takes into his/her (mouth) (anus) the reproductive sexual organ of another person) (places his penis into the (mouth) (anus) of another) (penetrates the female sex organ with his/her (mouth) (lips) (tongue)) (places his/her sexual reproductive organ into any opening of the body, except the sexual reproductive parts, of another person) (places his/her sexual reproductive organ into any opening of an animal's body)).

(Penetration of the (mouth) (anus) (_____), however slight, is required to accomplish sodomy. An ejaculation is not required.)

NOTE 1: Pandering as requiring three persons. Pandering requires three persons. If only two are involved, the evidence may raise the offense of solicitation to commit prostitution. United States v. Miller, 47 MJ 352 (CAAF 1997).

NOTE 2: Compensation not required. Pandering charged under MCM, Part IV, Paragraph 97(b)(3) does not require that the act be done for compensation. United States v. Gallegos, 41 MJ 446 (CAAF 1995).

3–97A–1. PAROLE—VIOLATION OF (ARTICLE 134)

a. MAXIMUM PUNISHMENT: BCD, 2/3 x 6 months, 6 months, E-1

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), a prisoner on parole, did, (at/on board - location), on or about _____, violate the conditions of his/her parole by_____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused was a prisoner as the result of a (court-martial conviction) (conviction in a criminal proceeding);

(2) That the accused was on parole;

(3) That there were certain conditions of parole that the accused was bound to obey:

(4) That the accused knew (he) (she) was on parole and the conditions of (his) (her) parole agreement;

(5) That, while in such status, the accused wrongfully violated the conditions of parole by doing an act or failing to do an act, to wit: (state the manner of the violation);

(6) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or to lower it in public esteem.

"Wrongful" means without legal justification or excuse.

"Prisoner" refers only to those in confinement resulting from (conviction at a court-martial) (conviction in a criminal proceeding).

"Parole" is defined as "word of honor." A prisoner on parole, or parolee, has agreed to adhere to a parole plan and conditions of parole. A "parole plan" is a written or an oral agreement made by the prisoner prior to parole to do or refrain from doing certain acts or activities. (A parole plan may include a residence requirement stating where and with whom a parolee will live, and a requirement that the prisoner have an offer of guaranteed employment.)

"Conditions of parole" include the parole plan and other reasonable and appropriate conditions of parole, such as paying restitution, beginning or continuing treatment for alcohol or drug abuse, or paying a fine ordered executed as part of a prisoner's (court-martial sentence) (sentence in a criminal proceeding). In return for giving (his) (her) "word of honor" to abide by a parole plan and conditions of parole, the prisoner is granted parole.

NOTE 1: Evidence of underlying conviction-limiting instruction. It is neither necessary nor permissible to prove the offense for which the accused was paroled. Proof of simply the conviction and the parole agreement is ordinarily sufficient. When evidence is introduced to establish the conviction which gives rise to the parole, the evidence should not disclose the offense for which the accused was convicted. The below instruction should be given.

The (court-martial promulgating order) (stipulation) (record of conviction) (testimony of _____) (_____) was admitted into evidence solely for the purpose of its tendency, if any, to show that the accused was convicted and on parole. You must disregard any evidence of possible misconduct which may have resulted in the accused's conviction or parole and you should not speculate about the nature of that possible misconduct.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge) may be applicable. Instruction 5-11-1, Mistake of Fact-Actual Knowledge, may be raised by the evidence.

3–98–1. PERJURY—SUBORNATION OF (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, procure _____ to commit perjury by inducing him/her, the said _____, to take a lawful (oath) (affirmation) in a (trial by court-martial of _____) (trial by a court of competent jurisdiction, to wit: _____ of _____) (deposition for use in a trial by _____ of _____) (_____) that he/she, the said _____, would (testify) (depose) (_____) truly, and to (testify) (depose) (_____) willfully, corruptly, and contrary to such (oath) (affirmation) in substance that _____, which (testimony) (deposition) (_____) was upon a material matter and which the accused and the said _____ did not then believe to be true.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused induced and procured (state the name of the alleged perjurer) to take an (oath) (affirmation) in a (judicial proceeding) (course of justice) and to (testify) (depose) upon such (oath) (affirmation) that (state the alleged perjured testimony);

(2) That the (oath) (affirmation) was administered to (state the name of the alleged perjurer) in a (matter) (_____) in which a (oath) (affirmation) was (required) (authorized) by law;

(3) That the (oath) (affirmation) was administered by a person having authority to do so;

(4) That upon such (oath) (affirmation) (state the name of the alleged perjurer) willfully (made) (subscribed) a statement, to wit: (set forth the statement as alleged);

(5) That the statement was material;

(6) That the statement was false;

(7) That the accused and (state the name of the alleged perjurer) did not then believe the statement to be true; and

(8) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Induce and procure" means to influence, persuade, or cause.

(An "oath" is a formal, outward pledge, coupled with an appeal to the Supreme Being, that the truth will be stated.)

(An "affirmation" is a solemn and formal pledge binding upon one's conscience, that the truth will be stated.)

("Subscribe" means to write one's name on a document for the purpose of adopting its words as one's own expressions.)

"Material" means important to the issue or matter of inquiry.

NOTE 1: False swearing as a lesser included offense. False swearing (Article 134) is not a lesser included offense of perjury.

NOTE 2: Corroboration instruction. When an instruction on corroboration is requested or otherwise appropriate, the military judge should carefully tailor the following to include only instructions applicable to the case. Subparagraphs (1), (2), or a combination of (1) and (2) may be given, as appropriate:

As to the sixth element of this offense, there are special rules for proving the falsity of a statement in perjury trials. The falsity of a statement can be proven by testimony and documentary evidence by:

(1) The testimony of a witness which directly contradicts the statement of (state the name of the alleged perjurer) as described in the specification, as long as the witness' testimony is corroborated or supported by the testimony of at least one other witness or by some other evidence which

tends to prove the falsity of the statement. You may find the accused guilty of subornation of perjury only if you find beyond a reasonable doubt that the testimony of (state the name of witness), who has testified as to the falsity of the statement described in the specification, is believable and is corroborated or supported by other trustworthy evidence or testimony. To "corroborate" means to strengthen, to make more certain, to add weight. The corroboration required to prove perjury is proof of independent facts or circumstances which, considered together, tend to confirm the testimony of the single witness in establishing the falsity of the oath.

(2) Documentary evidence directly disproving the truth of the statement described in the specification as long as the evidence is corroborated or supported by other evidence tending to prove the falsity of the statement. To "corroborate" means to strengthen, to make more certain, to add weight. The corroboration required to prove perjury is proof of independent facts or circumstances which, considered together, tend to confirm the information contained in the document in establishing the falsity of the oath.

NOTE 3: Exceptions to documentary corroboration requirement. There are two exceptions to the requirement for corroboration of documentary evidence. Applicable portions of the following should be given when an issue concerning one of these exceptions arises:

An exception to the requirement that documentary evidence must be supported by corroborating evidence is when the document is an official record which has been proven to have been well known to (state the name of the alleged perjurer) at the time (he) (she) (took the oath) (made the affirmation).

(Additionally) (An) (Another) exception to the requirement that documentary evidence must be supported by corroborating evidence is when the document was written or furnished by (state the name of the alleged perjurer) or had in any way been recognized by (him) (her) as containing the truth at some time before the supposedly perjured statement was made.

If (this exception) (these exceptions) exist(s), the documentary evidence may be sufficient without corroboration to establish the falsity of the statement.

You may find the accused guilty of perjury only if you find that the documentary evidence (and credible corroborative evidence) establish(es) the falsity of the statement of (state the name of the alleged perjurer) beyond a reasonable doubt.

NOTE 4: Proving that the accused and the alleged perjurer did not believe the statement to be true. Once the appropriate corroboration instruction is given, the military judge should give the following instruction:

The fact that the accused and (state the name of the alleged perjurer) did not believe the statement to be true when it was (made) (subscribed) may be proved by testimony of one witness without corroboration or by circumstantial evidence, if the testimony or evidence convinces you beyond a reasonable doubt as to this element of the offense.

NOTE 5: Requirement for witness to testify. An accused who solicits a potential witness to testify falsely on his behalf, but does not call the witness and the witness does not otherwise testify falsely, is not guilty of subornation of perjury, but may be guilty of a lesser included offense of attempt or obstruction of justice. See United States v. Standifer, 40 MJ 440 (CMA 1994).

3–99–1. PUBLIC RECORD—ALTERING, CONCEALING, REMOVING, MUTILATING, OBLITERATING, OR DESTROYING (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, willfully and unlawfully [(alter) (conceal) (remove) (mutilate) (obliterate) (destroy)] [appropriate with intent to (alter) (conceal) (remove) (mutilate) (obliterate) (destroy) (steal)] a public record, to wit: the (descriptive list) (rough deck log) (quartermaster's note book) of _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused [(altered) (concealed) (removed) (mutilated) (obliterated) (destroyed)] [appropriated with the intent to (alter) (conceal) (remove) (mutilate) (obliterate) (destroy) (steal)] a public record, namely: (state the record alleged);

(2) That the (altering) (_____) (appropriating) was willful and unlawful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Willfully" means intentionally or on purpose.

"Public records" include records, reports, statements, or data compilations in any form, to include paper, microfiche, or computerized, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law. (Public records include classified matters.)

NOTE 1: When appropriation is alleged. The applicable portion of the following instruction may be appropriate:

"Appropriated" means to take. (An "intent to steal" means an intent to permanently deprive another person of the use and benefit of property.)

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. Instruction 6-5, Partial Mental Responsibility, Instruction 5-1-7, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, as bearing on the issue of intent to alter, conceal, etc., may be applicable.

3–100–1. QUARANTINE—MEDICAL—BREAKING (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 6 months, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), having been duly placed in medical quarantine (in the isolation ward, _____ Hospital) (_____) by a person authorized to order the accused into medical quarantine, did, (at/on board—location), on or about_____, break said medical quarantine.

c. ELEMENTS:

(1) That the accused was duly placed in medical quarantine, namely: (state the place alleged);

(2) That the accused knew of (his) (her) medical quarantine;

(3) That (state the time and place alleged), the accused broke the medical quarantine; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Duly placed in medical quarantine" means that the accused, for medical reasons, was ordered by a person with authority to remain within certain specified limits until released by proper authority.

"Broke" means to go beyond the limits of a medical quarantine while it is still in effect.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. Instruction 6-5, Partial Mental Responsibility, Instruction 5-1-7, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, as bearing on the accused's knowledge, may be applicable.

3–100A–1. RECKLESS ENDANGERMENT (ARTICLE 134)

a. MAXIMUM PUNISHMENT: BCD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did (at/onboard—location) on or about _____, wrongfully and (recklessly) (wantonly) engage in conduct, to wit: he/she (describe conduct), conduct likely to cause death or grievous bodily harm to _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused did engage in conduct, to wit: (describe the conduct);

(2) That the conduct was wrongful and (reckless) (wanton);

(3) That the conduct was likely to produce death or grievous bodily harm to another person; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

NOTE 1: General Nature of Offense. This offense is intended to prohibit and therefore deter reckless or wanton conduct that wrongfully creates a substantial risk of death or grievous bodily harm to others. This offense is applicable only to conduct that occurred on or after 1 November 1999.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Wrongful" means without legal justification or excuse.

"Reckless" conduct is conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm or know that (his) (her) conduct is substantially certain to cause that result. The question is whether, under all the circumstances, the accused's conduct

was of such heedless nature that made it actually or imminently dangerous to the rights or safety of others.

("Wanton" includes "reckless," but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.)

When the natural and probable consequence of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is "likely to produce" that result. The drawing of this inference is not required. It is not necessary that death or grievous bodily harm actually result.

"Grievous bodily harm" means serious bodily injury. It does not mean minor injuries, such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

NOTE 2: Likelihood of death or grievous bodily harm. If there is an issue as to whether the alleged conduct is likely to produce death or grievous bodily harm, the following instruction may be appropriate.

The likelihood of death or grievous bodily harm is determined by measuring two factors. Those two factors are (1) the risk of the harm and (2) the magnitude of the harm. In evaluating the risk of the harm, the risk of death or grievous bodily harm must be more than merely a fanciful, speculative, or remote possibility. In evaluating the magnitude of the harm, death or grievous bodily harm must be a natural and probable consequence of the accused's conduct, not merely a possible consequence of the accused's conduct. (Where the magnitude of the harm is great, you may find that a reckless endangerment exists even though the risk of harm is statistically low. For example, if someone fires a rifle bullet into a crowd and a bystander in the crowd is shot, then to constitute a reckless endangerment, the risk of harm of hitting that person need only be more than merely a fanciful, speculative, or remote possibility since the magnitude of harm which the bullet is likely to inflict on that person is great if it hits the person.)

NOTE 3: Consent as a defense. Under certain circumstances, consent may be a defense to simple assault or assault consummated by a battery. In aggravated assault cases, which are most analogous to reckless endangerment cases, assault law does not recognize the validity of an alleged victim's consent to an act that is likely to result in grievous bodily harm or death, such as unprotected sexual intercourse with a Human Immunodeficiency Virus (HIV)-positive partner. The following instruction should be given in reckless endangerment cases when the evidence raises the consent issue. The law regarding assaults involving Acquired Immune Deficiency Syndrome (AIDS) and HIV-positive persons is evolving. See United States v. Bygrave, 46 MJ 91 (CAAF 1997) (CAAF held that an uninfected female service member's informed consent to unprotected sexual intercourse with an HIV-positive accused is not a defense to aggravated assault. CAAF did not address whether its decision would be the same were the act within a marital relationship, with a civilian victim, with a victim who is also HIV-positive, or other than sexual intercourse).

A victim may not lawfully consent to conduct which is likely to produce death or grievous bodily harm. Consent is not a defense (even if the purported victim was informed of the risk of exposure to HIV prior to the act).

NOTE 4: Other instructions. Instruction 5-4, Accident, may be raised by the evidence.

e. REFERENCES:

(1) Likelihood of death or grievous bodily harm: United States v. Weatherspoon, 49 MJ 209 (CAAF 1998); United States v. Outhier, 45 MJ 326 (CAAF 1996).

(2) Executive Order 13140, dated 6 October 1999, which established this offense, cited United States v. Wood, 28 MJ 318 (CMA 1989) (accused engaged in unprotected sexual intercourse with another service member, knowing that his seminal fluid contained deadly virus capable of being transmitted sexually).

3–101–1. REQUESTING COMMISSION OF AN OFFENSE (ARTICLE 134)

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3–102–1. RESTRICTION—BREAKING (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 1 month, 1 month, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), having been restricted to the limits of _____, by a person authorized to do so, did, (at/on board—location), on or about _____, break said restriction.

c. ELEMENTS:

(1) That (a certain person) (_____) ordered the accused to be restricted to the limits of (state the limits of the restriction alleged);

(2) That (said person) (_____) was authorized to order this restriction;

(3) That the accused knew of (his) (her) restriction and the limits thereof;

(4) That (state the time and place alleged), the accused went beyond the limits of the restriction before (he) (she) had been set free by proper authority; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 1: Proof of underlying offense prohibited. It is neither necessary nor permissible to prove the offense for which the restriction or any additional punishment was imposed. Proof simply of the status of restriction is sufficient. When documentary evidence is used to establish that the restriction was properly imposed, it should be masked to avoid reference to the offense for which the accused was originally punished. The following instruction, may be applicable:

(The Article 15) (court-martial promulgating order) (stipulation) (testimony of _____) (_____) was admitted into evidence solely for the

purpose of its tendency, if any, to show that the accused may have been in a restricted status at the time and place referred to in the specification. You must disregard any evidence of possible misconduct which may have resulted in the accused's punishment to restriction and you should not speculate about the nature of that possible misconduct.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–103–1. SEIZURE—DESTRUCTION, REMOVAL, OR DISPOSAL OF PROPERTY TO PREVENT (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent to prevent its seizure, (destroy) (remove) (dispose of) _____, property which, as the accused then knew, (a) person(s) authorized to make searches and seizures (was) (were) (seizing) (about to seize) (endeavoring to seize).

c. ELEMENTS:

(1) That (state the name(s) of the person(s) alleged), (a person) (persons) authorized to make searches and seizures were (seizing) (about to seize) (endeavoring to seize) certain property, to wit: (state the property alleged);

(2) That the accused then knew that (state the name(s) of the person(s) alleged) were (seizing) (about to seize) (endeavoring to seize) (state the property alleged);

(3) That (state the time and place alleged), the accused (destroyed) (removed) (disposed of) (state the property alleged) with the intent to prevent its seizure; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or to lower it in public esteem.

("Dispose of," as used in this specification, means an unauthorized transfer, relinquishment, getting rid of, or abandonment of the property.)

(Property may be considered "destroyed" if it has been sufficiently injured to be useless for the purpose for which it was intended, even if it has not been completely destroyed.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

3–103A–1. SELF-INJURY WITHOUT INTENT TO AVOID SERVICE (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) In time of war or hostile fire pay zone: DD, TF, 5 years, E-1.

(2) Otherwise: DD, TF, 2 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location) (in a hostile fire pay zone), on or about _____, (a time of war), intentionally injure himself/herself by _____(nature and circumstances of injury).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused intentionally inflicted injury upon (himself) (herself) by (state the manner alleged); (and)

(2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces; [and]

NOTE 1: Aggravating factors alleged. If the offense was committed in time of war or in a hostile fire pay zone, add the following element:

[(3)] That the offense was committed (in time of war) (in a hostile fire pay zone).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Intentionally" means the act was done willfully or on purpose.

"Inflict" means to cause, allow, or impose. The injury may be inflicted by nonviolent as well as violent means and may be accomplished by any act or omission that produces, prolongs, or aggravates a sickness or disability. (Thus, voluntary starvation that results in a disability is a self-inflicted injury.) (Similarly, the injury may be inflicted by another at the accused's request.)

"Conduct prejudicial to good order and discipline" is conduct that causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 2: Inability to perform duties raised. While inability to perform duty or absence from duty as a result of the injury is not an element of the offense, evidence of such is relevant to a determination of conduct prejudicial to good order and discipline or service discrediting conduct. United States v. Ramsey, 40 MJ 71 (CMA 1994). The following instruction should be given if raised by the evidence:

You may consider evidence that the accused was unable to perform (his) (her) duties or was absent from (his) (her) appointed place of duty due to the alleged injury, along with all matters in evidence, in determining if the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

e. REFERENCES: United States v. Ramsey, 35 MJ 733 (ACMR 1992), *aff'd* 40 MJ 71 (CMA 1994); United States v. Taylor, 38 CMR 393 (CMA 1968).

3–104–1. SENTINEL OR LOOKOUT—DISRESPECT TO (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, then knowing that _____ was a sentinel or lookout, [wrongfully use the following disrespectful language "_____, "or words to that effect, to _____, a (sentinel) (lookout) in the execution of his/her duty] [wrongfully behave in a disrespectful manner toward _____, a (sentinel) (lookout) in the execution of his/her duty, by _____].

c. ELEMENTS:

(1) That (state name of the sentinel or lookout alleged) was a (sentinel) (lookout) (state the time and place alleged);

(2) That the accused knew that (state name of the sentinel or lookout alleged) was a (sentinel) (lookout);

(3) That (state the time and place alleged), the accused [used disrespectful language, to wit: (state the disrespectful language alleged)] [behaved in a disrespectful manner, to wit: (state the disrespectful behavior alleged)]

(4) That the (use of such language) (behavior) by the accused was wrongful;

(5) That the (language) (behavior) was directed toward and within the sight or hearing of (state name of the sentinel or lookout alleged);

(6) That (state name of the sentinel or lookout alleged) was at the time in the execution of his/her duties as a (sentinel) (lookout); and

(7) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and

discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

A (sentinel) (lookout) is in the execution of his/her duties when doing any act or service required or authorized to be done by him/her by (statute) (regulation) (the order of a superior) (or) (by custom of the service).

"Disrespectful" means behavior or language which detracts from the respect due to the authority of a (sentinel) (lookout).

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3–104–2. SENTINEL OR LOOKOUT—LOITERING (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) In time of war or while receiving special pay under 37 USC Section 310: DD, TF, 2 years, E-1.

(2) Other cases: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), while posted as a (sentinel) (lookout) did, (at/on board—location) (while receiving special pay under 37 USC Section 310) on or about _____, (a time of war) (loiter) (wrongfully sit down) on his/her post.

c. ELEMENTS:

(1) That the accused was posted as a (sentinel) (lookout);

(2) That (state the time and place alleged), and while posted as a (sentinel) (lookout), the accused, without authorization or excuse, (loitered) (wrongfully sat down) on (his) (her) post; (and)

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces; [and]

NOTE: Aggravating factor(s) alleged. If the offense is alleged to have been committed in time of war or while the accused was receiving special pay under 37 USC Section 310, add the following element:

[(4)] That the accused was so posted (in time of war) (while receiving special pay under 37 USC Section 310).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

A (sentinel) (lookout) is posted when (he) (she) takes up a post in accordance with proper instructions. A "post" includes the surrounding

areas which may be necessary for the proper performance of the duties for which the (sentinel) (lookout) is posted.

("Loiter" means to stand around, to move about slowly, to linger, or to lag behind when that conduct is in violation of known instructions or accompanied by a failure to give complete attention to duty.)

3–105–1. SOLICITING ANOTHER TO COMMIT AN OFFENSE (ARTICLE 134)

NOTE 1: Using this instruction. This offense cannot include the solicitation of offenses which are listed in Article 82 (mutiny, desertion, sedition, and misbehavior before the enemy). See Instructions 3-6-1 and 3-6-2 for solicitation to commit the offenses listed in Article 82.

a. MAXIMUM PUNISHMENT:

(1) Espionage: DD, TF, life without eligibility for parole, E-1.

(2) Other offenses: The maximum for the offense solicited, except that confinement may not exceed 5 years, and death is not an authorized punishment.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully (solicit) (advise) _____ (to disobey a general regulation, to wit: _____) (to steal _____, of a value of (about) $_____, the property of _____) (to _____), by _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully ((solicited) (advised)) (state name(s) of the person(s) solicited or advised) to commit the offense of (state the offense allegedly solicited or advised) by (specify the statements, acts, or conduct allegedly constituting solicitation or advisement);

(2) That the accused specifically intended that (state the name(s) of the person(s) allegedly solicited or advised) commit the offense of (state the offense allegedly solicited or advised); and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

("Solicitation" means any statement or any other act which may be understood to be a serious request to commit the offense of (state the name of the offense allegedly solicited). The person solicited must know that the act requested is part of a criminal venture, although it is not necessary the person solicited agree to the request or act upon it.)

("Advisement" means any statement or any other act which may be understood to be a serious recommendation or suggestion to commit the offense of (state the name of the offense allegedly advised). The person advised must know that the act advised is part of a criminal venture, although it is not necessary the person advised agree to the advice or act upon it.)

Proof that the offense of (state the name of the offense solicited or advised) actually occurred is not required. However, it must be proven beyond a reasonable doubt that the accused intended that (state the name(s) of the person(s) solicited or advised) commit every element of the offense of (state the name of the offense solicited or advised). Those elements are as follows: (state the elements of the offense allegedly solicited along with necessary definitions)).

NOTE 2: Other terms to describe solicitation. A solicitation also includes counseling, influencing, urging, tempting, commanding, enticing, inducing, or inciting another to commit an offense. United States v. Mitchell, 15 MJ 214 (CMA 1983); United States v. Seeloff, 15 MJ 978, pet. denied, 17 MJ 18 (CMA 1983); and United States v Hubbs, 20 MJ 909 (ACMR 1990). The military judge may wish to use one or more of the above terms if it would assist the members.

NOTE 3: Instructing on the elements of the offense solicited. When stating the elements of the solicited offense, the military judge may describe that offense in summarized fashion, along with applicable definitions, rather than enumerate each element. For example, where the alleged offense solicited is larceny of an item of a value of greater than $500, the military judge may state, "Larceny is the wrongful taking of the property of another of a value greater than $500 with the intent to permanently deprive the owner of the use and benefit of the property or the intent to permanently appropriate the property to the accused's own use or the use of anyone other than the lawful owner. A taking is wrongful only when done without the consent of the owner and with a criminal state of mind." When the offense solicited involves elements of another offense, such as burglary with intent to commit rape, the elements of both offenses (burglary and rape), along with applicable definitions, must be stated.

NOTE 4: Graduated punishment possibilities for the solicited offense. If the solicited offense has maximum punishments graduated according to value, amounts, type of property, or other factors, the elements of the solicited offense should include the value, amount, type of property, or other factor alleged. For example, where the offense solicited is larceny of military property, that the property was military property must be stated as an element and the definition of military property given. The elements for the offenses need not be enumerated but may be summarized as in the example in NOTE 3 above.

NOTE 5: Specific intent and statements made in jest. Statements or conduct under circumstances which reveal them to be in jest do not constitute the offense. United States v. Asfeld, 30 MJ 917 (ACMR 1990). The accused must have specifically intended the solicited offense be committed. United States v. Taylor, 23 MJ 314 (CMA 1987), and United States v. Mitchell, supra. If the evidence indicates that the conduct was made in jest or that the accused did not specifically intend the offense be committed, the military judge should give the following instruction, appropriately tailored:

> To be guilty of this offense, the accused must have specifically intended that the offense of (specify the offense allegedly solicited or advised) be committed. You must also be convinced beyond a reasonable doubt that the accused's (statement(s)) (act(s)) (_____) constituted a serious (request) (recommendation) (suggestion) (_____) that the offense be committed. Unless you are satisfied beyond a reasonable doubt that the accused was not (speaking) (acting) (_____) in jest when the (statement(s)) (act(s)) (was) (were) (made) (done), and that the accused specifically intended the offense of (specify the offense allegedly solicited or advised) be committed, you may not convict the accused of this offense.

NOTE 6: Solicitation to commit murder or voluntary manslaughter. If the accused is charged with solicitation to commit murder or voluntary manslaughter, the military judge must instruct the specific intent required is to kill; an intent to inflict great bodily harm is not sufficient. See United States v. Roa, 12 MJ 210 (CMA 1982) and United States v. DeAlva, 34 MJ 1256 (ACMR 1992).

NOTE 7: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. If there is evidence that the accused may have had a mental condition that affected the ability to formulate the requisite specific intent, Instruction 5-17, Evidence Negating Mens Rea, is ordinarily applicable. If evidence of voluntary intoxication is raised, Instruction 5-12, Voluntary Intoxication, should ordinarily be given.

e. REFERENCES: United States v. Oakley, 23 CMR 197 (CMA 1957); United States v. Higgins, 40 MJ 67 (CMA 1994).

3–106–1. STOLEN PROPERTY—KNOWINGLY RECEIVING, BUYING, CONCEALING (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) $500 or less: BCD, TF, 6 months, E-1.

(2) Over $500: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully (receive) (buy) (conceal) _____, of a value of (about) $_____, the property of _____, which property, the accused then knew had been stolen.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused unlawfully (received) (bought) (concealed) (describe the property alleged);

(2) That (describe the property alleged) was of a value of about $_____ (or of some lesser value, in which case the finding should be in the lesser amount);

(3) That the property belonged to (state the name of the owner or other person alleged);

(4) That the property had been stolen by some person other than the accused;

(5) That, at the time the accused (received) (bought) (concealed) the property, (he) (she) then knew it was stolen; and

6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 1: Elements of larceny. The military judge should list here the elements of larceny, including pertinent definitions and supplemental instructions. See Instruction 3-46-1.

NOTE 2: As a lesser included offense. Receiving stolen property, knowing the same to have been stolen, is not a lesser included offense of larceny.

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable. Instruction 5-11, Ignorance or Mistake of Fact or Law, as bearing on a possible mistaken belief with respect to stolen property, may be applicable.

3–107–1. STRAGGLING (ARTICLE 134)

a. MAXIMUM PUNISHMENT: 2/3 x 3 months, 3 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, at _____, on or about _____, while accompanying his/her organization on (a march) (maneuvers) (_____), wrongfully straggle.

c. ELEMENTS:

1) That (state the time and place alleged), the accused while accompanying (his) (her) organization on (a practice march) (maneuvers) (_____), straggled;

(2) That such straggling was without just cause; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Straggle" means to wander away, to stray, to become separated from, or to lag or linger behind.

3–108–1. TESTIFY—WRONGFUL REFUSAL (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), being in the presence of (a) (an) ((general) (special) (summary) court-martial) (board of officer(s)) (court of inquiry) (officer conducting an investigation under Article 32, Uniform Code of Military Justice) (officer taking a deposition) (_____) (of) (for) the United States, of which _____ was (military judge) (president), (_____), (and having been directed by the said _____ to qualify as a witness) (and having qualified as a witness and having been directed by the said _____ to answer the following questions put to him/her as a witness, "_____"), did, (at/on board—location), on or about _____, wrongfully refuse (to qualify as a witness) (to answer said question(s)).

c. ELEMENTS:

(1) That the accused was in the presence of (a) (an) (general) (special) court-martial (duly appointed board of officers) (officer conducting an investigation under Article 32, Uniform Code of Military Justice) (officer taking a deposition), or (_____) (of) (for) the United States, of which (state the name and rank of the presiding official) was the (military judge) (president) (chairman) (_____);

(2) That (state the name and rank of the presiding official)

(a) directed the accused to qualify as a witness, or

(b) directed the accused, after (he) (she) had qualified as a witness, to answer the following question(s) as a witness, namely: (set forth the question(s) alleged);

(3) That (state the time and place alleged), the accused refused to (qualify as a witness) (answer such questions);

(4) That the refusal was wrongful; and

(5) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

(To "qualify as a witness" means for the witness to declare that (he) (she) will testify truthfully.)

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

NOTE 1: Self-incrimination raised. When the specification alleges that the accused, after qualifying as a witness, refused to answer certain questions and it appears to the military judge that the refusal was based on an assertion of the witness' right against self-incrimination, and there is no question of fact concerning grant of immunity, running of the statute of limitations, former trial, or other reason why the accused could successfully object to being tried for an offense as to which the privilege was asserted, the military judge must determine whether the answers to such questions would be self-incriminating as a matter of law. If the military judge determines that the answers to such questions would have been self-incriminating, the judge should grant a motion for a finding of not guilty. See RCM 917. If the military judge determines that there was no possibility the witness would ever be subject to a criminal prosecution for any offenses which could have been disclosed by his/her testimony, the judge should advise the members substantially as follows:

(State the name of the accused), while testifying as a witness at the prior proceeding, could not be forced against (his) (her) will to answer any question if the answer would tend to incriminate (him) (her).

"Incriminate" means to put one in danger of a criminal prosecution or operate against one's legal rights. You are advised that as a matter of law, the questions involved here which (he) (she) supposedly refused to answer would not have brought out matters which would have incriminated the accused.

NOTE 2: Grant of immunity or other bar to assertion of privilege raised. If an accused refused to testify based on a claim of self-incrimination which would ordinarily be valid, but an issue of fact exists as to whether trial of the accused for the offense as to which the privilege was asserted was barred because of a grant of immunity, former trial, the running of the statute of limitations, or some other reason, the military judge should submit such issue to the members, with carefully tailored instructions. If there is no contested issue of fact, the military judge should determine the matter as an interlocutory question. If there was no valid legal reason for the refusal, the members should be advised that the accused was required to answer the questions because there was no possibility that the accused

would ever be subject to any criminal prosecution for any offense which might have been disclosed by the testimony. Conversely, if the accused was not legally immunized from criminal prosecution for an offense which might be disclosed by that testimony, the military judge should grant a motion for a finding of not guilty. See RCM 917.

NOTE 3: Determining whether any privilege applies. Whether a grant of immunity, or a former trial, embraces the particular offense as to which the privilege against self-incrimination is asserted is ordinarily a question of law for the military judge to determine.

NOTE 4: Refusal to answer based on degrading/non-material questions. When the specification alleges that the accused, after qualifying as a witness, refused to answer certain questions and the refusal was based on an assertion of right, under Article 31(c), Uniform Code of Military Justice, not to make any statement before any military tribunal which is not material and which may tend to degrade him/her, the military judge must instruct the members that to find the accused guilty, the members must determine that the statement was material. When the evidence raises this issue, the members should be instructed substantially as follows:

> An accused as a witness before a military tribunal has the right to refuse to answer any question that is not material to the issues being determined by that tribunal and which would tend to degrade (him) (her). To find the accused guilty of this offense, you must be convinced beyond reasonable doubt that the question(s) described in this specification (was) (were) material to the issues being determined.
>
> "Material" means important to the issue or matter of inquiry.

3–109–1. BOMB THREAT (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location) on or about _____, wrongfully communicate certain language, to wit: _____, which language constituted a threat to harm a person or property by means of [(an) explosive(s); (a) weapon(s) of mass destruction; (a) biological agent(s); (a) chemical agent(s), substance(s), or weapon(s); (and) (a) hazardous material(s)].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused communicated certain language, that is (state the language of the threat alleged);

(2) That the language communicated amounted to a threat;

(3) That the harm threatened was to be done by means of ((an) explosive(s)) ((a) weapon(s) of mass destruction) ((a) biological agent(s)) ((a) chemical agent(s), substance(s), or weapon(s)) (and) ((a) hazardous material(s));

(4) That the communication was wrongful; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Threat" means an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage, or destroy is not required.

"Wrongful" means without justification or excuse.

("Explosive" means gunpowder, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device, and any other explosive compound, mixture, or similar material.)

("Weapon of mass destruction" means any device, explosive or otherwise, that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of: toxic or poisonous chemicals, or their precursors; a disease organism; or radiation or radioactivity.)

("Biological agent" means any microorganism (including bacteria, viruses, fungi, rickettsia or protozoa), pathogen, or infectious substance, and any naturally occurring, bioengineered, or synthesized component of any such micro-organism, pathogen, or infectious substance, whatever its origin or method of production, that is capable of causing either death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism; or deterioration of food, water, equipment, supplies, or materials of any kind; or deleterious alteration of the environment.)

("A chemical agent, substance, or weapon" means a toxic chemical and its precursors or a munition or device, specifically designed to cause death or other harm through toxic properties of those chemicals that would be released as a result of the employment of such munition or device, and any equipment specifically designed for use directly in connection with the employment of such munitions or devices.)

("Hazardous material" means a substance or material (including explosive, radioactive material, etiologic agent, flammable or combustible liquid or solid, poison, oxidizing or corrosive material, and compressed gas, or mixture thereof) or a group or class of material designated as hazardous by the Secretary of Transportation.)

3–109–2. BOMB HOAX—–DESIGNED OR INTENDED TO CAUSE PANIC OR PUBLIC FEAR (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, maliciously (communicate) (convey) certain information concerning an attempt being made or to be made to unlawfully ((kill) (injure) (intimidate) (_____)) ((damage) (destroy) (_____)) by means of [(an) explosive(s); (a) weapon(s) of mass destruction; (a) biological agent(s); (a) chemical agent(s), substance(s), or weapon(s); (a) hazardous material(s)]., to wit: _____, which information was false and which the accused then knew to be false.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused communicated or conveyed certain information, that is, (state the language of the threat alleged);

(2) That the information communicated or conveyed concerned an attempt being made or to be made by means of ((an) explosive(s)) ((a) weapon(s) of mass destruction) ((a) biological agent(s)) ((a) chemical agent(s), substance(s), or weapon(s)) (and) ((a) hazardous material(s)) to unlawfully

(a) [(kill) (injure) (intimidate)] [(a person) (people) (state name of the person or people alleged)], and/or

(b) [(damage) (destroy)] (state the property alleged to be damaged or destroyed);

(3) That the information communicated or conveyed by the accused was false and that the accused then knew it was false;

(4) That the communication of the information by the accused was malicious; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

A communication is ''malicious'' if the accused believed that the information would probably interfere with the peaceful use of the building, vehicle, aircraft, or other property concerned, or would cause fear or concern to one or more persons.

("Explosive" means gunpowder, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device, and any other explosive compound, mixture, or similar material.)

("Weapon of mass destruction" means any device, explosive or otherwise, that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of: toxic or poisonous chemicals, or their precursors; a disease organism; or radiation or radioactivity.)

("Biological agent" means any microorganism (including bacteria, viruses, fungi, rickettsia or protozoa), pathogen, or infectious substance, and any naturally occurring, bioengineered, or synthesized component of any such micro-organism, pathogen, or infectious substance, whatever its origin or method of production, that is capable of causing either death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism; or deterioration of food, water, equipment, supplies, or materials of any kind; or deleterious alteration of the environment.)

("A chemical agent, substance, or weapon" means a toxic chemical and its precursors or a munition or device, specifically designed to cause death or other harm through toxic properties of those chemicals that would be released as a result of the employment of such munition or device, and any equipment specifically designed for use directly in connection with the employment of such munitions or devices.)

("Hazardous material" means a substance or material (including explosive, radioactive material, etiologic agent, flammable or combustible liquid or solid, poison, oxidizing or corrosive material, and compressed gas, or mixture thereof) or a group or class of material designated as hazardous by the Secretary of Transportation.)

3–110–1. THREAT—COMMUNICATING (ARTICLE 134)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully communicate to _____ (a threat to injure _____ by _____) (accuse _____ of having committed the offense of _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused communicated certain language, to wit: (state the language alleged), or words to that effect;

(2) That the communication was made known to (state the name of the person threatened, or a third person, as alleged);

(3) That the language used by the accused under the circumstances amounted to a threat, that is, a clear, present determination or intent to injure the (person) (property) (reputation) of (state the name of the person allegedly threatened) (presently) (or) (in the future);

(4) That the communication was wrongful; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

Proof that the accused actually intended to harm another is not required, but the language used, on its face, must convey the intention to injure another immediately or in the future.

NOTE: Statements made in jest. A statement made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose which contradicts the expressed intent to commit the act is not wrongful. The offense is not committed by the mere statement of intent to commit an unlawful act not involving injury to another. Consequently, if the evidence indicates any such defense, the military judge must, sua sponte, instruct carefully and comprehensively on the issue.

3–111–1. UNLAWFUL ENTRY (ARTICLE 134)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, unlawfully enter the (dwelling house) (garage) (warehouse) (tent) (vegetable garden) (orchard) (stateroom) (_____) of _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused entered (the dwelling house) (garage) (_____) of another, to wit: (state the name of the person alleged);

(2) That such entry was unlawful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

"Unlawfully enter" means to enter without the consent of any person authorized to consent to entry or without other lawful authority.

3–112–1. WEAPON—CARRYING CONCEALED (ARTICLE 134)

a. MAXIMUM PUNISHMENT: BCD, TF, 1 year, E-1.

b. MODEL SPECIFICATION:
In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, unlawfully carry on or about his/her person a concealed weapon, to wit: a _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused carried concealed on or about (his) (her) person (a) (an) (state the weapon alleged);

(2) That the carrying was unlawful;

(3) That the (state the weapon alleged) was a dangerous weapon; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

A weapon is carried "on or about (his) (her) person" when it is either on one's person or when it is within one's immediate reach. A weapon is concealed when it is intentionally covered or kept from sight.

An object is a dangerous weapon if (it was specifically designed for the purpose of doing grievous bodily harm) (or) (it was used or intended to be used by the accused to do grievous bodily harm).

(I remind you that) ("Grievous bodily harm" means fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injury.)

NOTE 1: Inference of unlawfulness. Unlawfulness may be inferred from the surrounding circumstances and, hence, proved by circumstantial evidence. In such cases, the following instruction should be given. Instruction 7-3, Circumstantial Evidence, may also be given:

> The carrying of a concealed weapon may be inferred to be unlawful in the absence of evidence to the contrary. However, the drawing of this inference is not required. (In deciding this issue, you may consider along with all the evidence (whether carrying a weapon is authorized by military regulation or competent military authority) (is necessitated by military exigencies) (the nature of the accused's military duties) (_____).

NOTE 2: Other instructions. Instruction 3-54-8, Aggravated Assault—Dangerous Weapon, Means, or Force, contains further definitions of grievous bodily harm if they are required.

e. REFERENCES: United States v. Lyons, 33 MJ 88 (CMA 1991).

3–113–1. WEARING UNAUTHORIZED INSIGNIA, DECORATION, BADGE, RIBBON, DEVICE, OR LAPEL BUTTON (ARTICLE 134)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully and without authority wear upon his/her (uniform) (civilian clothing) (the insignia of grade of a (master sergeant of _____) (chief gunner's mate of _____)) (Combat Infantryman Badge) (the Distinguished Service Cross) (the ribbon representing the Silver Star) (the lapel button representing the Legion of Merit) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wore upon (his) (her) (uniform) (civilian clothing) (the insignia of the grade of (a master sergeant of _____) (the Combat Infantryman Badge) (the lapel button representing the Legion of Merit) (_____);

(2) That the accused was not authorized to wear the (identify the insignia, decoration, or badge alleged);

(3) That the wearing was wrongful; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

RESERVED

Chapter 4
CONFESSIONS INSTRUCTIONS

4–1. CONFESSIONS AND ADMISSIONS

NOTE 1: General. Upon timely motion to suppress or objection to the use of a pretrial statement of the accused or any derivative evidence therefrom, the military judge must determine admissibility by a preponderance of the evidence standard. MRE 304 and 305 cover pertinent definitions and rules for admissibility. Absent a stipulation of fact, the judge shall make essential findings of fact.

NOTE 2: Timing of motion and ruling. Except for "good cause," motions to suppress statements of the accused must be made prior to plea or are waived. The military judge should ordinarily rule on such objections prior to entry of plea.

NOTE 3: Presenting evidence on voluntariness to the court members. If a statement is admitted into evidence, the defense must be permitted to present evidence as to the voluntariness of the statement. The military judge in such a case must instruct the members to give such weight to the statement as it deserves under all the circumstances. Defense evidence relevant to voluntariness might include, for example, evidence of an inadequate or improper rights advisement; evidence of coercion, unlawful influence or inducement; or evidence concerning the accused's failure to understand any required rights advisement. A tailored instruction substantially as follows is appropriate in such a case:

> A pretrial statement by the accused has been admitted into evidence (as Prosecution Exhibit ___). The defense has introduced evidence that the accused's statement(s) (was) (were) obtained (through the use of _____) (in violation of _____) (_____). You must decide the weight or significance, if any, such statement(s) deserve(s) under all the circumstances. In deciding what weight or significance, if any, to give to the accused's statement(s), you should consider the specific evidence offered on the matter (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides), your own common sense and knowledge of human nature, and the nature of any corroborating evidence as well as the other evidence in this trial (to include any evidence presented by the government in rebuttal).

NOTE 4: Corroboration. A pretrial admission or confession can only be considered as evidence against the accused if it is corroborated. Corroboration is not required for a statement made by the accused before the court, those made prior to or contemporaneously with the alleged criminal act, or for statements introduced under a rule of evidence other than that pertaining to the admissibility of admissions or confessions. The corroboration required for a pretrial statement is proof of independent facts which raise an inference of the truth of the essential facts admitted. The military judge alone

determines the admissibility of the admission or confession. Corroborating evidence is usually introduced before the statement, but the statement may be admitted subject to later corroboration. If the military judge determines that there is sufficient evidence to corroborate the accused's admission or confession and admits it, the members may consider any corroborating evidence in deciding what weight to give the admission or confession. United States v. Duvall, 47 MJ 189 (CAAF 1997). See also United States v. Faciane, 40 MJ 399 (CMA 1994). If the corroborating evidence contains uncharged misconduct, the military judge should give an appropriately tailored uncharged misconduct instruction. See Instruction 7-13-1.

NOTE 5: Accused's testimony on the limited issue of voluntariness. If the accused has testified on the merits concerning only the voluntariness of a pretrial statement, the members must be instructed upon defense request that the testimony can only be used for this limited purpose and for no other purpose. The judge may instruct sua sponte if a failure to do so would constitute plain error. See also Instruction 7–12, Accused's Failure to Testify. The following instruction may be used:

> The accused testified for the limited purpose of contesting the voluntariness of (his) (her) pretrial statement. You are to consider this testimony in determining the weight and significance to be given to the pretrial statement and for no other purpose.

NOTE 6: Issue as to whether statement was made by the accused. If evidence has been received on the merits raising an issue as to whether a statement was in fact made by the accused, the military judge should instruct the court substantially as follows:

> The evidence has raised an issue as to whether a pretrial statement was in fact made by the accused as to the offense(s) of (specify the relevant offense(s)). You must consider all relevant facts and circumstances (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)). You must decide in your deliberations on the findings of guilt or innocence whether and to what extent the evidence (on behalf of either side) should be believed. You may only consider the statement as evidence if you are convinced beyond a reasonable doubt that it was in fact made by the accused. Otherwise, you must disregard it and give it no consideration whatsoever.

(The accused testified for the limited purpose of whether (he) (she) made the pretrial statement. You are to consider this testimony for determining this issue only and for no other purpose.)

REFERENCES: MRE 304 and 305.

Chapter 5
SPECIAL AND OTHER DEFENSES

5–1. GENERAL INFORMATION ABOUT INSTRUCTIONS IN THIS CHAPTER

a. Special defenses, sometimes called affirmative defenses, are those that, although not denying that the objective acts were committed by the accused, do deny, either wholly or partially, criminal responsibility for those acts. Special defenses must be instructed upon *sua sponte* when there is some evidence raising the defense. The credibility of witnesses, including the accused, whose testimony raises a possible affirmative defense, is not a factor in determining whether an instruction is necessary. Other defenses, such as alibi or character, deny the commission of the acts charged by the accused. When raised, a *sua sponte* instruction is not ordinarily required, but the military judge must instruct on such issues when requested to do so. Whenever a special defense is raised, the burden is on the prosecution to establish beyond a reasonable doubt the nonexistence of the defense and the military judge must so instruct in each case.

b. The instructions in this chapter are not all inclusive. Special defenses concerning mental conditions are discussed in Chapter 6, *infra*. Chapter 7, Evidentiary Instructions, also contains instructions that bear on matters the defense may raise. *See*, for example, Instruction 7-8-1 on the accused's character.

c. REFERENCES:

(1) Abandonment: Instruction 5-15.

(2) Accident: RCM 916(f); Instruction 5-4.

(3) Alibi: Instruction 5-13.

(4) Burden of proof: RCM 916(b).

(5) Causation (Lack of Causation, Intervening Cause, and Contributory Negligence): Instruction 5-19.

(6) Character: Instructions 5-14 and 7-8-1.

(7) Claim of right: Instruction 5-18.

(8) Coercion or duress: RCM 916(h); Instruction 5-5.

(9) Defenses generally: RCM 916(a).

(10) Defense of another: RCM 916(e)(5); Instructions 5-3-1 through 5-3-3.

(11) Defense of property: Instruction 5-7.

(12) Entrapment: RCM 916(g); Instruction 5-6.

(13) Ignorance or mistake of fact: RCM 916(j); Instructions 5-11-1 through 5-11-4.

(14) Ignorance or mistake of law: RCM 916(l)(1); Instruction 5-11.

(15) Inability and impossibility: RCM 916(i); Instructions 5-9-1, 5-9-2 and 5-10.

(16) Justification: RCM 916(c).

(17) Mental responsibility: RCM 916(k); Chapter 6, DA Pam 27-9; Ellis v. Jacob, 26 MJ 90 (CMA 1988); *compare* Instruction 5-17.

(18) Obedience to orders: RCM 916(d); Instruction 5-8-1 and 5-8-2.

(19) Parental Discipline: Instruction 5-16.

(***20)*** Self-Defense: RCM 916(e); Instructions 5-2-1 through 5-2-6.

(21) Voluntary intoxication: RCM 916(l)(2), Instructions 5-12 and 5-2-6, NOTE 4, 5-11-2, NOTE 2; 5-17, NOTE 7; and 6-5, NOTE 4.

5–2. SELF–DEFENSE GENERALLY AND USING THESE INSTRUCTIONS

The military judge must instruct on self-defense, *sua sponte*, when the issue has been raised by some evidence. The first five instructions (Instructions 5-2-1 through 5-2-5) contain basic self-defense instructions that apply in five distinct situations:

a. Homicide is charged or the assault in issue involves the use of deadly force or a force likely to produce grievous bodily harm (Instruction 5-2-1).

b. Ordinary assault or battery not involving deadly force or a force likely to produce grievous bodily harm is in issue (Instruction 5-2-2).

c. Assault or assault consummated by a battery is in issue as a lesser included offense to an offense involving the use of deadly force or a force likely to produce grievous bodily harm (Instruction 5-2-3).

d. Homicide is charged and there is evidence that the death was an unintended result of the application of less than deadly force (Instruction 5-2-4).

e. The use of force to deter (Instruction 5-2-5).

Instruction 5-2-6 contains instructions on issues that occasionally arise in connection with self-defense (*e.g.*, opportunity to withdraw; mutual combat).

5–2–1. HOMICIDE OR ASSAULT AND/OR BATTERY INVOLVING DEADLY FORCE

The evidence has raised the issue of self-defense in relation to the offense(s) of (state the alleged offense(s)). (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

Self-defense is a complete defense to the offense(s) of (state the alleged offense(s)).

For self-defense to exist, the accused must have had a reasonable apprehension that death or grievous bodily harm was about to be inflicted on (himself) (herself) and (he) (she) must have actually believed that the force (he) (she) used was necessary to prevent death or grievous bodily harm.

In other words, self-defense has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on (himself) (herself). The test here is whether, under the same facts and circumstances present in this case, an ordinary, prudent adult person faced with the same situation would have believed that there were grounds to fear immediate death or serious bodily harm. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant. Second, the accused must have actually believed that the amount of force (he) (she) used was required to protect against death or serious bodily harm. To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors to consider in determining the accused's actual belief about the amount of force required to protect (himself) (herself). As long as the accused actually believed that the amount of force (he)

(she) used was necessary to protect against death or grievous bodily harm, the fact that the accused may have used excessive force (or a different type of force than that used by the attacker) does not matter.

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the alleged offense(s)) (and) (the lesser included offense(s) of (state the lesser included offense(s) raised)), but also to the issue of self-defense. In order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.

NOTE 1: Grievous bodily harm. The following definition may be given if the term has not yet been defined:

"Grievous bodily harm" means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

NOTE 2: Reasonableness of apprehension of harm. The ordinary objective standard used to determine whether apprehension of serious bodily harm or death was reasonable must be qualified if there is evidence of a special factor affecting the reasonableness of the apprehension (e.g., sex of the accused, age of the accused, or if the accused is a person who lacks sufficient intelligence to act as a normal prudent adult person). The requirement of reasonableness should be determined in light of these special factors.

NOTE 3: Other instructions. Instructions on additional issues in connection with self-defense should be given at this point when appropriate. Sample instructions on opportunity to retreat/presence of others, accused's state of mind, voluntary intoxication, provocateur/mutual combatant, and escalation of force are included in Instruction 5-2-6.

5–2–2. ASSAULT OR ASSAULT AND BATTERY INVOLVING OTHER THAN DEADLY FORCE

NOTE 1: Using this instruction. This instruction is distinguished from deadly force situations. When ordinary assault or battery is charged and deadly force is not employed, the standard of self-defense is different from a situation in which deadly force is employed. The accused must only apprehend some bodily harm, not death or grievous bodily harm. However, when the accused only apprehends some bodily harm, the accused is then limited in the force which the accused can legitimately use to defend himself/herself, i.e., the accused may not use such force as would likely cause death or grievous bodily harm.

The evidence has raised the issue of self-defense in relation to the offense(s) of (state the alleged offense(s)). (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

Self-defense is a complete defense to the offense(s) of (state the alleged offense(s)).

For self-defense (to exist) (to be a defense to the lesser included offense(s) of (state the lesser included offense(s) raised)), the accused must have had a reasonable belief that bodily harm was about to be inflicted on (himself) (herself) and (he) (she) must have actually believed that the force (he) (she) used was necessary to prevent bodily harm.

In other words, the defense of self-defense has two parts. First, the accused must have had a reasonable belief that physical harm was about to be inflicted on (him) (her). The test here is whether, under the same facts and circumstances in this case, any reasonably prudent person faced with the same situation, would have believed that (he) (she) would immediately be physically harmed. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant. Secondly, the accused must have actually believed that the amount of force (he) (she) used was required to protect (himself) (herself). To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known

to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors in determining the accused's actual belief about the amount of force required to protect (himself) (herself). In protecting (himself) (herself), the accused is not required to use the same amount or kind of force as the attacker. However, the accused cannot use force which is likely to produce death or grievous bodily harm.

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the alleged offense(s)) (and) (to the lesser included offense(s) of (state the lesser included offense(s)) but also to the issue of self-defense. Therefore, in order to find the accused guilty of the offense of (state the alleged offense(s)), you must be convinced beyond reasonable doubt that the accused did not act in self-defense.

NOTE 2: Grievous bodily harm. The following definition may be given if the term has not yet been defined:

"Grievous bodily harm" means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

NOTE 3: Reasonableness of apprehension of harm. The ordinary objective standard used to determine whether apprehension of serious bodily harm or death was reasonable must be qualified if there is evidence of a special factor affecting the reasonableness of the apprehension (e.g., sex of the accused, age of the accused, or if the accused is a person who lacks sufficient intelligence to act as a normal prudent adult person). The requirement of reasonableness should be determined in light of these special factors.

NOTE 4: Other instructions. Instructions on additional issues in connection with self-defense should be given at this point when appropriate. Sample instructions on opportunity to retreat/presence of others, accused's state of mind, voluntary intoxication, provocateur/mutual combatant, and escalation of force are included in Instruction 5-2-6.

5–2–3. HOMICIDE OR AGGRAVATED ASSAULT WITH ASSAULT CONSUMMATED BY A BATTERY OR ASSAULT AS A LESSER INCLUDED OFFENSE

NOTE 1: Using this instruction. In some cases both standards of self-defense (deadly and non-deadly force) may be in issue. In such cases, the military judge must carefully explain and distinguish both standards and the offenses to which they apply. The following may be used as a guide in such cases:

The evidence has raised the issue of self-defense in relation to the offense(s) of (state the alleged offense(s)). (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

Self-defense is a complete defense to the offense(s) of (state the alleged offense(s)).

For self-defense to exist, the accused must have had a reasonable apprehension that death or grievous bodily harm or some lesser degree of harm was about to be inflicted on (himself) (herself) and (he) (she) must have actually believed that the force (he) (she) used was necessary to prevent death or harm to (himself) (herself).

In other words, the defense of self-defense has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm or a lesser degree of harm was about to be inflicted on (himself) (herself). The test here is whether, under the same facts and circumstances present in this case, an ordinary prudent adult person faced with the same situation would have believed that there were grounds to fear immediate death or grievous bodily harm or some lesser degree of harm. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant. Second, the accused must have actually believed that the amount of force (he) (she) used was required to protect against death or the harm that (he) (she) reasonably apprehended.

If the accused reasonably apprehended that death or grievous bodily harm was about to be inflicted upon (himself) (herself), then (he) (she) was permitted to use any degree of force actually believed necessary to protect against death or grievous bodily harm. The fact that the accused used excessive force, if in fact you believe that, or that (he) (she) used a different type of force than that used by the attacker does not matter.

If the accused reasonably apprehended that some harm less than death or grievous bodily harm was about to be inflicted upon (his) (her) person, (he) (she) was permitted to use the degree of force actually believed necessary to prevent that harm. However, the accused could not use force which was likely to produce death or grievous bodily harm. The accused was not required to use the same amount or kind of force as the attacker.

To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors to consider in determining the accused's actual belief about the amount of force required to protect (himself) (herself).

If the accused reasonably apprehended that death or grievous bodily harm was about to be inflicted upon (himself) (herself), and if the accused believed that the force (he) (she) used was necessary to protect against death or grievous bodily harm, (he) (she) must be acquitted of the alleged offense(s) and all lesser included offenses. (If the accused reasonably apprehended that some harm less than grievous bodily harm was about to be inflicted upon (himself) (herself), and if (he) (she) believed that the force used was necessary to prevent this harm, and such force was not likely to produce death or grievous bodily harm, the accused may not be convicted of any of these offenses including the lesser included offense(s) of (assault) (or) (assault consummated by a battery).)

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the alleged offense(s)) (and to the lesser included offense(s) of (state the lesser included offense(s) raised)), but also to the issue of self-defense. In order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.

NOTE 2: Grievous bodily harm. The below definition may be given if the term has not yet been defined:

"Grievous bodily harm" means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

NOTE 3: Reasonableness of apprehension of harm. The ordinary objective standard used to determine whether apprehension of serious bodily harm or death was reasonable must be qualified if there is evidence of a special factor affecting the reasonableness of the apprehension (e.g., sex of the accused, age of the accused, or if the accused is a person who lacks sufficient intelligence to act as a normal, prudent, adult person). The requirement of reasonableness should be determined in light of these special factors.

NOTE 4: Other instructions. Instructions on additional issues in connection with self-defense should be given at this point when appropriate. Sample instructions on opportunity to retreat/presence of others, accused's state of mind, voluntary intoxication, provocateur/mutual combatant, and escalation of force are included in Instruction 5-2-6.

5–2–4. DEATH OF VICTIM UNINTENDED—DEADLY FORCE NOT AUTHORIZED (SELF–DEFENSE)

NOTE 1: Using this instruction. Even if the accused was not entitled to use deadly force, self-defense will still require acquittal despite the death of the victim if: (1) the accused reasonably anticipated immediate bodily harm; (2) the accused believed the force actually used was necessary for self-protection; (3) deadly force was not used; (4) the death was unintended; and (5) the death was not a reasonably foreseeable consequence. The following instruction may be used as a guide in such cases:

In this case, there is evidence which indicates that the death of (state the name of the alleged victim) may have occurred as an unintended result of the accused's lawful use of force in defense of (himself) (herself). (Here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides.)

Self-defense is a complete defense to the death of (state the name of the alleged victim) if:

First, the accused had a reasonable belief that bodily harm was about to be inflicted on (himself) (herself);

Second, the accused actually believed that the force (he) (she) used was necessary to protect (himself) (herself);

Third, deadly force was not used by the accused;

Fourth, the death of (state the name of the alleged victim) was not intended by the accused; and

Fifth, the death of (state the name of the alleged victim) was not a reasonably foreseeable result of the accused's act.

The accused must have had a reasonable belief that bodily harm was about to be inflicted on (himself) (herself). The test here is whether, under the same facts and circumstances, any reasonably prudent person faced with the same situation, would have believed that there were grounds to anticipate immediate physical harm. Because this test is

objective, such matters as intoxication or emotional instability of the accused are not relevant.

If you are convinced beyond a reasonable doubt that the accused either did not fear immediate bodily harm or that the accused's fear was not a reasonable one under the circumstances, the defense of self-defense does not exist.

In deciding the remaining elements of the defense of self-defense, you must determine whether the force used by the accused was proper. You are advised that a person who anticipates an assault may stand (his) (her) ground and resist force with force. In protecting (himself) (herself), a person is not required to use exactly the same type or amount of force used by the attacker. With the following principles in mind, you must decide whether the force used by the accused was legal.

The accused cannot use more force than (he) (she) actually believed was necessary to protect (himself) (herself). To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors in determining the accused's actual belief about the amount of force required to protect (himself) (herself).

Next, the accused must not have used force likely to produce death or grievous bodily harm.

Additionally, the accused must not have intended to cause the death of (state the name of the alleged victim).

Finally, the death of (state the name of the alleged victim) must not have been a reasonably foreseeable result of the force used by the accused.

If you are satisfied beyond reasonable doubt that the accused exceeded one or more of these limitations I have described for you, the defense of self-defense does not exist.

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the alleged offense(s)) (and the lesser included offenses of (state the lesser included offense(s) raised), but also to the issue of self-defense. In order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.

NOTE 2: Grievous bodily harm. The below definition may be given if the term has not yet been defined:

"Grievous bodily harm" means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

NOTE 3: Reasonableness of apprehension of harm. The ordinary objective standard used to determine whether apprehension of serious bodily harm or death was reasonable must be qualified if there is evidence of a special factor affecting the reasonableness of the apprehension (e.g., sex of the accused, age of the accused, or if the accused is a person who lacks sufficient intelligence to act as a normal, prudent, adult person). The requirement of reasonableness should be determined in light of these special factors.

NOTE 4: Other instructions. Instructions on additional issues in connection with self-defense should be given at this point when appropriate. Sample instructions on opportunity to retreat/presence of others, accused's state of mind, voluntary intoxication, provocateur/mutual combatant, and escalation of force are included in Instruction 5-2-6.

5–2–5. EXCESSIVE FORCE TO DETER (SELF–DEFENSE)

NOTE 1: Using this instruction. An accused may threaten more force than can actually be used in self-defense (e.g., brandish a weapon to deter a simple assault), as long as the accused does not actually use the weapon or other means in a manner likely to produce death or grievous bodily harm.

There is evidence in this case that the accused (displayed) (brandished) (_____) the (state the object used) solely to defend (himself) (herself) by deterring (state the name of the alleged victim) rather than for the purpose of actually injuring (state the name of the alleged victim). (Evidence has been offered tending to show (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

A person may, acting in self-defense, in order to (frighten) (or) (discourage) an assailant, threaten more force than (he) (she) is legally allowed to actually use under the circumstances.

An accused who reasonably fears an immediate attack is allowed to ((display) (threaten the use of)) ((an ordinarily dangerous weapon) (an object likely to produce grievous bodily harm) (_____)) even though the accused does not have a reasonable fear of serious harm, as long as (he) (she) does not actually use the (weapon) (means) (_____) (or attempt to use it) in a manner likely to produce grievous bodily harm.

Whether the accused was using the (state the weapon or object concerned) as a deterrent, or was using it in a manner likely to cause death or grievous bodily harm, is for you to decide. Your determination rests on two factors. First, the accused must have reasonably and honestly believed that (state the name of the alleged victim) was about to inflict some bodily harm on the accused. The test here is whether, under the same facts and circumstances, a reasonably prudent adult (male) (female) faced with the same situation, would have believed that there were grounds to anticipate immediate physical harm. Because this test is objective, such matters as intoxication or emotional instability of the

accused are not relevant. Second, the accused must have intended to use, and must in fact have used, the weapon or means only as a deterrent and not in a manner likely to produce death or grievous bodily harm.

If you are satisfied beyond a reasonable doubt that the accused (displayed) (brandished) (used) (_____) the (state the weapon or object in question) in a manner likely to produce death or grievous bodily harm, rather than merely threatening its use to deter (state the name of the alleged victim), the defense of self-defense does not exist.

The prosecution's burden of proof to establish the guilt of the accused applies to the issue of self-defense. In order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.

NOTE 2: Grievous bodily harm. The following definition may be given if the term has not yet been defined.

"Grievous bodily harm" means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries.

NOTE 3: Reasonableness of apprehension of harm. The ordinary objective standard used to determine whether apprehension of serious bodily harm or death was reasonable must be qualified if there is evidence of a special factor affecting the reasonableness of the apprehension (e.g., sex of the accused, age of the accused, or if the accused is a person who lacks sufficient intelligence to act as a normal, prudent, adult person). The requirement of reasonableness should be determined in light of these special factors.

NOTE 4: Other instructions. Instructions on additional issues in connection with self-defense should be given at this point when appropriate. Sample instructions on opportunity to retreat/presence of others, accused's state of mind, voluntary intoxication, provocateur/mutual combatant, and escalation of force are included in Instruction 5-2-6.

NOTE 5: When accident may be in issue. If the victim was killed or seriously injured as an apparent result of the accused's display of the weapon, this may raise an issue of accident. Such an instruction (see Instruction 5-4, Accident) should be combined with the above.

5–2–6. OTHER INSTRUCTIONS (SELF–DEFENSE)

NOTE 1: Using this instruction. This instruction contains several instructions pertaining to self-defense. The headers to the NOTEs provide information on when the instruction is appropriate.

NOTE 2: Self-defense—opportunity to withdraw—presence of others. The accused is not required to retreat when at a place the accused has a right to be. The presence or absence of an opportunity to withdraw may be a factor in deciding whether the accused acted in self-defense. The following instruction should be given when opportunity to withdraw or the presence of others is raised by the evidence.

There has been some evidence in this case concerning the accused's (ability) (or) (lack of ability) to leave (or move away) from (his) (her) assailant.

A person may stand (his) (her) ground when (he) (she) is at a place at which (he) (she) has a right to be. Evidence tending to show that the accused (had) (did not have) an opportunity to withdraw safely is a factor which should be considered along with all the other circumstances in deciding the issue of self-defense.

(You should also consider any evidence as to whether the accused knew that other persons who might have helped (him) (her) were (present) (in the immediate area) at the time of the incident.)

NOTE 3: State of mind. The state of mind instruction below should normally be given in conjunction with the above instruction.

The accused, under the pressure of a fast moving situation or immediate attack, is not required to pause at (his) (her) peril to evaluate the degree of danger or the amount of force necessary to protect (himself) (herself). In deciding the issue of self-defense, you must give careful consideration to the violence and rapidity, if any, involved in the incident.

NOTE 4: Voluntary intoxication. When there is evidence of prior use of intoxicants by the accused, the military judge may wish to give the following clarifying instruction. This instruction may be especially appropriate when voluntary intoxication is the subject of other instructions in the case.

There exists evidence that indicates that at the time of the offense alleged the accused may have been under the influence of (alcohol) (drugs).

(I (have previously instructed) (will later instruct) you on the relevance that intoxication has on the accused's (intent) (knowledge) (ability to premeditate) (_____) with regard to the offense(s) of (state the alleged offense(s))).

On the issue of self-defense alone, the accused's voluntary intoxication should not be considered in deciding whether the accused was in reasonable apprehension of (immediate death or grievous bodily harm) (an attack upon (himself) (herself)). Voluntary intoxication does not permit the accused to use any greater force than (he) (she) would believe necessary to use when sober.

NOTE 5: Provocateur—mutual combatant. One who intentionally provokes an assault, or voluntarily engages in mutual combat is not entitled to claim self-defense, although the right to self-defense may be regained by good faith withdrawal, if it is physically impossible for the accused to withdraw in good faith, or if the adversary escalates the level of conflict. The following instructions may be used, as appropriate, in conjunction with earlier instructions, when such issues are raised by the evidence. If any of the following instructions are given, either the instruction following NOTE 6, or the instruction following NOTE 7, or both, is ordinarily required.

There exists evidence in this case that the accused may have been (a person who intentionally provoked the incident) (a person who voluntarily engaged in mutual fighting). A person who (intentionally provoked an attack upon (himself) (herself)) (voluntarily engaged in mutual fighting) is not entitled to self-defense (unless (he) (she) previously withdrew in good faith) (unless it was physically impossible for (him) (her) to withdraw in good faith) (unless the adversary escalated the level of conflict).

A person has provoked an attack and, therefore, given up the right to self-defense if (he) (she) willingly and knowingly does some act toward the other person reasonably calculated and intended to lead to a fight (or a deadly conflict). Unless such act is clearly calculated and intended by

the accused to lead to a fight (or a deadly conflict), the right to self defense is not lost.

(A person may seek an interview with another in a nonviolent way for the purpose of (demanding an explanation of offensive words or conduct) (demanding redress of a grievance or settlement of a claim) without giving up the right to self-defense. One need not seek the interview in a friendly mood. (The right to self-defense is not lost merely because the person arms (himself) (herself) before seeking the interview.))

NOTE 6: Burden of proof – provocateur or mutual combatant issue. Either the instruction following this NOTE, or one of the instructions following NOTE 7 or NOTE 8, or a combination of those instructions, is ordinarily required if any instruction in NOTE 5 is given.

The burden of proof on this issue is on the prosecution. If you are convinced beyond a reasonable doubt that the accused (intentionally provoked an attack upon (himself) (herself) so that (he) (she) could respond by (injuring) (killing) (state name of victim)) (voluntarily engaged in mutual fighting), then you have found that the accused gave up the right to self-defense. However, if you have a reasonable doubt that the accused (intentionally provoked an attack upon (himself) (herself)) (voluntarily engaged in mutual combat) then you must conclude that the accused retained the right to self-defense, and, then you must determine if the accused actually did act in self-defense.

NOTE 7: Withdrawal as reviving right to self-defense. The following instruction covers the burden of proof when there is an issue of withdrawal.

Even if you find that the accused (intentionally provoked an attack upon (himself) (herself)) (voluntarily engaged in mutual fighting), (if the accused was physically unable to withdraw in good faith) (or) if the accused later withdrew in good faith and indicated to (his) (her) adversary a desire for peace, by words or actions or both, and if (state the name of the victim) (followed the accused and) revived the (conflict) (fight), then the accused was no longer (voluntarily engaged in mutual fighting) (provoking an attack) and was entitled to act in self-defense.

If you have a reasonable doubt that the accused remained (a person provoking an attack) (a voluntary mutual combatant) at the time of the offense, you must find that the accused did not lose the right to act in self-defense, and, then, you must decide if the accused acted in self-defense.

NOTE 8: Escalation as reviving right to self-defense. The following instruction covers the burden of proof when there is an issue of whether the adversary escalated the level of the conflict. United States v. Dearing, 63 MJ 478 (CAAF 2006); United States v. Cardwell, 15 MJ 124 (CMA 1983); United States v. Lewis, 65 MJ 85 (CAAF 2007).

Even if you find that the accused (intentionally provoked an attack upon (himself) (herself)) (voluntarily engaged in mutual fighting), if the adversary escalated the level of the conflict, then the accused was entitled to act in self-defense if (he) (she) was in reasonable apprehension of immediate death or grievous bodily harm. Therefore, if the accused (intentionally provoked an attack upon (himself) (herself) by using force not likely to produce death or grievous bodily harm) (voluntarily engaged in mutual fighting not involving force likely to produce death or grievous bodily harm), and the adversary escalated the level of the conflict to one involving force likely to produce death or grievous bodily harm and thereby placed the accused in reasonable apprehension of immediate death or grievous bodily harm, the accused was entitled to use force (he) (she) actually believed was necessary to prevent death or grievous bodily harm.

Accordingly, even if you find beyond a reasonable doubt that the accused (intentionally provoked an attack upon (himself) (herself) by using force not likely to produce death or grievous bodily harm) (voluntarily engaged in mutual fighting not involving force likely to produce death or grievous bodily harm), but you have reasonable doubt that the adversary did not escalate the level of the conflict to one involving force likely to produce death or grievous bodily harm and thereby placed the accused in reasonable apprehension of immediate death or grievous bodily harm, the accused was entitled to act in self defense. You must then decide if the accused acted in self-defense.

NOTE 9: Escalation as reviving right to self-defense in homicide case. In a homicide case, the military judge should consider whether the evidence raises an LIO of Article 119(c)(2). If the accused initially was perpetrating or attempting to perpetrate an offense directly affecting the victim, e.g., battery, the evidence may raise Article 119(c)(2) as an LIO if the escalation of the level of the conflict by the victim may have been reasonably foreseeable under the circumstances.

REFERENCES: RCM 916(e).

5–3–1. DEFENSE OF ANOTHER (HOMICIDE OR AGGRAVATED ASSAULT CHARGED; NO LESSER ASSAULTS IN ISSUE)

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on defense of another when it has been raised by some evidence. The following instruction, properly tailored, can be used when the accused is charged with homicide, or aggravated assault, and no lesser assaults are raised by the evidence. When ordinary assault or battery is charged or raised as a lesser included offense, use either Instruction 5-3-2 or 5-3-3, as appropriate.

The evidence has raised the issue of defense of another in relation to the offense(s) of (state the alleged offense(s)). (There has been some (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides). A person may use force in defense of another only if that other person could have lawfully used such force in defense of (himself) (herself) under the same circumstances. (Therefore, if (state name of person defended) was also (an aggressor) (intentionally provoked an attack) (a mutual combatant) then the accused could not lawfully use force in (his) (her) behalf (regardless of the accused's understanding of the situation).)

For defense of another to exist, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on the person defended, and, the accused must have actually believed that the force (he) (she) used was necessary to protect that person. In other words, defense of another has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on (state name of person defended). The test here is whether, under the same facts and circumstances, a reasonably prudent person, faced with the same situation, would have believed that death or grievous bodily harm was about to be inflicted. Second, the accused must have actually believed that the amount of force (he) (she) used was necessary to protect against death or grievous bodily harm. To determine the accused's actual belief as to the amount of force necessary, you must view the situation through the eyes of the accused. In addition to what was known to the accused at the time, the

accused's (age) (intelligence) (emotional control) (_____) are all important factors to consider in determining (his) (her) actual belief as to the amount of force necessary to protect (state the name of person defended). (As long as the accused actually believed that the amount of force (he) (she) used was necessary to protect against death or grievous bodily harm, the fact that the accused may have used such force (or a different type of force than that used by the attacker) does not matter.)

The burden is on the prosecution to establish the guilt of the accused. Unless you are satisfied beyond a reasonable doubt that the accused did not act in defense of another, you must acquit the accused of the offense(s) of (_____).

NOTE 2: Other instructions. See Instructions 5-2-1 through 5-2-6, for additional self-defense instructions which, when properly tailored, may be appropriate in an instruction on defense of another.

NOTE 3: Use of force in defense of property or to prevent a crime. See Instruction 5-7 for an instruction on use of force in protection of property, premises, or to prevent the commission of a crime.

REFERENCES: RCM 916(e)(5).

5–3–2. DEFENSE OF ANOTHER (ASSAULT OR ASSAULT AND BATTERY CHARGED)

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on defense of another when it has been raised by some evidence. When homicide or aggravated assault is the charged offense, do not use this instruction. Use Instruction 5-3-1, instead. If an assault other than aggravated assault is raised as a lesser included offense to a charged homicide or aggravated assault, Instruction 5-3-3, appropriately tailored, should be given.

The evidence has raised the issue of defense of another in relation to the offense(s) of (state the alleged offense(s)). (There has been some (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides). A person may use force in defense of another only if that other person could have lawfully used such force in defense of (himself) (herself) under the same circumstances. (Therefore, if (state name of person defended) was also (an aggressor) (intentionally provoked an attack) (a mutual combatant) then the accused could not lawfully use force in (his) (her) behalf (regardless of the accused's understanding of the situation).)

For defense of another to exist, the accused must have had a reasonable belief that bodily harm was about to be inflicted on the person defended, and, the accused must have actually believed that the force (he) (she) used was necessary to protect that person, and the force used by the accused must have been less than force likely to result in death or grievous bodily harm. In other words, defense of another has two parts. First, the accused must have had a reasonable belief that bodily harm was about to be inflicted on (state name of person defended). The test here is whether, under the same facts and circumstances, a reasonably prudent person, faced with the same situation, would have believed that bodily harm was about to be inflicted. Second, the accused must have actually believed that the amount of force (he) (she) used was necessary to protect against bodily harm, and the force used by the accused was not likely to cause death or grievous bodily harm. To determine the accused's actual belief as to the amount of force necessary, you must view the situation through the eyes of the

accused. In addition to what was known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors to consider in determining (his/her) actual belief as to the amount of force necessary to protect (state the name of person defended). (As long as the accused actually believed that the amount of force (he) (she) used was necessary to protect against bodily harm, the fact that the accused may have used such force (or a different type of force than that used by the attacker) does not matter.)

In defending another person the accused is not required to use the same type or amount of force used by the attacker, but the accused cannot use force which is likely to produce death or grievous bodily harm.

The burden is on the prosecution to establish the guilt of the accused. Unless you are satisfied beyond a reasonable doubt that the accused did not act in defense of another, you must acquit the accused of the offense(s) of (_____).

NOTE 2: Other instructions. See Instructions 5-2-1 through 5-2-6, for additional self-defense instructions which, when properly tailored, may be appropriate in an instruction on defense of another.

NOTE 3: Use of force in defense of property or to prevent a crime. See Instruction 5-7 for an instruction on use of force in protection of property, premises, or to prevent the commission of a crime.

REFERENCES: RCM 916(e)(5).

5–3–3. DEFENSE OF ANOTHER (HOMICIDE OR AGGRAVATED ASSAULT CHARGED AND A LESSER ASSAULT RAISED AS A LESSER INCLUDED OFFENSE)

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on defense of another when it has been raised by some evidence. The following instruction, properly tailored, can be used when the accused is charged with homicide, or aggravated assault, and a lesser form of assault is also raised. When ordinary assault or battery is charged, use Instruction 5-3-2, not this instruction.

The evidence has raised the issue of defense of another in relation to the offense(s) of (state the alleged offense(s)). (There has been some (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides). A person may use force in defense of another only if that other person could have lawfully used such force in defense of (himself) (herself) under the same circumstances. (Therefore, if (state name of person defended) was also (an aggressor) (intentionally provoked an attack) (a mutual combatant) then the accused could not lawfully use force in (his) (her) behalf (regardless of the accused's understanding of the situation).)

For defense of another to exist, the accused must have had a reasonable belief that death or grievous bodily harm or some lesser degree of harm, was about to be inflicted on the person defended, and, the accused must have actually believed that the force (he) (she) used was necessary to protect that person.

In other words, defense of another has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm or a lesser degree of harm was about to be inflicted on (state name of person defended). The test here is whether, under the same facts and circumstances present in this case, a reasonably prudent person, faced with the same situation, would have believed that death or grievous bodily harm or some lesser degree of harm was about to be inflicted. Second, the accused must have actually believed that the amount of

force (he) (she) used was necessary to protect against death or other harm.

If the accused reasonably apprehended that death or grievous bodily harm was about to be inflicted upon (state the name of the person defended), then (he) (she) was permitted to use any degree of force (he/she) actually believed was necessary to protect against death or grievous bodily harm. The fact that the accused used excessive force, if, in fact, you believe that, or that (he) (she) used a different type of force than that used by the attacker does not matter.

If the accused reasonably apprehended that some harm less than death or grievous bodily harm was about to be inflicted, (he) (she) was permitted to use the degree of force (he) (she) actually believed necessary to prevent that harm. However, (he) (she) could not use force which was likely to produce death or grievous bodily harm. The accused was not required to use the same amount or kind of force as the attacker.

To determine the accused's actual belief as to the amount of force necessary, you must view the situation through the eyes of the accused. In addition to what was known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors to consider in determining (his) (her) actual belief as to the amount of force necessary to protect (state the name of person defended).

If the accused reasonably believed that death or grievous bodily harm was about to be inflicted upon (state the name of the person defended), and if (he) (she) believed that the force (he) (she) used was necessary to protect against death or grievous bodily harm, (he) (she) must be acquitted of the alleged offense(s) of _____ and all lesser included offenses.

If the accused reasonably apprehended that some harm less than grievous bodily harm was about to be inflicted upon (state the name of

the person defended), and if (he) (she) believed that the force (he) (she) used was necessary to prevent this harm, and such force was not likely to produce death or grievous bodily harm, (he) (she) may not be convicted of any of these offenses, including the lesser included offense(s) of (assault) (or) (assault consummated by a battery).

The prosecution's burden to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the charged offense(s)) (and to the lesser included offense(s) of (state the lesser offense(s) raised)), but also to the issue of defense of another. Unless you are satisfied beyond a reasonable doubt that the accused did not act in defense of another, you must acquit the accused of the offense(s) of (_____).

NOTE 2: Other instructions. See Instructions 5-2-1 through 5-2-6, for additional self-defense instructions which, when properly tailored, may be appropriate in an instruction on defense of another.

NOTE 3: Use of force in defense of property or to prevent a crime. See Instruction 5-7 for an instruction on use of force in protection of property, premises, or to prevent the commission of a crime.

REFERENCES: RCM 916(e)(5).

5–4. ACCIDENT

NOTE 1: Using this instruction. Generally, the military judge must instruct, sua sponte, on the defense of accident when the issue has been raised by some evidence. The instruction following NOTE 2 is always given when accident is in issue. When accident has been raised concerning an offense requiring the accused's conduct to be intentional, willful, inherently dangerous, or culpably negligent, great care must be taken to explain how accident relates to the offense's required degree of culpability. In such cases, the instructions following NOTE 3 should be given. When proximate cause is in issue, an instruction may be necessary to explain why the accused's negligence could negate an accident defense but not be a proximate cause of the charged harm. The instructions following NOTE 4 accomplish this purpose. The military judge should consult NOTE 5 if the charged and lesser included offenses involve different degrees of culpability.

NOTE 2: Mandatory instruction. The following instruction is given in ALL cases where accident is in issue:

The evidence has raised the issue of accident in relationship to the offense(s) of (state the alleged offense(s)). In determining this issue, you must consider all the relevant facts and circumstances (including, but not limited to: (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

Accident is a complete defense to the offense(s) of (state the alleged offense(s)).

If the accused was doing a lawful act in a lawful manner free of any negligence on (his) (her) part, and (an) unexpected (death) (bodily harm) (_____) occurs, the accused is not criminally liable. The defense of accident has three parts. First, the accused's (act(s)) (and) (or) (failure to act) resulting in the (death) (bodily harm) (_____) must have been lawful. Second, the accused must not have been negligent. In other words, the accused must have been acting with the amount of care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances.

Third, the (death) (bodily harm) (_____) must have been unforeseeable and unintentional.

The burden is on the prosecution to establish the guilt of the accused. Consequently, unless you are convinced beyond a reasonable doubt that the (death) (bodily harm) (_____) was not the result of an accident, the accused may not be convicted of (state the alleged offense(s)).

NOTE 3: Intentional, willful, inherently dangerous, or culpably negligent act/failure to act. When an offense includes an intentional, willful, or inherently dangerous act or failure to act, or culpable negligence as an element, the military judge must instruct that while the members may have found the accused was negligent, simple negligence does not establish the degree of culpability required to find the accused guilty of the offense in issue. In such cases, the following should be tailored and given:

If you are satisfied beyond a reasonable doubt that the accused did not act with the amount of care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances, the defense of accident does not exist. However, this does not necessarily mean that the accused is guilty of (state the alleged offense(s)). To find the accused guilty of (this) (these) offense(s) the accused's conduct must have amounted to more than simple negligence. You will recall that to convict the accused of (state the alleged offense(s)), one of the elements the government must prove beyond a reasonable doubt is that the accused ((intentionally) (willfully)) (or) ((with) (by) (an inherently dangerous act evincing a wanton disregard for human life) (culpable negligence)) ((caused) (inflicted) (did)) ((kill) (killed) (grievous bodily harm) (bodily harm) (_____)).

("Simple negligence" is the failure to act with the care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances. ("Culpable negligence" is a negligent (act) (or) (failure to act) accompanied by a gross, reckless, indifferent, wanton, or deliberate disregard for the foreseeable results to others.) (An "act inherently dangerous to another" is one that is characterized by heedlessness of the probable consequences of the act, indifference to the likelihood of death or great bodily harm, and clearly demonstrates a total disregard for the known probable results of death or great bodily harm.))

To summarize on this point, a finding of simple negligence will deprive the accused of the accident defense; however, simple negligence is not enough to find the accused guilty of the offense(s) of (state the alleged offense(s)).

NOTE 4: Relationship between proximate cause and defense of accident. An accused's negligence, or a greater degree of culpability, defeats the defense of accident. Nevertheless, the accused cannot be convicted unless the accused's conduct is a proximate cause of the death or bodily harm. When the issue of proximate cause is raised, the following should be tailored and given:

If you find the accused (committed an inherently dangerous act evincing a wanton disregard for human life) (was (culpably) negligent) and, thus, not protected from criminal liability by the defense of accident, you may not convict unless you find beyond a reasonable doubt that the (inherently dangerous act) ((culpable) negligence) was a proximate cause of the (death) (bodily harm) (_____).

"Proximate cause" means that the (death) (bodily harm) (_____) must have been the result of the accused's (inherently dangerous) ((culpably) negligent) (act) (failure to act). A proximate cause does not have to be the only cause, but it must be a direct or contributing cause which plays a material role, meaning an important role, in bringing about the (death) (bodily harm) (_____). If some other unforeseeable, independent, intervening event, which did not involve the accused, was the only cause which played any important part in bringing about the (death) (bodily harm) (_____), then the accused may not be convicted of the offense(s) of (state the alleged offense(s)).

The burden is on the prosecution to establish the guilt of the accused. Before the accused can be convicted of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the defense of accident either does not exist or has been disproved, and that the accused's (inherently dangerous) ((culpably) negligent) conduct was a proximate cause of the (death) (bodily harm) (_____).

NOTE 5: Different degrees of culpability raised by lesser included offenses. The military judge must be especially attentive in applying this instruction when lesser included

offenses involve different degrees of culpability. The instructions following NOTEs 3 and 4 may have to be tailored to apply to lesser included offenses. For example, if an accused is charged with unpremeditated murder, the evidence may raise the lesser included offenses of Article 118(3) murder, voluntary manslaughter, involuntary manslaughter, and negligent homicide. The degrees of culpability would then include a willful or intentional act, an inherently dangerous act, culpable negligence, and simple negligence.

REFERENCES: RCM 916(f); United States v. Tucker, 38 CMR 349 (CMA 1968); United States v. Hubbard, 33 CMR 184 (CMA 1963); United States v. Bull, 14 CMR 53 (CMA 1954).

5–5. DURESS (COMPULSION OR COERCION)

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on the issue of duress when it is raised by some evidence. Duress is not a defense to homicide. Generally, the defense of duress applies if the accused reasonably feared immediate death or great bodily harm to himself or herself or another. The following instruction, appropriately tailored, may be appropriate in such cases:

The evidence has raised the issue of duress in relation to the offense(s) of (state the alleged offense(s)). "Duress" means compulsion or coercion. It is causing another person to do something against (his) (her) will by the use of either physical force or psychological coercion. (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

To be a defense, the amount of duress used on the accused, whether physical or psychological, must have been sufficient to cause a reasonable fear that if (he) (she) did not commit the offense, (he) (she) (another) would be immediately killed or would immediately suffer serious bodily injury. The amount of coercion or force must have been sufficient to have caused a person of normal strength and courage to give in. The fear which caused the accused to commit the offense(s) must have been fear of immediate death or immediate serious bodily injury, and not simply fear of injury to reputation or property. The threat and resulting fear must have continued throughout the commission of the offense(s). If the accused had a reasonable chance to avoid committing the offense(s) without subjecting (himself) (herself) (another) to the threatened danger, the defense of duress does not exist.

(You should consider here the opportunity, or lack of opportunity, the accused may have had to report the threat to the authorities, (and whether the accused reasonably believed that a report would protect (him) (her) (another) from the threatened danger).) The burden is on the prosecution to establish the accused's guilt beyond a reasonable doubt. Duress is a complete defense to the offense(s) of (state the alleged

offense(s)). If you are convinced beyond a reasonable doubt that the accused did not act under duress, the defense of duress does not exist.

NOTE 2: Limitations of use of the defense. Military courts have held that the defense of duress may apply to escape from confinement or absence without authority offenses where the accused escapes or absents himself or herself in order to avoid physical harm. See United States v. Blair, 36 CMR 413 (CMA 1966). See also United States v. Guzman, 3 MJ 740 (NMCMR 1977). The Supreme Court has held that the defense of duress is not available to one who commits a continuing offense unless the offending activity (such as continued absence from custody) is terminated as soon as the circumstances compelling the illegal behavior have ceased to exist. See United States v. Bailey, 444 U.S. 394 (1980). When such an issue is raised, the preceding instructions should be appropriately tailored.

REFERENCES: RCM 916(h).

5–6. ENTRAPMENT

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on the issue of entrapment when there is some evidence that the suggestion or inducement for the offense originated with a government agent and some evidence exists that the accused was not predisposed to commit the offense. Military judges should err on the side of caution and give this instruction whenever there is some evidence the accused was not predisposed. Entrapment may be a defense even though the accused denies commission of the offense alleged. Each instruction should be carefully tailored with due regard to the particular facts of the case and any proposed instructions by counsel. In such cases, the military judge should instruct substantially as follows:

The evidence has raised the issue of entrapment in relation to the offense(s) of (state the alleged offense(s)). (There has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

Entrapment is a defense when government agents, or people cooperating with them, cause an innocent person to commit a crime which otherwise would not have occurred. The accused cannot be convicted of the offense(s) of (state the alleged offense(s)) if (he) (she) was entrapped.

An "innocent person" is one who is not predisposed or inclined to readily accept the opportunity furnished by someone else to commit the offense charged. It means that the accused must have committed the offense charged only because of inducements, enticements, or urging by representatives of the government. You should carefully note that if a person has the predisposition, inclination, or intent to commit an offense or is already involved in unlawful activity which the government is trying to uncover, the fact that an agent provides opportunities or facilities or assists in the commission does not amount to entrapment. You should be aware that law enforcement agents can engage in trickery and provide opportunities for criminals to commit an offense, but they cannot create criminal intent in otherwise innocent persons and thereby cause criminal conduct.

The defense of entrapment exists if the original suggestion and initiative to commit the offense originated with the government, not the accused, and the accused was not predisposed or inclined to commit the offense(s) of (state the alleged offense(s)). Thus, you must balance the accused's resistance to temptation against the amount of government inducement. The focus is on the accused's latent predisposition, if any, to commit the offense, which is triggered by the government inducement.

(The latitude given the government in inducing the criminal act is considerably greater in contraband cases than would be permissible as to other crimes.) In deciding whether the accused was entrapped you should consider all evidence presented on this matter (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The prosecution's burden of proof to establish the guilt of the accused applies to the elements of the offense(s) of (state the alleged offense(s)) (and) the lesser included offense(s) of (state the lesser included offense(s) raised), but also to the issue of entrapment. In order to find the accused guilty, you must be convinced beyond a reasonable doubt that the accused was not entrapped.

NOTE 2: Relevant factors and predisposition. Relevant factors on the issue of entrapment may include the circumstances surrounding the alleged transaction (e.g., the nature and number of enticements by government agents to the accused or the accused's apparent willingness or reluctance to engage in the activity involved) as well as evidence of other acts of misconduct similar to those charged to establish predisposition. The following cases might be helpful in tailoring instructions: Responding to advertisements for child pornography not entrapment, United States v. Tatum, 36 MJ 302 (CMA 1993); Nine-year-old non-judicial punishment for sale of cocaine admissible to show predisposition, United States v. Rayford, 33 MJ 747 (ACMR 1991); Knowing price of drugs and where they can be bought can be predisposition, United States v. Lubitz, 40 MJ 165 (CMA 1994); A "ready response" may indicate predisposition, United States v. Bell, 38 MJ 358 (CMA 1993); Repeated requests do not in and of themselves constitute inducement, United States v. Howell, 36 MJ 354 (CMA 1993).

NOTE 3: Enrollment in drug treatment programs. The military judge must be attentive to evidence when an accused was enrolled in a drug treatment program at the time of the government inducements. While appellate courts have held such inducements to have

been lawful, drug treatment program policies may preclude government agents from using knowledge of the accused's enrollment to induce the accused. United States v. Cooper, 33 MJ 356 (CMA 1991), upheld on reconsideration 35 MJ 417 (CMA 1992), cert. denied 507 U.S. 985 (1993); United States v. Bell, 38 MJ 358 (CMA 1993); and United States v. Harris, 41 MJ 433 (CAAF 1995)

NOTE 4: "Due process" entrapment defense. Federal Circuit Courts of Appeal have recognized a due process entrapment defense when inducements of government agents are a "shocking police abuse that have been "outrageous, fundamentally unfair, and shocking to the universal sense of justice." The due process entrapment defense would exonerate an accused who was predisposed. It is unclear whether the U.S. Court of Appeals for the Armed Forces has adopted this defense or only recognized the "shocking" police practices on the issue of the propriety of the inducement. Equally unclear is whether this defense is one for the military judge to decide or a question of fact for the members. The unsettled nature of the law in this matter makes a definitive instruction inappropriate, but military judges should be attentive to the issue. See United States v. Bell, 38 MJ 358 (CMA 1993) and United States v. Lemaster, 40 MJ 178 (CMA 1994).

REFERENCES: RCM 916(g); United States v. Howell, 36 MJ 354 (CMA 1993); United States v. Vanzandt, 14 MJ 332 (CMA 1982); United States v. Tatum, 36 MJ 302 (CMA 1993); United States v. Rayford, 33 MJ 747 (ACMR 1991); United States v. Lubitz, 40 MJ 165 (CMA 1994); United States v. Bell, 38 MJ 358 (CMA 1993); United States v. Lemaster, 40 MJ 178 (CMA 1994); United States v. Cooper, 33 MJ 356 (CMA 1991), *upheld on reconsideration*, 35 MJ 417 (CMA 1992), *cert. denied*, 507 U.S. 985 (1993); United States v. Harris, 41 MJ 433 (CAAF 1995).

5–7. DEFENSE OF PROPERTY

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on defense of property when it has been raised by some evidence. A person is justified in using reasonable force to protect his/her real or personal property from trespass or theft, when the person reasonably believes that his/her property is in immediate danger of an unlawful interference, and that the use of such force is necessary to avoid the danger. Depending on the situation, reasonable force could also include the use of deadly force. The following instruction may be used:

The evidence has raised the issue of defense of property in relation to the offense(s) of (state the alleged offense(s)). (There has been (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).) Defense of property is a complete defense to the offense(s) of (state the alleged offense(s)).

For defense of property to exist, the accused must have had a reasonable belief that (his) (her) (real) (personal) property was in immediate danger of (trespass) (theft) and that (he) (she) must have actually believed that the force (he) (she) used was necessary to prevent the (trespass to) (theft of) (his) (her) (real) (personal) property.

In other words, the defense of property has two parts. First, the accused must have had a reasonable belief that (his) (her) (real) (personal) property was in immediate danger of (trespass) (theft). The test here is whether, under the same facts and circumstances as in this case, any reasonably prudent person, faced with the same situation, would have believed that (his) (her) property was in immediate danger of unlawful interference. Secondly, the accused must have actually believed that the amount of force (he) (she) used was required to protect (his) (her) property. To determine the accused's actual belief as to the amount of force which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's (age) (intelligence) (emotional control) (_____) are all important factors in determining the accused's actual belief about the amount of force required to protect (his)

(her) property. No requirement exists for the accused to have requested that (state the name of the alleged victim) stop interfering with (his) (her) property before resorting to force to protect (his) (her) property.

(In protecting (his) (her) property, the accused cannot use force which is likely to produce death or grievous bodily harm unless two factors exist: (1) the danger to the property actually must have been of a forceful, serious, or aggravated nature; and (2) the accused honestly believed the use of deadly force was necessary to prevent loss of the property.) The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense, but also to the issue of defense of property. In order to find the accused guilty of the offense(s) of (state the alleged offense(s)), you must be satisfied beyond a reasonable doubt that the accused did not act in defense of property.

NOTE 2: Possible application of self-defense instructions. If the accused's reasonable force in protection of his/her property is met with an attack upon the accused's own person, then the defense of self-defense may also be in issue, which could potentially give rise to the lawful use of deadly force. See Self-Defense instructions (Instructions 5-2, 5-2-1, 5-2-2, and 5-2-3). See also United States v. Richey, 20 MJ 251 (CMA 1985).

NOTE 3: Ejecting someone from the property. A person, who is lawfully in possession or in charge of property, and who requests another to leave whom he/she has a right to request to leave, may lawfully use as much force as is reasonably necessary to remove the person, after allowing a reasonable time for the person to leave. The person who refuses to leave after being asked to do so, becomes a trespasser and the trespasser may not resist if only reasonable force is employed in ejecting him or her. United States v. Regalado, 33 CMR 12 (CMA 1963); United States v. Payne, No. 20040756 (ACCA 15 April 2005) (may include automobiles).

REFERENCES: United States v. Lee, 13 CMR 57 (CMA 1953); United States v. Gordon, 33 CMR 489 (ABR 1963).

5–8–1. OBEDIENCE TO ORDERS—UNLAWFUL ORDER

NOTE 1: Using this instruction. Use this instruction when the defense of obedience to an unlawful order is raised. Instruction 5-8-2 should be used when the defense of obedience to a lawful order is raised. Obedience to an order is a complete defense unless the order was illegal and the accused actually knew it was illegal or a person of ordinary sense and understanding would, under the circumstances, know the order was illegal. Whether the order in question was legal is an interlocutory question to be resolved by the military judge. In cases where the order is found to be illegal, the following may be useful as a guide in preparing an instruction:

The evidence has raised an issue of obedience to orders in relation to the offense(s) of (state the alleged offense(s)). In this regard, there has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides). An order to (state performance allegedly required by order(s)) (if you find such an order was given) would be an unlawful order. Obedience to an unlawful order does not necessarily result in criminal responsibility of the person obeying the order. The acts of the accused if done in obedience to an unlawful order are excused and carry no criminal responsibility unless the accused knew that the order was unlawful or unless the order was one which a person of ordinary common sense, under the circumstances, would know to be unlawful.

You must first decide whether the accused was acting under (an) order(s) to (state performance allegedly required of accused). You should consider (summarize evidence and contentions of parties concerning whether an order was issued, and its terms, as appropriate).

If you are convinced beyond a reasonable doubt that the accused was not acting under orders to (state performance allegedly required of accused), then the defense of obedience to orders does not exist.

If you find that the accused was acting under order(s) you must next decide whether the accused knew the order(s) to be illegal. You must resolve this issue by looking at the situation subjectively, through the

eyes of the accused. You should consider the accused's (age) (education) (training) (rank) (background) (experience) (_____).

If you are convinced beyond a reasonable doubt that the accused actually knew the order(s) to be illegal, then the defense of obedience to orders does not exist.

If you are not convinced beyond a reasonable doubt that the accused actually knew the order(s) to be unlawful, you must then determine whether, under the same circumstances as are present in this case, a person of ordinary common sense would have known that the order(s) (was) (were) unlawful. In resolving this issue, you should consider (summarize evidence and contentions of parties concerning whether the order(s) (was) (were) issued, and (its) (their) terms, as appropriate). If you are convinced beyond a reasonable doubt that a person of ordinary common sense would have known that the order was unlawful, the defense of obedience to orders does not exist, even if the accused did not in fact know that the order was unlawful.

The burden of proof is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused was not acting pursuant to orders to (state performance allegedly required of accused), or that the accused knew such order(s) to be unlawful, or that a person of ordinary common sense would have known the order(s) to be unlawful, then the accused will not avoid criminal responsibility based on obedience to orders.

5–8–2. OBEDIENCE TO ORDERS—LAWFUL ORDER

NOTE: Using this instruction. Use this instruction when the defense of obedience to a lawful order is raised. Instruction 5-8-1 should be used when the defense of obedience to an unlawful order is raised. Obedience to a lawful order is an absolute defense. Factual issues might remain, such as whether the order was issued, or whether the accused was acting pursuant to that order. The military judge should instruct on such issues, sua sponte, when they arise. A sample instruction follows:

The evidence has raised an issue of obedience to orders in relation to the offense(s) of (state the alleged offense(s)). In this regard, there has been (evidence) (testimony) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides). An order to (state the performance allegedly required by order(s)) is an absolute defense to the offense(s) of (state the alleged offense(s)), if the accused committed the act(s) charged in obedience to such an order. You must decide whether (such an order was given) (and) (whether the accused was acting pursuant to such an order at the time of the alleged offense(s)).

The prosecution must establish the guilt of the accused beyond a reasonable doubt. If you are convinced beyond a reasonable doubt that the accused (had not received) (was not acting pursuant to) an order to (state the performance allegedly required by order(s)), the accused will not avoid criminal responsibility based on obedience to an order.

5–9–1. PHYSICAL IMPOSSIBILITY

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on the issue of physical impossibility if the issue is raised by some evidence. Physical inability (see Instruction 5-9-2) is distinguished from physical impossibility in that under the former it may have been possible for the accused to perform, but the accused chose not to perform because of his/her belief that he/she was not physically able to perform.

The evidence has raised an issue of physical impossibility in relation to the offense(s) of (state the alleged offense(s)). In this regard, there has been (evidence) (testimony) tending to show that the accused suffered from (describe injury, ailment, or disability) which (made it physically impossible for (him) (her) to (obey the order to _____) (perform)) (caused (him) (her) to _____). (Here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides.)

If the accused's physical condition made it impossible for (him) (her) to (obey the order to _____) (perform _____)) (caused (him) (her) to _____), (his) (her) conduct is excusable. Physical impossibility is a defense if the physical condition was a proximate cause of the (failure to act) (act) charged. The physical condition is a proximate cause if it is a direct cause or a material factor, meaning an important factor, contributing to the charged misconduct.

The burden of proof to establish the accused's guilt is on the prosecution. If you are convinced beyond a reasonable doubt that at the time of the charged offense(s) it was physically possible for the accused to (obey the order to _____) (perform _____) (refrain from _____), the defense of physical impossibility does not exist.

NOTE 2: Physical inability also raised. If physical inability has also been raised by the evidence, then the military judge must separately instruct on that defense, using Instruction 5-9-2. That instruction should be prefaced with the following instruction where both defenses are in issue:

If you are convinced beyond a reasonable doubt that it was physically possible for the accused to (_____), you must also consider

whether (he) (she) was reasonably justified in not (_____) because of physical inability.

5–9–2. PHYSICAL INABILITY

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on the issue of physical inability if the issue is raised by some evidence. Physical inability is distinguished from physical impossibility in that under the former it may have been possible for the accused to perform, but the accused chose not to perform because of the accused's belief that he/she was not physically able to perform. Physical inability is a complete defense provided the accused had a reasonable belief that he/she was not physically able to perform.

The evidence has raised the issue of physical inability in relation to the offense(s) of (state the alleged offense(s)). In this regard there has been (evidence) (testimony) that the accused suffered from (describe injury, ailment, or disability) which (he) (she) (believed would be severely aggravated) (_____) if (he) (she) (obeyed the order to _____) (performed _____).

Physical inability will justify the accused's (failure) (refusal) to (comply with the order) (perform the duties of _____) (_____) if the (failure) (refusal) was reasonably justified in light of the nature and extent of the (injury) (ailment) (disability), its relation to what may have been required of the accused, and all the surrounding circumstances (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden of proof to establish the accused's guilt is upon the prosecution. If you are convinced beyond a reasonable doubt that at the time of the offense(s) charged the accused did not reasonably believe (he) (she) was justified in (failing) (refusing) to (carry out an order given by _____) (_____) because of physical inability, the defense of physical inability does not exist.

NOTE 2: Physical impossibility also raised. If both impossibility and inability are raised, give Instruction 5-9-1, Physical Impossibility, first.

5–10. FINANCIAL AND OTHER INABILITY

NOTE 1: Using this instruction. The military judge must instruct, sua sponte, on financial or other inability when the issue is raised by some evidence. The defense most frequently arises in cases where disobedience of an order or failure to perform some military duty is alleged. The following instruction is designed for cases in which the inability is financial. If the alleged inability is the result of other causes (except for physical causes, see Instructions 5-9-1 and 5-9-2), the following instruction should be appropriately modified:

The evidence has raised the issue of financial inability in relation to the offense(s) of (state the alleged offense(s)). (In this regard, there has been (testimony) (evidence) that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The inability of an accused through no fault of (his) (her) own to (comply with the terms of an order) (perform a military duty) is an absolute defense. If the accused was prevented from obeying the order to (_____) because of some circumstances which (he) (she) could not control, (his) (her) (failure to obey) (_____) is not a crime. Thus, if the (failure to obey) (_____) was because of the accused's financial condition, and if the condition was a circumstance which (he) (she) could not control at the time, financial inability is a defense. However, to be a defense, the financial inability must not have been the accused's fault after (he) (she) had knowledge of the order to (_____). Additionally, the financial condition must have been of such nature that it could not be corrected by timely, reasonable, and lawful actions of the accused to obtain the necessary funds.

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that at the time of the offense(s) charged the accused was financially able to (_____), then the defense of financial inability does not exist.

5–11. IGNORANCE OR MISTAKE OF FACT OR LAW—GENERAL DISCUSSION

This is a general introduction to the defenses of ignorance or mistake and not an instruction. An issue of ignorance or mistake of fact may arise in cases where any type of knowledge of a particular fact is necessary to establish an offense. This issue must be instructed upon, *sua sponte*, when raised by some evidence.

The standard for ignorance or mistake of fact varies with the nature of the elements of the offense involved. If the ignorance or mistake concerns an element of an offense involving specific intent (*e.g.*, desertion, larceny), willfulness (*e.g.*, willful disobedience of an order), knowledge (*e.g.*, assault upon commissioned officer, failure to obey lawful order), or premeditation, the ignorance or mistake need only exist in the mind of the accused. Generally, for crimes not involving specific intent, willfulness, knowledge, or premeditation, (*e.g.*, AWOL) ignorance or mistake must be both honest (actual) and reasonable. Extreme care must be exercised in using this test, however, as ignorance or mistake in some "general intent" crimes need only be honest to be a defense. (*See, e.g.*, Instruction 5-11-4, Ignorance or Mistake - Drug Offenses.) Moreover, in some "specific intent" crimes, the alleged ignorance or mistake may not go to the element requiring specific intent or knowledge, and thus may have to be both reasonable and honest. Consequently, the military judge must carefully examine the elements of the offense, affirmative defenses, and relevant case law, in order to determine what standard applies.

Some elements of some offenses require no type of knowledge, such as the existence of a lawful general regulation, so that ignorance or mistake as to that fact is no defense. Also, if the alleged ignorance or mistaken belief is not one which would exonerate the accused if true, it is no defense. Some offenses require a special degree of prudence (*e.g.*, certain bad check or bad debt offenses, *see* Instruction 5-11-3), and ignorance or mistake standards must be adjusted accordingly.

Ignorance or mistake of law is generally not a defense. However, when actual knowledge of a certain law or of the legal effect of certain known facts is necessary to establish an offense, ignorance or mistake of law or legal effect will be a defense. Also, such unawareness may be a defense to show the absence of a criminal state of mind when actual knowledge is not necessary to establish the offense. For example, an honest belief the accused was, under the law, the rightful owner of an automobile is a defense to larceny even if the accused was mistaken in that belief.

The following are the instructions relating to ignorance or mistake:

5-11-1. Ignorance or mistake when specific intent or actual knowledge is in issue.

5-11-2. Ignorance or mistake when only general intent is in issue.

5-11-3. Ignorance or mistake in check offenses under Article 134.

5-11-4. Ignorance or mistake in drug offenses.

5–11–1. IGNORANCE OR MISTAKE—WHERE SPECIFIC INTENT OR ACTUAL KNOWLEDGE IS IN ISSUE

NOTE: Using this instruction. The military judge should review Instruction 5-11, the general discussion on the area of ignorance or mistake of fact or law, prior to using this instruction.

The evidence has raised the issue of (ignorance) (mistake) on the part of the accused concerning (state the asserted ignorance or mistake) in relation to the offense(s) of (state the alleged offense(s)).

I advised you earlier that to find the accused guilty of the offense(s) of (state the alleged offense(s)), you must find beyond a reasonable doubt that the accused (had the specific intent to _____) (knew that _____) (_____).

If the accused at the time of the offense was (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake) then (he) (she) cannot be found guilty of the offense(s) of (state the alleged offense(s)).

The (ignorance) (mistake), no matter how unreasonable it might have been, is a defense. In deciding whether the accused was (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake), you should consider the probability or improbability of the evidence presented on the matter.

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that at the time of the alleged offense(s) the accused was not (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake), then the defense of (ignorance) (mistake) does not exist.

REFERENCES: RCM 916(j); United States v. Binegar, 55 MJ 1 (CAAF 2001); United States v. Jackson, 50 MJ 868 (ACCA 1999), *aff'd,* and *pet. denied,* 53 MJ 220 (CAAF 2000).

5–11–2. IGNORANCE OR MISTAKE—WHEN ONLY GENERAL INTENT IS IN ISSUE

NOTE 1: Using this instruction. The military judge should review the general discussion on the area of ignorance or mistake of fact or law, in Instruction 5-11.

The evidence has raised the issue of (ignorance) (mistake) on the part of the accused concerning (state the asserted ignorance or mistake) in relation to the offense(s) of (state the alleged offense(s)).

The accused is not guilty of the offense of (_____) if:

(1) (he) (she) ((did not know) (mistakenly believed)) that (state the asserted ignorance or mistake) and

(2) if such (ignorance) (belief) on (his) (her) part was reasonable.

To be reasonable the (ignorance) (belief) must have been based on information, or lack of it, which would indicate to a reasonable person that _____. (Additionally, the (ignorance) (mistake) cannot be based on a negligent failure to discover the true facts.)

(Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the accused's (age) (education) (experience) (_____) along with the other evidence on this issue, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused was not (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake), the defense of (ignorance) (mistake) does not exist. Even if you conclude that the accused was (ignorant of the fact) (under the mistaken belief) that (state the asserted ignorance or mistake), if you are convinced

beyond a reasonable doubt that, at the time of the charged offense(s), the accused's (ignorance) (mistake) was unreasonable, the defense of (ignorance) (mistake) does not exist.

NOTE 2: Voluntary intoxication in evidence. If there is evidence the accused may have been under the influence of an intoxicant, the following instruction should ordinarily be given:

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

REFERENCES: RCM 916(j); United States v. True, 41 MJ 424 (CAAF 1995); United States v. Binegar, 55 MJ 1 (CAAF 2001); United States v. Jackson, 50 MJ 868 (ACCA 1999), *aff'd*, and *pet. denied*, 53 MJ 220 (CAAF 2000).

5–11–3. IGNORANCE OR MISTAKE—CHECK OFFENSES UNDER ARTICLE 134

NOTE: Using this instruction. The military judge should review Instruction 5-11, the general discussion on the area of ignorance or mistake of fact or law, prior to using this instruction. Worthless check offenses under Article 134 (see Instruction 3-68-1) do not include an element of specific intent, but instead contain an element of dishonorable conduct, that is, conduct characterized by bad faith or gross indifference. Ignorance or mistake of fact, to constitute a defense to check offenses under Article 134, must therefore, not be the result of bad faith or gross indifference. The following instruction may be used as a guide in such instances:

The evidence has raised an issue of (ignorance) (mistake) on the part of the accused concerning (state the asserted ignorance or mistake) in relation to the offense(s) of (state the alleged offense(s)).

There has been (evidence) (testimony) tending to show that at the time (he) (she) (made) (uttered) the (check) (draft) (_____) charged in the specification, and until the time that the (check) (draft) (_____) was presented for payment, the accused was (ignorant of the fact that ((his) (her) bank account had been depleted by _____) (certain checks had not been credited to (his) (her) account) (_____)) (under the mistaken belief that (certain funds had been deposited to (his) (her) account) ((his) (her) account contained sufficient funds for payment of the (check) (draft) (_____) on presentment) (_____)).

If the accused was ignorant or mistaken as to (state the asserted ignorance or mistake) and if the (ignorance) (mistake) was not the result of bad faith or gross indifference on (his) (her) part, then (he) (she) cannot be found guilty of the offenses(s) of (state the alleged offense(s)).

You should consider the probability or improbability of the evidence presented on the matter. You should consider the accused's (age) (education) (experience) (_____) along with the other evidence bearing on this issue, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that at the time of the charged

offense(s) the accused was not (ignorant of the fact)(under the mistaken belief) that (state the asserted ignorance or mistake), then the defense of (ignorance)(mistake) does not exist. Even if you conclude that the accused was (ignorant of the fact)(under the mistaken belief) that (state the asserted ignorance or mistake of fact), if you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused's (ignorance)(mistake) was the result of bad faith or gross indifference on (his)(her) part, then the defense of (ignorance)(mistake) does not exist.

5-11-4. IGNORANCE OR MISTAKE—DRUG OFFENSES

NOTE 1: Using this instruction. The military judge should review Instruction 5-11, the general discussion on the area of ignorance or mistake of fact or law, prior to using this instruction. Actual knowledge by the accused of the presence and nature of contraband drugs is necessary for a finding of guilty of Article 112a offenses. Ignorance can arise with respect to the presence of drugs, and mistake can be raised as to knowledge of their identity. Ignorance or mistake of the fact that a particular substance is contraband (i.e., that its possession, distribution, use, etc., was forbidden by law, regulation, or order) is not a defense. For a finding of guilty of wrongful introduction, the accused must also have actual knowledge that he/she entered into or onto a military unit, base, station, post, installation, vessel, vehicle, or aircraft. When the evidence raises such issues, the military judge must instruct upon them, sua sponte. A suggested guide follows:

The evidence has raised the issue of (ignorance) (mistake of fact) in relation to the offenses(s) of (state the alleged offense(s)). There has been (evidence) (testimony) tending to show that, at the time of the alleged offenses(s), the accused (did not know that (he) (she) had entered (into) (onto) a military (unit) (base) (station) (post) (installation) (vessel) (vehicle) (aircraft)) (did not know that (he) (she) had (state name of substance) (on (his) (her) person) (in (his) (her) belongings) (_____)) (did not know that (state name of substance) was in (his) (her) (food or drink) _____)) (was under the mistaken belief that the substance (he) (she) (used) (possessed) (distributed) (manufactured) (imported) (exported) (introduced) (_____) was _____) (was unaware that the substance (he) (she) (used) (possessed) (distributed) (manufactured) (imported) (exported) (introduced) (_____) was _____).

(I advised you earlier that the (possession) (distribution) (manufacture) (importation) (exportation) (introduction) must be knowing and conscious.) If the accused was in fact (ignorant that (he) (she) had entered (into) (onto) a military (unit) (base) (station) (post) (installation) (vessel) (vehicle) (aircraft)) (ignorant of (the presence of (state name of substance) in (his) (her) belongings) (_____)) (under the mistaken belief that the substance (he) (she) (used) (possessed) (distributed) (manufactured) (imported) (exported) (introduced) (_____) was _____), then (he) (she) cannot be found guilty of the offenses(s) of

(state the alleged offense(s)). The accused's actual (unawareness) (erroneous belief), no matter how unreasonable, is a defense.

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's (age) (education) (experience) (_____), along with the other evidence in this case (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to establish the guilt of the accused. If you are satisfied beyond a reasonable doubt that the accused was not (ignorant of the fact that _____) (under the mistaken belief that _____), then the defense of (mistake) (ignorance) does not exist.

NOTE 2: When the accused believed the substance to be a different contraband from the one charged. The accused's belief that the substance possessed, used, distributed, etc., was a contraband substance different from the one charged is not a defense. An instruction to this effect should be given when the evidence raises the issue as to whether the accused had such belief.

5–12. VOLUNTARY INTOXICATION

NOTE 1: Applicability of this instruction to general intent offense. When the ignorance or mistake of fact defense is raised with respect to a general intent offense or a general intent element, the government must prove the accused's belief was either not honest or not reasonable. In such cases, voluntary intoxication is not a factor for the members to consider in deciding whether the accused's belief was a reasonable one and Instruction 5-12 is not applicable. The instruction following NOTE 2 in Instruction 5-11-2 may be applicable.

NOTE 2: Using this instruction. Voluntary intoxication from alcohol or drugs may negate the elements of premeditation, specific intent, willfulness, or knowledge. The military judge must instruct, sua sponte, on this issue when it is raised by some evidence in the case. Instructions on the elements of any lesser included offenses placed into issue should be given in such instances, and the relationship of those offenses with the principal offense and the defense of intoxication explained. Voluntary intoxication not amounting to legal insanity is not a defense to 'general intent' crimes, nor is it a defense to unpremeditated murder. Voluntary intoxication, by itself, will not reduce unpremeditated murder to a lesser offense. When the below instruction is applicable, the instruction following NOTE 4 is also given. The instruction following NOTE 3, may be given.

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). I advised you earlier that one of the elements of the offense(s) of (state the alleged offense(s)) is that the accused (entertained the premeditated design to kill) (had the specific intent to _____) (knew that _____). In deciding whether the accused (entertained such a premeditated design) (had such a specific intent at the time) (had such knowledge at the time) you should consider the evidence of voluntary intoxication.

The law recognizes that a person's ordinary thought process may be materially affected when (he) (she) is under the influence of intoxicants. Thus, evidence that the accused was intoxicated may, either alone, or together with other evidence in the case cause you to have a reasonable doubt that the accused (premeditated) (had the specific intent to _____) (knew _____).

On the other hand, the fact that a person may have been intoxicated at the time of the offense does not necessarily indicate that (he) (she) was unable to (premeditate) (have the specific intent to _____) (know

that _____) because a person may be drunk yet still be aware at that time of (his) (her) actions and their probable results.

In deciding whether the accused (entertained a premeditated design to kill) (had the specific intent to _____ at the time of the offense) (knew that _____ at the time of the offense) you should consider the effect of intoxication, if any, as well as the other evidence in the case. (In determining the possible effect on the accused of (his) (her) prior use, if any, of intoxicants, you should consider (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

NOTE 3: Amnesia due to alcoholism or drug addiction raised. The following instructions may be appropriate when evidence has been presented concerning amnesia or the disease of alcoholism or drug addiction on the part of the accused at the time of the offense:

The inability to remember because of intoxication, sometimes called "alcoholic amnesia" or "blackouts," is not in itself a defense. It is, however, one of the factors you should consider when deciding the extent and the effect, if any, of the accused's intoxication.

(Alcoholism is recognized by the medical profession as a disease involving a compulsion toward intoxication. As a matter of law, however, intoxication from drinking as a result of the compulsion of alcoholism is regarded as voluntary intoxication. Alcoholism is not in itself a defense and the above instructions apply whether or not the accused was an alcoholic.)

NOTE 4: Concluding mandatory instruction. The following instruction should be given as the concluding instruction on this defense, regardless of whether the instruction following NOTE 2 is given:

The burden of proof is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused in fact (entertained the premeditated design to kill) (had the specific intent to _____) (knew that _____), the accused will not avoid criminal responsibility because of voluntary intoxication.

REFERENCES: RCM 916(j); United States v. True, 41 MJ 424 (CAAF 1995).

5–13. ALIBI

NOTE: Normally the military judge has no duty to instruct on alibi, sua sponte, but the judge must do so upon a defense request when the issue is raised. The issue is raised when there is evidence which may tend to establish that the accused was not at the scene of the offense charged, unless it appears that the actual presence of the accused at a particular time or place is not essential for commission of the offense.

The evidence has raised the defense of alibi in relation to the offenses(s) of (state the alleged offense(s)). "Alibi" means that the accused could not have committed the offense(s) charged (or any lesser included offense) because the accused was at another place when the offense(s) occurred. Alibi is a complete defense to the offense(s) of (state the alleged offense(s)). (In this regard, there has been evidence that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused was present at the time and place of the alleged offense, then the defense of alibi does not exist.

5–14. CHARACTER

If evidence of a pertinent good character trait of the accused has been introduced for its bearing on the general issue of guilt or innocence, the court should ordinarily be instructed on its effect, and must be so instructed upon request. Instruction 7-8, properly tailored, should be used to prepare a character instruction.

5–15. VOLUNTARY ABANDONMENT

NOTE: Using this instruction. Voluntary abandonment is an affirmative defense to a completed attempt. When raised by the evidence, the military judge must instruct sua sponte on this defense. The defense is raised when the accused abandons his/her effort to commit a crime under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The defense is available only when the accused abandons the intended crime because of a change of heart. Thus, where the abandonment results from fear of immediate detection or apprehension, the decision to await a better opportunity for success, or inability to commit the crime, the defense is not available. Similarly, where injury results from the accused's attempt, a subsequent abandonment is not a defense.

The defense of voluntary abandonment has been raised by the evidence with respect to the offense(s) of attempted (state the alleged offense(s)). In determining this issue, you must consider all the relevant facts and circumstances (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

If you are satisfied beyond a reasonable doubt of each of the elements of attempted (state the alleged offense(s)), you may not find the accused guilty of this offense if, prior to the completion of (state the offense intended), the accused abandoned (his) (her) effort to commit that offense (or otherwise prevented its commission) under circumstances manifesting a complete and voluntary renunciation of the accused's criminal purpose.

Renunciation of criminal purpose is not voluntary if it is motivated in whole or in part by circumstances not present or apparent at the inception of the accused's attempt that increases the probability of detection or apprehension or makes more difficult the accomplishment of the criminal purpose. Renunciation is not voluntary if it is motivated in whole or in part by fear of immediate detection or apprehension, by the resistance of the victim, or by the inability to commit the crime.

Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time (or to transfer the criminal effort to another, but similar objective or victim).

(When an attempted (murder) (_____) has proceeded to the extent that (injury) (offensive touching of another) (_____)occurs, voluntary abandonment is no longer a defense.) The burden is on the prosecution to establish the accused's guilt beyond a reasonable doubt. Consequently, unless you are satisfied beyond a reasonable doubt that the accused did not completely and voluntarily abandon (his) (her) criminal purpose, you may not find the accused guilty of attempted (state the alleged offense(s).)

REFERENCES: United States v. Schoof, 37 MJ 96 (CMA 1993); United States v. Rios, 33 MJ 436 (CMA 1991); United States v. Byrd, 24 MJ 286 (CMA 1987); United States v. Collier, 36 MJ 501 (AFCMR 1992).

5–16. PARENTAL DISCIPLINE

NOTE 1: Using this instruction. Parental discipline can constitute an affirmative defense. However, the right of a parent to discipline a child by use of force is not without limits. When the defense of parental discipline is raised, the military judge should instruct as follows:

The evidence has raised an issue of whether the accused was imposing corporal punishment as a permissible parental disciplinary measure at the time of the alleged act(s) on (his) (her) child in relation to the offense(s) of (state the alleged offense(s)).

In determining this issue you must consider all the relevant facts and circumstances (including, but not limited to (the amount of force used) (the instrument used) (where upon the body the (force) (instrument) was applied) (the number of times and manner (force) (the instrument) was used) (the age and size of the child) (the size of the accused) (here the military judge may specify other significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

A parent does not ordinarily commit a criminal offense by inflicting corporal punishment upon a child subject to (his) (her) parental authority because such parental authority includes the right to discipline a child. The corporal punishment must be for the purpose of safeguarding or promoting the welfare of the child, including the prevention or punishment of the child's misconduct, and the force used may not be unreasonable or excessive.

Unreasonable or excessive force is that designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain, extreme mental distress, or gross degradation.

If the act(s) of the accused in (striking) (_____) (his) (her) child (was) (were) for the purpose of disciplining the child, and the force used was not unreasonable or excessive as I have defined those terms, the

accused is considered to have had legal justification for (his) (her) acts and (he) (she) must be acquitted. However, if you are satisfied beyond a reasonable doubt that at the time of the accused's act(s), the accused was motivated by other than a parental desire to safeguard or promote the welfare of the child, including the prevention or punishment of misconduct, or, that the force used was unreasonable or excessive, then the act(s) may not be excused as permissible, parental disciplinary measures.

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the alleged offense(s)), but also to the issue of parental discipline. In order to find the accused guilty of the offense(s) of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the accused's acts(s) ((was) (were)) not within the authority of parental discipline as I have defined that term, or that the force used was unreasonable or excessive.

NOTE 2: Who may claim the defense. This defense may also be employed by a guardian or other person similarly responsible for the child's general care and supervision or a person acting at the request of a parent, guardian, or other responsible person. When the evidence raises the issue of whether the accused may avail himself/herself of this defense, the MJ must present this issue to the members. The following may be helpful and should precede the instruction in NOTE 1:

The evidence has raised the issue whether the accused was one who was authorized to use force to discipline (state the name of the alleged victim). One is authorized to discipline a child if (he) (she) is a parent, guardian, one similarly responsible for the general care and supervision of the child, or acting at the request of a parent, guardian, or other responsible person.

In deciding this issue, you must consider (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).

If you are convinced beyond a reasonable doubt that the accused was not one authorized to discipline the child, the parental discipline defense

does not apply. If you are not so convinced, then you must consider the defense of parental discipline.

REFERENCES: United States v. Robertson, 36 MJ 190 (CMA 1992); United States v. Brown, 26 MJ 148 (CMA 1988); and United States v. Scofield, 33 MJ 857 (ACMR 1991; Model Penal Code, section 3.08(1), reprinted in United States v. Robertson, supra and United States v. Brown, supra.

5–17. EVIDENCE NEGATING MENS REA

NOTE 1: Relationship between this instruction and the defense of lack of mental responsibility under Article 50a and RCM 916(k). Notwithstanding RCM 916(k) (1) and (2), evidence of a mental disease, defect, or condition is admissible if it is relevant to the elements of premeditation, specific intent, knowledge, or willfulness. Ellis v. Jacob, 26 MJ 90 (CMA 1988); United States v. Berri, 33 MJ 337 (CMA 1991).

NOTE 2: When to use this instruction. DO NOT use this instruction if the evidence has raised the defense of lack of mental responsibility. If the defense of lack of mental responsibility has been raised, use the instructions in Chapter 6 including, if applicable, Instruction 6-5, Partial Mental Responsibility. Use the instructions below when premeditation, specific intent, willfulness, or knowledge is an element of an offense, and there is evidence tending to establish a mental or emotional condition of any kind, which, although not amounting to lack of mental responsibility, may negate the mens rea element. The military judge has a sua sponte duty to instruct on this issue. When such evidence has been admitted, the following should be given:

The evidence in this case has raised an issue whether the accused had a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____) and the required state of mind with respect to the offense(s) of (state the alleged offense(s)).

You must consider all the relevant facts and circumstances (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides, to include any expert evidence admitted).

One of the elements of (this) (these) offense(s) is the requirement of (premeditation) (the specific intent to _____) (that the accused knew that _____) (that the accused's acts were willful (as opposed to only negligent)) (_____).

An accused, because of some underlying (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____), may be mentally incapable of (entertaining (the premeditated design to kill) (specific intent to _____)) (having the knowledge that _____) (acting willfully) (_____).

You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____) of such consequence and degree as to deprive (him) (her) of the ability to (act willfully) (entertain the (premeditated design to kill) (specific intent to _____)) (know that _____) (_____).

The burden of proof is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Unless in light of all the evidence you are satisfied beyond a reasonable doubt that the accused, at the time of the alleged offense(s) was mentally capable of (entertaining (the premeditated design to kill) (a specific intent to _____)) (knowing that _____) (acting willfully in _____) (_____), you must find the accused not guilty of (that) (those) offense(s).

NOTE 3: Distinguishing mens rea negating evidence and a lack of mental responsibility defense. If there is a need to explain that mens rea negating evidence should not be confused with the defense of lack of mental responsibility (Article 50a), the following may be given:

This evidence was not offered to demonstrate or refute whether the accused is mentally responsible for (his) (her) conduct. Lack of mental responsibility, that is, an insanity defense, is not an issue in this case. (What is in issue is whether the government has proven beyond a reasonable doubt that the accused had the ability to (act willfully) (entertain the (premeditated design to kill) (specific intent to _____)) (know that _____) (_____).)

NOTE 4: Expert witnesses. When there has been expert testimony on the issue, Instruction 7-9-1, Expert Testimony, should be given.

NOTE 5: Evaluating testimony. Evidence supporting or refuting the existence of mens rea negating evidence may be clear and the members may not need any special instructions on how the evidence should be evaluated. If additional instructions may be helpful in evaluating the evidence, the following may be given:

You may consider evidence of the accused's mental condition before and after the alleged offense(s) of (state the alleged offense(s)), as well as evidence as to the accused's mental condition on the date of the alleged offense. The evidence as to the accused's condition before and after the alleged offense was admitted for the purpose of assisting you to determine the accused's condition on the date of the alleged offense(s).

(You have heard the evidence of (psychiatrists) (and) (psychologists) (and) (_____) who testified as expert witnesses. An expert in a particular field is permitted to give (his) (her) opinion. In this connection, you are instructed that you are not bound by medical labels, definitions, or conclusions. Whether the accused had a (mental condition) (_____) and the effect, if any, that (condition) (_____) had on the accused, must be determined by you.)

(There was (also) testimony of lay witnesses with respect to their observations of the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts. In weighing the testimony of such lay witnesses, you may consider the circumstances of each witness, their opportunity to observe the accused and to know the facts to which the witness has testified, their willingness and capacity to expound freely as to their observations and knowledge, the basis for the witness's opinion and conclusions, and the time of their observations in relation to the time of the offense(s) charged.)

(You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness's observation of the accused and the nature and length of time of the witness' contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a mental condition and that the failure of a lay witness to observe abnormal acts by the

accused may be significant only if the witness had prolonged and intimate contact with the accused.)

(You are not bound by the opinions of (either) (expert) (or) (lay) witnesses. You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight you believe it is fairly entitled to receive.)

NOTE 6: Lesser included offenses. When there are lesser included offenses raised by the evidence that do not contain a mens rea element, the military judge may explain that the mens rea negating evidence instruction is inapplicable. The following may be helpful:

Remember that (state the lesser included offense raised) is a lesser included offense of (state the alleged offense(s)). This lesser included offense does not contain the element that the accused (had the premeditated design to kill) (specific intent to _____) (knew that _____) (willfully _____) (_____). In this regard, the instructions I just gave you with respect to the accused's mental ability to (premeditate) (know) (form the specific intent) (act willfully) (_____) do not apply to the lesser included offense of (state the lesser included offense raised).

NOTE 7: Voluntary intoxication. When there is evidence of the accused's voluntary intoxication, Instruction 5-12, Voluntary Intoxication, is ordinarily applicable with respect to elements of premeditation, specific intent, willfulness, or knowledge.

5–18. CLAIM OF RIGHT

NOTE 1: Using this instruction. Although the claim of right defense is not listed in the MCM, the courts have acknowledged that it constitutes an affirmative defense in some cases involving a wrongful taking, withholding, or obtaining, e.g., robbery, larceny, or wrongful appropriation. The military judge must instruct, sua sponte, on the issue when it is raised by some evidence. The claim of right defense arises in two different scenarios where an accused typically takes property under 'self-help': (1) when a person takes, withholds, or obtains property under a claim of right either as security for, or in satisfaction of, a debt (see NOTE 2); or (2) when a person takes, withholds, or obtains property under an honest belief that the property belongs to him or her (see NOTE 3).

NOTE 2: Claim of right as security for, or in satisfaction of, a debt. The claim of right defense where an accused takes, withholds, or obtains property from another for the purposes of obtaining security or satisfying a debt exists when three criteria co-exist: (1) the accused takes, withholds, or obtains property under an honest belief that the accused is entitled to the property as security for, or in satisfaction of, a debt owed to the accused; (2) such taking, withholding, or obtaining is based upon a prior agreement between the accused and the alleged victim providing for the satisfaction or the security of the debt by the use of self-help; and (3) the taking, withholding, or obtaining is done in the open, not surreptitiously. The following instruction may be used as a guide in such circumstances:

The evidence has raised the defense of claim of right in relation to the offense(s) of (state the alleged offense(s)) (and the lesser included offense(s) of (state the lesser included offense(s) raised) (in that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

A (taking) (withholding) (obtaining) of property belonging to another is not wrongful if it is done under claim of right. The defense of claim of right exists when three criteria co-exist: (1) the accused and (state the name of the victim) had a prior agreement that permitted the accused to (take) (withhold) (obtain) the property (to satisfy a debt) (as security for a debt); (2) the accused (took) (withheld) (obtained) the property (to satisfy a debt) (as security for a debt) in accordance with the prior agreement, and (3) the (taking) (withholding) (obtaining) by the accused was done in the open, not surreptitiously or by stealth.

In deciding whether the defense of claim of right applies in this case, you should consider all the evidence presented on the matter. The burden is

on the prosecution to establish the accused's guilt beyond a reasonable doubt. You must be convinced beyond a reasonable doubt that the accused did not act under a claim of right before you can convict the accused of (state the name of the offenses and lesser included offenses to which claim of right applies).

NOTE 3: Claim of right under an honest belief of ownership not involving satisfaction of, or security for, a debt. The claim of right defense where an accused takes, withholds, or obtains property from another not involving satisfaction of, or security for a debt exits where the accused honestly believes (1) that he/she has a claim of ownership to the property which he/she has taken, withheld, or obtained; and (2) claim of ownership is equal to or greater than the right of the one from whose possession the property is taken, withheld, or obtained. In this situation, the accused's belief, even if mistaken, in ownership of the property may negate the wrongfulness of the taking. The following instruction may be used as a guide in such circumstances:

The evidence has raised the defense of claim of right in relation to the offense(s) of (state the alleged offense(s)) (and the lesser included offense(s) of (state the lesser included offense(s) raised) (in that (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

I advised you earlier that to find the accused guilty of the offense(s) of (state the alleged offense(s)), you must find beyond a reasonable doubt that the accused's (taking) (withholding) (obtaining) of the (property) (_____) was wrongful. If the accused at the time of the offense was under the honest belief, even if mistaken, that (he) (she) ((owned the property) (had the authority to (take) (withhold) obtain) the property)) and had, at least the same or, a greater right of possession in the property than the person from whom the property was (taken) (withheld) (obtained), then (he) (she) cannot be found guilty of the offense(s) of (state the alleged offense(s)).

The accused's honest belief, even if the accused was mistaken in that belief, is a defense. In deciding whether the accused was under the honest belief that (he) (she) ((owned the property) (had the authority to (take) (withhold) (obtain) the property)) and had, at least the same or, a

greater right of possession in the property than the person from whom the property was (taken) (withheld) (obtained), you should consider the probability or improbability of the evidence presented on the matter. You should consider the accused's (age) (education) (experience) (the prior agreement existing between the accused and _____) (the circumstances of the property leaving the accused's possession) (the accused's testimony) (the accused's credibility) (_____) along with all other evidence on this issue.

The burden is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that at the time of the alleged offense(s) the accused did not have the honest belief that: (1) (he) (she) ((owned the property) (had the authority to (take) (withhold) (obtain) the property)); and (2) had at least the same or a greater right of possession in the property than the person from whom the property was (taken) (withheld) (obtained), then the defense of claim of right does not exist.

NOTE 4: <u>Taking in excess of what is due</u>. When the evidence raises the claim of right defense and that the accused may have taken, withheld, or obtained more than that to which the accused was entitled, the following should be given in conjunction with NOTE 2:

Under the defense of claim of right, the accused may only (take) (withhold) (obtain) that amount of (property) (money) (_____) reasonably approximating that (to) which the accused honestly thought ((he) (she) was entitled) (was the amount of the debt owed to the accused)).

If you find that the value of the (property) (money) (_____) alleged to have been (taken) (withheld) (obtained) by the accused exceeded the value of the (property) (money) (_____) to which the accused honestly believed (he) (she) was entitled, you may infer that the accused had the intent to wrongfully (take) (withhold) (obtain) the amount in excess of (that which (he) (she) was entitled) (the debt owed to the accused). The drawing of this inference is not required. If you conclude that the accused had the intent to wrongfully (take) (withhold) (obtain) the

amount in excess of (that to which (he) (she) was entitled) (the debt owed to the accused), your findings must reflect that the wrongful (taking) (withholding) (obtaining) was only as to the (amount) (property) (_____) that was in excess of the amount to which the accused was entitled.

NOTE 5: Claim of Right defense—aiding or conspiring with another to act under a claim of right. The defense of claim of right is also available to an accused who assists or conspires with another in taking property when the accused honestly believes that the person being helped has a claim of right. It is the bona fide nature of the accused's belief as to the existence of the claim of right by the person being helped, and not the actual legitimacy of the debt or claim, that is in issue. These instructions must be tailored when the accused is not the one who has the claim of right.

NOTE 6: Robbery and other offenses where larceny or wrongful appropriation is a component. Because robbery is a compound offense combining larceny and assault, if the claim of right issue arises in a robbery case, the defense of claim of right may negate the wrongfulness of the taking, but it is not a defense to the assault component. In such cases, the military judge must ensure that the members are aware that the defense exists to robbery and, if in issue, its lesser included offense of larceny. It will not, however, apply to the lesser included offense of assault. The defense of claim of right also applies to other offenses where larceny or wrongful appropriation is a component of the charged offense, e.g., burglary with intent to commit larceny, or housebreaking with the intent to commit larceny or wrongful appropriation.

NOTE 7: Claim of right to contraband. The defense of claim of right does not apply when an accused has no legal right to possess the property to which the accused asserts a claim of right, e.g., illegal drugs. The defense also does not exist when the accused takes under a purported claim of right the value of the contraband property. United States v. Petrie, 1 MJ 332 (CMA 1976).

NOTE 8: Mistake of Fact. The military judge must be alert to evidence that the accused had a mistaken belief concerning the amount of the debt the accused believed the victim owed, or concerning the value of the property. In such cases, a tailored version of Instruction 5-11, Mistake of Fact, may be appropriate. The accused's belief need only be honest; it need not be reasonable.

REFERENCES: United States v. Smith, 8 CMR 112 (CMA 1953); United States v. Kachoughian, 21 CMR 276 (CMA 1956); United States v. Dosal-Maldonado, 31 CMR 28 (CMA 1961); United States v. Eggleton, 47 CMR 920 (CMA 1973); United States v. Smith, 14 MJ 68 (CMA 1982); United States v. Birdsong, 40 MJ 606 (ACMR 1994); United States v. Gunter, 42 MJ 292 (CAAF 1995); United States v. Jackson, 50 MJ 868 (ACCA 1999), *aff'd*, and *pet. denied*, 53 MJ 220 (CAAF 2000).

5–19. LACK OF CAUSATION, INTERVENING CAUSE, OR CONTRIBUTORY NEGLIGENCE

NOTE 1: General. Some offenses require a causal nexus between the accused's conduct and the harm that is the subject of the specification. For example, if the accused's omission is alleged to have suffered the loss of military property, the prosecution must prove beyond a reasonable doubt that the omission caused the loss. Other offenses may also raise this issue, e.g., homicides, hazarding a vessel. When raised by some evidence, the military judge must instruct, sua sponte, on proximate cause, joint causes, intervening cause, and contributory negligence. When a Benchbook instruction on a punitive article does not include such instructions, the following instructions may be used with appropriate tailoring.

NOTE 2: Using this instruction. If causation is in issue, the military judge must instruct that the accused's conduct must be a proximate cause of the alleged harm.

a. If there is no evidence that there was an intervening, independent cause and no evidence that anyone other than the accused had a role in the alleged harm, give the instructions following NOTE 3.

b. If there is evidence that an independent, intervening event might have been a proximate cause of the alleged harm, or that anyone other than the alleged victim and accused had a role in the alleged harm, give the instructions following NOTE 4. That instruction must be tailored depending on whether there is evidence of an independent, intervening cause(NOTE 5) or another had a role in the alleged harm (NOTE 6), or both.

c. If contributory negligence of the alleged victim is in issue, give either the instructions following NOTEs 3 or 4, as appropriate, and also the instructions following NOTE 7.

NOTE 3: Proximate cause in issue; intervening cause or acts or omissions of someone other than the accused NOT in issue.

To find the accused guilty of the offense(s) of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the accused's (conduct) ((willful) (intentional) (inherently dangerous) act) (omission) ((culpable) negligence) (_____) was a proximate cause of the (injury to _____) (loss of _____) (destruction of _____) (damage to _____) (grievous bodily harm to _____) (death of _____) (_____). This means that the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____) must have been the natural and probable result of the accused's (conduct) (act) (omission) (negligence) (_____). A proximate cause does not have to be the only cause, nor must it be the immediate cause. However, it must be a direct or contributing cause that

plays a material role, meaning an important role, in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____).

In determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause, you must consider all relevant facts and circumstances, (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The burden is on the prosecution to prove proximate cause. Unless you are satisfied beyond a reasonable doubt that the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the alleged harm, you may not find the accused guilty of the offense(s) of (state the alleged offense(s)).

NOTE 4: Proximate cause in issue; independent, intervening cause and/or acts or omissions of others in issue.

To find the accused guilty of the offense(s) of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the accused's (conduct) ((willful) (intentional) (inherently dangerous) act) (omission) ((culpable) negligence) (_____) was a proximate cause of the (injury to _____) (loss of _____) (destruction of _____) (damage to _____) (grievous bodily harm to _____) (death of _____) (_____). This means that the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____) must have been the natural and probable result of the accused's (conduct) (act) (omission) ((culpable) negligence) (_____). A proximate cause does not have to be the only cause, nor must it be the immediate cause. However, it must be a direct or contributing cause that plays a material role meaning an important role, in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____).

NOTE 5: <u>Intervening cause</u>. If intervening cause, give the following instruction:

If some other unforeseeable, independent, intervening event that did not involve the accused was the only cause that played any important part in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____), then the accused's (conduct) (act) (omission) (negligence) (_____) was not the proximate cause of the alleged harm.)

NOTE 6: <u>More than one contributor to proximate cause</u>. If there was more than one contributor, give the following instruction:

(In addition,) It is possible for the (conduct) (act) (omission) (negligence) (_____) of two or more persons to contribute each as a proximate cause of the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____). If the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the alleged harm, the accused will not be relieved of criminal responsibility because some other person's (conduct) (act) (omission) (negligence) (_____) was also a proximate cause of the alleged harm. An (act) (omission) is a proximate cause of the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____) even if it is not the only cause, as long as it is a direct or contributing cause that plays a material role, meaning an important role, in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____).

In determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause and the role, if any, of (other events) (or) (the acts or omissions of another), you must consider all relevant facts and circumstances, (including, but not limited to, (<u>here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides</u>)).

The burden is on the prosecution to prove proximate cause. Unless you are satisfied beyond a reasonable doubt that the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of

the alleged harm as I have defined that term for you, you may not find the accused guilty of the offense(s) of (state the alleged offense(s)).

You are reminded that to find the accused's (conduct) (act) (omission) (negligence) (_____) to be a proximate cause also requires you to find beyond a reasonable doubt that (any other intervening, independent event that did not involve the accused) (and) (the (act) (conduct) of another) (was) (were) not the only cause(s) that played any material role, meaning an important role, in bringing about the (injury) (loss) (destruction) (damage) (grievous bodily harm) (death) (_____).

NOTE 7: Contributory negligence. If there is evidence that the victim of an injury or death may have been contributorily negligent, the following instruction should be given. The military judge should consider whether there are situations other than homicide, assault, or injury in which contributory negligence can be a defense:

There is evidence raising the issue of whether (state the name of person(s) allegedly harmed/killed) failed to use reasonable care and caution for his/her own safety. If the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the (injury) (death), the accused is not relieved of criminal responsibility because the negligence of (state the name of person(s) allegedly harmed/killed) may have contributed to his/her own (injury) (death). The conduct of the (injured) (deceased) person should be considered in determining whether the accused's (conduct) (act) (omission) (negligence) (_____) was a proximate cause of the (injury) (death). (Conduct) (An act) (An omission) (Negligence) is a proximate cause of (injury) (death) even if it is not the only cause, as long as it is a direct or contributing cause that plays a material role, meaning an important role, in bringing about the (injury) (death). (An act) (An omission) (Negligence) is not a proximate cause if some other unforeseeable, independent, intervening event, which did not involve the accused's conduct, was the only cause that played any important part in bringing about the (injury) (death). If the negligence of (state the name of victim) looms so large in comparison with the (conduct) (act) (omission) (negligence) (_____) by the accused that the accused's conduct

should not be regarded as a substantial factor in the final result, then conduct of (state the name of victim) is an independent, intervening cause and the accused is not guilty.

Finding the accused's (conduct) (act) (omission) (negligence) (_____) to be the proximate cause also requires you to find beyond a reasonable doubt that the (act) (conduct) of the alleged victim was not the only cause that played any material role, meaning an important role, in bringing about the (injury) (death).

NOTE 8: Relationship to accident defense. The evidence that raises lack of causation, intervening cause, or contributory negligence may also raise the defense of accident. See Instruction 5-4, Accident.

NOTE 9: Different degrees of culpability raised by lesser included offenses. The military judge must be especially attentive in applying this instruction when lesser included offenses involve different degrees of culpability. The instructions may have to be tailored differently for certain lesser included offenses. For example, if an accused is charged with unpremeditated murder, the evidence may raise the lesser included offenses of Article 118(3) murder, voluntary manslaughter, involuntary manslaughter, and negligent homicide. The respective degrees of culpability would then include an intentional act or omission, an inherently dangerous act, an intentional act or omission, culpable negligence, and simple negligence.

REFERENCES: United States v. Lingenfelter, 30 MJ 302 (CMA 1990); United States v. Reveles, 41 MJ 388 (CAAF 1995); United States v. Taylor, 44 MJ 254 (CAAF 1996); United States v. Cooke, 18 MJ 152 (CMA 1984); United States v. Moglia, 3 MJ 216 (CMA 1977); United States v. Romero, 1 MJ 227 (CMA 1975); United States v. Klatil, 28 CMR 582(ABR 1959).

Chapter 6
MENTAL CAPACITY AND RESPONSIBILITY

6–1. SANITY INQUIRY

The actions and demeanor of the accused as observed by the court or the assertion from a reliable source that the accused may lack mental capacity or mental responsibility may be sufficient to cause an inquiry by the court. The military judge should remember, however, that the accused is presumed to be sane and that a mere assertion that the accused is insane is not necessarily sufficient to raise an issue of insanity. A request or other action to cause the court to make an inquiry may be initiated by the military judge or any member of the court, prosecution, or defense. A good faith, non-frivolous request for a sanity board should be granted. United States v. Nix, 36 CMR 76 (CMA 1965); United States v. Kish, 20 MJ 652 (ACMR 1985).

If the defense proffers expert testimony as to the accused's mental responsibility or capacity, the accused can be required to submit to psychiatric evaluation by government psychiatrists as a condition to the admission of defense psychiatric evidence. The military judge rules finally as to whether an inquiry should be made into the accused's mental capacity or mental responsibility. When the military judge believes that there is a reasonable basis for an inquiry, the matter will be referred to a board. The referral order must comport with the requirements of RCM 706.

No individual, other than the defense counsel, accused, or military judge, is permitted to disclose to the trial counsel any statement made by the accused to the board or any evidence derived from that statement.

Additional mental examinations may be directed at any stage of the proceedings. If a motion for inquiry into the accused's sanity is denied, the military judge will direct counsel to proceed with the trial. When the motion is granted, the military judge ordinarily issue a written order UP RCM 706.

If the defense proffers expert testimony as to the accused's mental responsibility or capacity, the accused can be required to submit to psychiatric evaluation by government psychiatrists as a condition to the admission of defense expert testimony. The provisions of MRE 302 prescribe additional rules and procedures governing this situation.

6–2. MENTAL CAPACITY AT TIME OF TRIAL

The military judge rules finally on the issue of mental capacity, which is an interlocutory matter. Any question of mental capacity should be determined as early in the trial as possible. In rare cases, a situation may arise where the issue of mental capacity is raised more than once as a result of developing evidence. In those situations, the issue should again be determined shortly after it arises. In every case, the issue of mental capacity must be finally determined by the military judge separately from the issue of guilt or innocence or the determination of an appropriate sentence. The standard of proof on this issue is whether the accused is presently suffering from a severe mental disease or severe mental defect rendering him/her mentally incompetent to the extent that he/she is unable to understand the nature of the proceedings or to cooperate intelligently in the defense of the case. When the military judge determines by a preponderance of the evidence that the accused is not competent to stand trial, further action should be directed substantially as follows:

> I have determined that the accused lacks the mental capacity to stand trial. The defense's motion for a stay of proceedings is granted. The record of these proceedings with a statement of my determination will be transmitted to the convening authority.
>
> The court is adjourned.

REFERENCES: RCM 909.

6–3. PRELIMINARY INSTRUCTIONS ON SANITY

NOTE 1: Using this instruction. When some evidence has been adduced that tends to show the accused lacked mental responsibility, the military judge may, at the time the evidence is introduced, advise the members of the relevant legal concepts and applicable procedures. These instructions will facilitate the ability of the members to evaluate subsequent evidence on this issue. The preliminary instructions should be given only after consultation with counsel for both sides. The following preliminary instruction may be appropriate:

> There are indications from the (evidence presented so far) (state any other basis) that you may be required to decide the issue of the accused's mental responsibility at the time of the offense. I will now instruct you on certain legal principles and procedures which will assist you in deciding this issue.

NOTE: Other instructions. See Instruction 6-4, Mental Responsibility at Time of Offense.

REFERENCES: RCM 916(k).

6–4. MENTAL RESPONSIBILITY AT TIME OF OFFENSE

NOTE 1: Using these instructions. Lack of mental responsibility (insanity) at the time of the offense is an affirmative defense which must be instructed upon, sua sponte, when the military judge presents final instructions. These instructions may be modified for use as preliminary instructions. See Instruction 6-3, Preliminary Instructions on Sanity. The following instruction is suggested:

The evidence in this case raises the issue of whether the accused lacked criminal responsibility for the offense(s) of (state the alleged offense(s)) as a result of a severe mental disease or defect. (In this regard, the accused (himself) (herself) has denied criminal responsibility because of a severe mental condition.)

You are not to consider this defense unless you have first found that the government has proved beyond a reasonable doubt each element of the offense(s) of (state the alleged offense(s)). In other words, you should vote first on whether the government has proved beyond a reasonable doubt each element of the offense(s). Unless at least two-thirds of the members, that is _____ members, find that each element has been proved, you should return a finding of NOT GUILTY (as to that specification) and you need not consider the issue of mental responsibility.

If, however, two-thirds of the members are convinced beyond reasonable doubt that the accused did the act(s) charged (in (The) Specification (___) of (The) (Additional) Charge) (___)) (or committed a lesser included offense), then you must decide whether the accused was mentally responsible for the offense(s) of (state the alleged offense(s)).

This will require a second vote, and each member must vote, regardless of your vote on the elements.

NOTE 2: When a sanity determination might be required in spite of a NOT GUILTY finding. It is possible to acquit of a greater offense and then find the accused NOT GUILTY only by reason of Lack of Mental Responsibility. Tailor instructions accordingly.

The accused is presumed to be mentally responsible. This presumption continues throughout the proceedings until you determine, by clear and

convincing evidence, that (he) (she) was not mentally responsible. Note that, while the government has the burden of proving the elements of the offense(s) beyond a reasonable doubt, the defense has the burden of proving by clear and convincing evidence that the accused was not mentally responsible. As the finders of fact in this case, you must first decide whether, at the time of the offense(s) of (state the alleged offense(s)), the accused actually suffered from a severe mental disease or defect. The term "severe mental disease or defect" can be no better defined in the law than by the use of the term itself. However, a severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct or by nonpsychotic behavior disorders and personality disorders. If the accused at the time of the offense(s) of (state the alleged offense(s)) was not suffering from a severe mental disease or defect, (he) (she) has no defense of lack of mental responsibility.

If you determine that, at the time of the offense(s) of (state the alleged offense(s)), the accused was suffering from a severe mental disease or defect, then you must decide whether, as a result of that severe mental disease or defect, the accused was unable to appreciate the nature and quality or wrongfulness of (his) (her) conduct.

If the accused was able to appreciate the nature and quality and the wrongfulness of (his) (her) conduct, (he) (she) is criminally responsible; and this is so regardless of whether the accused was then suffering from a severe mental disease or defect, (and regardless of whether or not (his) (her) own personal moral Code was violated by the commission of the offense(s)).

(On the other hand, if the accused had a delusion of such a nature that (he) (she) was unable to appreciate the nature and quality or wrongfulness of (his) (her) acts, the accused cannot be held criminally responsible for (his) (her) acts, provided such a delusion resulted from a severe mental disease or defect.)

To summarize, you must first determine whether the accused, at the time of (this) (these) offense(s), suffered from a severe mental disease or defect. If you are convinced by clear and convincing evidence that the accused did suffer from a severe mental disease or defect, then you must further consider whether (he) (she) was unable to appreciate the nature and quality or the wrongfulness of (his) (her) conduct. If you are convinced by clear and convincing evidence that the accused suffered from a severe mental disease or defect, and you are also convinced by clear and convincing evidence that (he) (she) was unable to appreciate the nature and quality or wrongfulness of (his) (her) conduct, then you must find the accused not guilty only by reason of lack of mental responsibility. On the other hand, you may not acquit the accused on the ground of lack of mental responsibility, absent the accused suffering from a severe mental disease or defect, or if you believe that (he) (she) was able to appreciate the nature and quality and wrongfulness of (his) (her) conduct. Applying these principles to the accused's burden of establishing a lack of mental responsibility by clear and convincing evidence, you are finally advised that the accused, in order to be acquitted on the basis of lack of mental responsibility, is required to prove, by clear and convincing evidence, that the accused was not mentally responsible at the time of the offense(s). By "clear and convincing evidence," I mean that measure or degree of proof which will produce in your mind a firm belief or conviction as to the facts sought to be established. The requirement of clear and convincing evidence does not call for unanswerable or conclusive evidence. Whether the evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence. The facts to which the witnesses have testified must be distinctly remembered and the witnesses themselves found to be credible. In deliberating on this issue, you should consider all the evidence, including that from experts (and laypersons), as well as your common sense, your knowledge of human nature, and the general experience of mankind that most people are mentally responsible.

NOTE 3: Other instructions. See Instruction 6-5 for additional instructions that are frequently applicable when insanity is in issue.

6–5. PARTIAL MENTAL RESPONSIBILITY

NOTE 1: Using these instructions. RCM 916(k) (1) and (2) declare that, except as relevant to the defense of lack of mental responsibility, a mental disease or defect is not a defense and evidence of same is inadmissible. This is not an accurate statement of the law. Notwithstanding RCM 916(k)(1) and (2), evidence of a mental disease, defect, or condition is admissible if it is relevant to the elements of premeditation, specific intent, knowledge, or willfulness. Ellis v. Jacob, 26 MJ 90 (CMA 1988); United States v. Berri, 33 MJ 337 (CMA 1991). Use this instruction only when the evidence has raised an Article 50a defense of lack of mental responsibility AND there is evidence that tends to negate any mens rea element. If there is evidence that the accused may have lacked the necessary mens rea, but the Article 50a defense of lack of mental responsibility has not been raised, use Instruction 5-17, Evidence Negating Mens Rea.

An issue of partial mental responsibility has been raised by the evidence with respect to (state the applicable offense(s)).

In determining this issue you must consider all relevant facts and circumstances and the evidence presented on the issue of lack of mental responsibility (except _____). (You may also consider _____.)

One of the elements of (this) (these) offense(s) is the requirement of (premeditation) (the specific intent to _____) (that the accused knew that _____) (that the accused's acts were willful (as opposed to only negligent)) (_____).

An accused may be sane and yet, because of some underlying (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____), may be mentally incapable of (entertaining (the premeditated design to kill) (the specific intent to _____) (having the knowledge that _____) (acting willfully) (_____).

You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____) of such consequence and degree as to deprive (him/her) of the ability to

(act willfully) (entertain (the premeditated design to kill) (the specific intent to _____)) (know that _____) (_____).

The burden of proof is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Unless in light of all the evidence you are satisfied beyond a reasonable doubt that the accused, at the time of the alleged offenses(s) was mentally capable of ((entertaining (the premeditated design to kill) (the specific intent to _____)) (know that _____) (act willfully in _____) (_____), you must find the accused not guilty of (that) (those) offense(s).

It is essential that you remember that the defense of lack of mental responsibility, that is, insanity, and evidence the accused may have lacked the required state of mind are separate defenses although the same evidence may be considered with respect to both.

NOTE 2: Expert witnesses. When there has been expert testimony on the issue, Instruction 7-9-1, Expert Testimony, should be given.

NOTE 3: Lesser included offenses. When there are lesser included offenses raised by the evidence that do not contain a mens rea element, the military judge may explain that the partial mental responsibility instruction is inapplicable. The following may be helpful:

Remember that (state the lesser included offense raised) is a lesser included offense of the offense of (state the alleged offense). This lesser included offense does not contain the element that the accused (had the premeditated design to kill) (specific intent to _____) (knew that _____) (willfully _____) (_____). In this regard, the instructions I just gave you with respect to the accused's partial mental responsibility and ability to (premeditate) (know) (form the specific intent) (act willfully) (_____) do not apply to the lesser included offense of (state the lesser included offense raised).

The defense of a lack of mental responsibility, however, applies to both the offense(s) of (state the alleged offense(s)) and the lesser included offense(s) of (state the relevant lesser included offense(s)).

NOTE 4: Voluntary intoxication. When there is evidence of the accused's voluntary intoxication, Instruction 5-12, Voluntary Intoxication, is ordinarily applicable with respect to elements of premeditation, specific intent, willfulness, or knowledge.

6–6. EVALUATION OF TESTIMONY

NOTE: Using these instructions. The following instructions should normally be given to assist the members in evaluating evidence if the military judge instructs on the defense of lack of mental responsibility (Article 50a). The optional portions of the instruction contained in parenthesis should also be given if the military judge instructs on partial mental responsibility, Instruction 6-5.

In considering the issue(s) of mental responsibility, (and partial mental responsibility,) you may consider evidence of the accused's mental disease or defect (and mental condition) before and after the alleged offense(s) of (state the alleged offense(s)), as well as the evidence as to the accused's mental disease or defect (and mental condition) on that date. The evidence as to the accused's mental disease or defect (and mental condition) before and after that date was admitted for the purpose of assisting you to determine the accused's mental disease or defect (and mental condition) on the date of the alleged offense(s).

You have heard the evidence of (psychiatrists) (and) (psychologists) (and) (_____) who testified as expert witnesses. An expert in a particular field is permitted to give his/her opinion. In this connection, you are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect. What psychiatrists (and psychologists) may or may not consider a severe mental disease or defect for clinical purposes, where their concern is treatment, may or may not be the same as a severe mental disease or defect for the purpose of determining criminal responsibility. Whether the accused had a severe mental disease or defect (or mental condition) must be determined by you.

(There was also testimony of lay witnesses, with respect to their observations of the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts. In weighing the testimony of such lay witnesses, you may consider the circumstances of each witness, their opportunity to observe the accused and to know the facts

to which the witness has testified, their willingness and capacity to expound freely as to his/her observations and knowledge, the basis for the witness's opinion and conclusions, and the time of their observations in relation to the time of the offense charged.)

(You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness' observation of the accused and the nature and length of time of the witness' contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a mental disease or defect (or mental condition) and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.)

You are not bound by the opinions of (either) (expert) (or) (lay) witness(es.) You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight you believe it is fairly entitled to receive.

6–7. PROCEDURAL INSTRUCTIONS ON FINDINGS (MENTAL RESPONSIBILITY AT ISSUE)

NOTE 1: Using this instruction. When the defense of lack of mental responsibility has been raised in a trial with members, the following procedural instruction on voting must be given instead of the voting instructions at paragraphs 2-5-14 and 8-3-13.

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

You vote on the Specification(s) under the Charge(s) before you vote on the Charge. With respect to (each) (The) Specification, you vote first on whether the prosecution has proved the elements of the offense beyond a reasonable doubt, without regard to the defense of lack of mental responsibility. If the vote results in a finding that the prosecution has not proved the elements, then your vote constitutes a finding of not guilty, and you need not further consider the specification (that your vote concerned.)

If your vote results in a finding that the prosecution has proved the elements of the offense, you then vote on whether the accused has proven, by clear and convincing evidence, lack of mental responsibility. (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.)

(If you find the accused guilty of any Specification under (the) (a) Charge, the finding as to (the) (that) Charge is guilty.)

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

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding that the prosecution has proven the elements of the specification. Since we have ___ members, that means ___ members must concur in any such finding. If fewer than ___ members vote that the prosecution has proven the elements of the specification, then your vote has resulted in a finding of NOT GUILTY as to that specification (and you should move on to consider the remaining specification(s) (and) (Charge(s)).

Table 6–1
Votes Needed for a Finding of Guilty (Mental Responsibility)

No. of Members	Two-thirds
3	2
4	3
5	4
6	4
7	5
8	6
9	6
10	7
11	8
12	8

NOTE 2: Article 106 offenses. Modify the above instruction in the event of a Charge under Article 106, UCMJ.

MJ: If, however, ___ or more members vote that the prosecution has proved the elements of the specification, you must then vote on whether the accused has proven, by clear and convincing evidence, that (he) (she) lacked mental responsibility.

The concurrence of more than one-half of the members present when the vote is taken is required for any finding that the accused lacked mental responsibility. Since we have ___ members, that means ___ members must concur in any such finding.

Table 6–2
Votes Needed for Mental Responsibility

No. of Members	More than one-half
3	2
4	3
5	3
6	4
7	4
8	5
9	5
10	6
11	6
12	7

NOTE 3: Article 106 offenses. Modify the above instruction in the event of a Charge under Article 106, UCMJ.

MJ: If your vote results in a finding of lack of mental responsibility, then your vote constitutes a finding of not guilty only by reason of lack of mental responsibility. If, however, less than a majority votes that the accused lacked mental responsibility, then you have rejected that defense and your first vote constitutes a finding of guilty.

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 further instructions on the procedure for reconsideration.

NOTE 4: Reconsideration instructions. See Instruction 6-8 for detailed reconsideration instructions. Do not use the reconsideration instruction found in Chapter 2.

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 in making a proper announcement of the findings, you may use Appellate Exhibit ___, the Findings Worksheet (which the (Trial Counsel) (Bailiff) may now hand to the president).

NOTE 5: Explanation of Findings Worksheet. A suggested approach to explaining the Findings Worksheet follows:

MJ: (COL) (___) _____, as indicated on Appellate Exhibit(s) ___, the first portion will be used if the accused is completely acquitted of (the) (all) charge(s) and specification(s). The second part will be used if the accused is convicted, as charged, of (the) (all) charge(s) and specification(s); (and the third portion will be used if the accused is convicted of some, but not all of the offenses). Once you have finished filling in what is applicable, 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(s) (has) (have) 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). (This) (These) modification(s) of the worksheet in no way indicate(s) (an) opinion(s) by me or by either counsel concerning any degree of guilt of this accused. (They are) (It is) merely included to aid you in understanding what findings might be made in the case, and for no other purpose whatsoever. The worksheet(s) (is) (are) provided only as an aid in finalizing your decision.

MJ: 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 in that matter. The Uniform Code of Military Justice prohibits me or anyone else from entering your closed sessions. You may not consult the Manual for Courts-Martial or any other legal publication unless it has been admitted into evidence.

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

TC/DC: (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 Exhibit(s) _____ (and Defense Exhibit(s) _____) for use during the court's 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.)

MJ: The court is closed.

6–8. RECONSIDERATION INSTRUCTIONS (FINDINGS—MENTAL RESPONSIBILITY AT ISSUE)

NOTE 1: Using this instruction. An instruction substantially as follows must be given when any court member proposes reconsideration in a case in which the mental responsibility of the accused is at issue:

MJ: Once any finding has been reached and reconsideration has been proposed by any member, the question is whether or not to reconsider the findings. This shall be determined by secret, written ballot.

If you have reached only a finding that the prosecution has proven the elements, but have not yet voted on the issue of mental responsibility, you must reconsider your finding if more than one-third of the members vote in favor of doing so.

NOTE 2: Concurrence-Reconsideration of Findings.

Table 6–3
Votes Needed for Reconsideration of Findings

No. of Members	Majority	More than one-third
3	2	2
4	3	2
5	3	2
6	4	3
7	4	3
8	5	3
9	5	4
10	6	4
11	6	4
12	7	5

As we have ___ members, ___ must vote in favor of reconsidering a prior finding that the prosecution has proven the elements.

If you reached a finding that the prosecution failed to prove the elements of the offense(s) beyond a reasonable doubt, that constitutes a finding of not guilty. A prior NOT GUILTY finding must be considered when a MAJORITY of the members vote in favor of reconsidering. So you would have to vote again on such a NOT GUILTY finding if ___ members voted to reconsider.

If you have reached a finding that the prosecution has proven the elements of the offense, and have further found that the accused was mentally responsible at the time of the offense, that constitutes a finding of guilty. In that circumstance a member may propose reconsideration as to either the finding on the elements or as to the finding on mental responsibility. The member proposing reconsideration must announce whether he/she desires reconsideration of the determination that the elements were proven or the determination that the accused does not lack mental responsibility, or both. In either case, you would have to vote again if more than one-third vote in favor of reconsideration. Since we have ___ members, you would have to vote again on such findings if ___ vote to reconsider.

If you end up voting again on the elements of the offense, and if fewer than two-thirds of the members vote that the elements of the offense(s) have been proven, then your ballot has resulted in a finding of NOT GUILTY. If, on the other hand, you vote again on the issue of lack of mental responsibility, and if a majority of the members find that the accused lacked mental responsibility, then your ballot has resulted in a finding of NOT GUILTY only by reason of lack of mental responsibility.

If you have reached a finding that the prosecution has proven the elements of the offense(s), and have further found that the accused was not mentally responsible at the time of the offense, that constitutes a finding of not guilty only by reason of lack of mental responsibility. In that circumstance a member may propose reconsideration as to either the finding on the elements or as to the finding on mental responsibility. A new vote must be taken on the finding that the accused lacked mental responsibility if more than one-half of the members vote in favor of reconsidering the finding of lack of mental responsibility. This would mean you would have to vote again if ___ voted in favor of reconsidering the finding of lack of mental responsibility.

On the other hand, if after a finding that the prosecution has proven the elements of the offense(s), but that the accused lacks mental responsibility, a member proposes reconsideration of the finding that the prosecution has proven the elements of the offense, you must reconsider your finding if more than one-third of the members vote in favor of doing so. You would have to vote again if ___ members voted to reconsider.

If the vote to reconsider did not have the required number for reconsideration, then, if you have not already done so and if required because of a finding that the elements have been proven, you should proceed to vote on the issue of mental responsibility. If you have already voted on mental responsibility, then you should (move on to vote on other specifications, if any remain, and then) return to open court for the announcement of your findings.

If reconsideration is required, you must adhere to all of my original instructions for determining whether the accused is guilty or not, to include the procedural rules pertaining to your voting on the findings, the two-thirds vote required for determining whether the prosecution has proven the elements beyond a reasonable doubt, and the vote by more than one-half to determine whether the accused has proven lack of mental responsibility by clear and convincing evidence.

MJ: Counsel, any objections to the instructions given or requests for additional instructions?

TC/DC: (Respond.)

MJ: Court will again be closed.

6–9. SENTENCING FACTORS

NOTE: Using this instruction. Presentence instructions on the mitigating effect of a mental condition or other impairment or deficiency, and on the mitigating or other effect of a condition classified as a personality (character or behavior) disorder should be given whenever any such evidence has been presented, whether before or after findings. Such instructions may be substantially as follows:

Although you have found the accused guilty of the offense(s) charged and, therefore, mentally responsible (you should consider as a mitigating circumstance evidence tending to show that the accused was suffering from a mental condition) (you should consider a condition classified as a (personality) (character or behavior) disorder as a (mitigating) factor tending to explain the accused's conduct.) (I refer specifically to matters including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)

Chapter 7
EVIDENTIARY INSTRUCTIONS

EVIDENTIARY INSTRUCTIONS:

(1) Vicarious Liability-Principals and Co-conspirator: Instruction 7-1

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7–1. VICARIOUS LIABILITY—PRINCIPALS AND CO-CONSPIRATOR

If the evidence at trial indicates that a person other than the accused committed the substantive criminal acts charged against the accused and that the prosecution is asserting criminal liability against the accused on a theory of vicarious or imputed liability, the theory of liability will usually rest on one or two bases: the law of principals and/or the rule of co-conspirators. The law of principals allows conviction of the accused for a substantive offense upon proof that the accused aided, abetted, counseled, commanded, or procured the commission of the offense by the actual perpetrator, or caused an illegal act to be done. The rule of co-conspirators allows conviction of the accused for a substantive offense upon a showing that the accused was a member of an unlawful conspiracy, and that while the accused continued to be a member of that conspiracy the offense charged was committed in furtherance of the conspiracy or was an object of the conspiracy.

While the two theories of liability are distinct, they are closely related and, in most cases, both theories will apply to the facts of the case. Occasionally, however, the facts will only support one theory or the other. The military judge may, in the exercise of discretion, choose to instruct on one or both theories. Prior to deciding upon the appropriate instructions, the military judge may wish to question the trial counsel as to the theory being relied upon by the prosecution.

Instructions 7-1-1, 7-1-2, and 7-1-3 may be used as general guides in drafting instructions explaining the provisions of Article 77, which defines the term "principal." An appropriate instruction on the law of principals should be given to supplement the statement of the elements of the offense charged whenever it appears that an accused is being tried upon the theory that the accused is a principal because he or she aided, abetted, counseled, commanded, or procured the commission of the offense, or because the accused caused an act to be done which, if directly performed by him or her, would have been an offense. These instructions (Instructions 7-1-1, 7-1-2, and 7-1-3) should be carefully tailored to reflect that the accused is charged as a principal and should not be in language that would indicate that the accused was the active perpetrator. For example, such tailoring is required when an accused is charged with an offense of escape from confinement (Article 95, UCMJ), but the prosecution's theory is that the accused did not escape, but aided and abetted another prisoner to escape. Before giving instructions on the applicable law of principals, an instruction such as the following on the elements, tailored to reflect the theory of the prosecution, should be given:

1. That (state the name of the fellow prisoner) was duly placed in confinement;

2. That (state the time and place alleged) (state the name of the fellow prisoner) freed himself/herself from the physical restraint of his/her confinement before he/she had been released by proper authority; and

3. That (state the name of the accused) aided and abetted (state the name of the fellow prisoner) in freeing himself/herself from the restraint by knowingly and in furtherance of a common criminal purpose unlocking the door to the cell of (state the name of the fellow prisoner).

When the offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must ordinarily establish that the aider or abettor had the requisite intent or state of mind or that the accused knew that the perpetrator had the requisite intent or state of mind. There is no requirement, however, that the accused agree with, or even have knowledge of, the means by which the perpetrator is to carry out that criminal intent. It is possible that the aider or abettor, although sharing a common purpose with the perpetrator, may entertain a different intent or state of mind, either more or less culpable than that of the perpetrator, in which event the accused may be guilty of an offense of either greater or lesser seriousness than the perpetrator. Thus, when a homicide is committed, the actual perpetrator may act in the heat of

sudden passion caused by adequate provocation and be guilty of manslaughter, while the aider and abettor who hands a weapon to the perpetrator during the encounter with shouts of encouragement for him/her to kill the victim may be guilty of murder. On the other hand, if two persons share a common purpose to commit robbery in a particular place, and one of the two acts as lookout, sharing only the criminal purpose of the perpetrator to commit robbery, and if the perpetrator, without the knowledge of the lookout, seizes a victim and rapes her after the robbery, the perpetrator will be guilty of rape and robbery, but the aider and abettor will be guilty only of the robbery. In a case when the intent of the alleged aider or abettor differs or may differ from that of the alleged perpetrator, instructions explaining this must be drawn with great care, with particular attention to all possible lesser included offenses and in light of all relevant decisional law.

7–1–1. PRINCIPALS—AIDING AND ABETTING

NOTE: Using this instruction. The following are customary instructions that may be used as applicable, appropriately tailored:

Any person who actually commits an offense is a principal. Anyone who knowingly and willfully aids or abets another in committing an offense is also a principal and equally guilty of the offense. An aider or abettor must knowingly and willfully participate in the commission of the crime as something (he) (she) wishes to bring about and must aid, encourage, or incite the person to commit the criminal act.

(Presence at the scene of the crime is not enough (nor is failure to prevent the commission of an offense); there must be an intent to aid or encourage the person(s) who commit(s) the crime.) (If the accused witnessed the commission of the crime and had a duty to interfere, but did not because (he) (she) wanted to protect or encourage (state the name(s) of the person(s) who actually committed the crime), (he) (she) is a principal.)

(Although the accused must consciously share in the actual perpetrator's criminal intent to be an aider or abettor, there is no requirement that the accused agree with, or even have knowledge of, the means by which the perpetrator is to carry out that criminal intent.)

(If you find that the accused was an aider or abettor, you may also find that (he) (she) had a (specific intent) (or) (state of mind) (more) (less) criminal than that of (state the name of the perpetrator(s)). If this is the case, then the accused may be guilty of a (greater) (lesser) offense than that committed by (state the name of the alleged perpetrator(s)). The offense of (state the name of the offense) which (state the name of the perpetrator(s)) may have committed requires (state the state of mind or specific intent required). (Then enumerate the alleged greater or any lesser offenses, as applicable, detailing their elements and explaining how they are related to the offense allegedly committed by the perpetrator).

If you are satisfied beyond a reasonable doubt that (state the name of the accused) aided or abetted the commission of the offense(s) of (state the name of the offense(s) with which (he) (she) is charged) (_____) (and that (he) (she) specifically intended (_____) (knew the victim was (his) (her) superior officer) (_____), you may find (him) (her) guilty of that offense even though (he) (she) was not the person who actually committed the crime.

(However, if you are not satisfied beyond a reasonable doubt that (state the name of the accused) (specifically intended to _____) (knew the alleged victim was (his) (her) superior officer) (_____), but are satisfied beyond a reasonable doubt that (he) (she) is guilty of a lesser included offense, then you may find (him) (her) guilty of only the lesser included offense.)

7–1–2. PRINCIPALS—COUNSELING, COMMANDING, OR PROCURING

NOTE: Using this instruction. The following is a suggested instruction when counseling, commanding, or procuring is the government's theory of the accused's liability as a principal:

Any person who commits an offense is a principal. Any person who knowingly and willfully (counsels) (commands) (procures) another to commit an offense is also a principal and is just as guilty as the person who actually committed the offense. (Presence at the scene of the crime is not required.) ("Counsel" means to advise, recommend, or encourage.) ("Command" means an order given by one person to another, who, because of the relationship of the parties, is under an obligation or sense of duty to obey the order.) ("Procure" means to bring about or cause.) (If the offense is committed, even if it is accomplished in a different manner from that (counseled) (commanded) (procured), the person who (counseled) (commanded) (procured) the commission of the offense is guilty of the offense.) Once the act (counseled) (commanded) (procured) by a person is done, (he) (she) is criminally responsible for all the likely results that may occur from the doing of that act.

If you are satisfied beyond a reasonable doubt that (state the name of the accused to whom this instruction applies) knowingly and willfully (counseled) (commanded) (procured) the commission of an offense with which (he) (she) is charged (or a lesser included offense), you may find (him) (her) guilty of that offense even though (he) (she) was not the person who actually committed the crime.

7–1–3. PRINCIPALS—CAUSING AN ACT TO BE DONE

NOTE: Using this instruction. The following is a suggested instruction when the government's theory of liability is that the accused caused an act to be done:

Any person who commits an offense is a principal. Anyone who willfully causes an act to be done which, if actually performed by (him) (her) would be a criminal offense, is a principal and is just as guilty of the offense as if (he) (she) had done the act (himself) (herself). (Once an act is done, a principal is criminally responsible for all the likely results that may occur from the doing of that act.)

If you are satisfied beyond a reasonable doubt that (state the name of the accused to whom this instruction applies) willfully caused an act which (amounted to an offense) (resulted in an offense with which (he) (she) is charged) (or a lesser included offense) to be done, you may find (him) (her) guilty of that offense, even though (he) (she) was not the person who actually did the act. An act is willful if done voluntarily and intentionally and with the specific intent to do something the law forbids or to fail to do something the law requires.

7–1–4. VICARIOUS LIABILITY—CO-CONSPIRATORS

NOTE 1: Using this instruction. The instructions in this section may be used as general guides in drafting instructions explaining the vicarious liability of co-conspirators for substantive offenses committed by another conspirator. Co-conspirators are criminally liable for any substantive offense committed by any member of the conspiracy in furtherance of the conspiracy or as an object of the conspiracy while the accused remained a member of the conspiracy. While the accused need not be formally charged with conspiracy, the existence of the conspiracy must be shown before the accused may be convicted of a substantive offense under this theory. Unlike the law of principals, the accused need not play any role in the commission of the substantive offense, nor must he/she have any particular state of mind regarding the offense, nor must he/she be aware of the commission of the offense. The instructions normally encompass three parts: instructions on the elements of conspiracy, instructions on the elements of the substantive offense, and instructions explaining vicarious liability of co-conspirators. The instructions should be carefully tailored to reflect this theory and should not be in language that would indicate that the accused was the active perpetrator. If the offense which was the original object of the conspiracy is different from the substantive offense charged against the accused, this distinction should be emphasized to avoid confusion. For example, if the accused is charged with larceny (Article 121, UCMJ), but the prosecution's theory is not that the accused stole anything, but instead that the accused entered into a conspiracy to steal, and that a co-conspirator actually committed the larceny, then instructions such as the following, tailored to reflect the theory of the prosecution, should be given (the use of elements relating to larceny is for illustrative purposes only):

With regard to (identify the appropriate charge and specification), the prosecution is alleging that, while the accused was a member of a conspiracy, the offense of (larceny) (_____) was committed by another conspirator in furtherance of that conspiracy. A member of a conspiracy is criminally responsible under the law for any offense which was committed by any member of the conspiracy in furtherance of the conspiracy or as an object of the conspiracy, even if (he) (she) was neither a principal nor an aider and abettor in the offense.

In order to find the accused guilty of this offense, you must first be satisfied beyond a reasonable doubt that, at the time that this offense was committed, the accused had entered into and continued to be a member of an unlawful conspiracy (as I have already defined to you) (as follows:)

(1) That (state the time and place raised by the evidence), the accused entered into an agreement with (state the name(s) of the co-

conspirator(s)) to commit (larceny) (_____), an offense under the Uniform Code of Military Justice; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, (state the name of the co-conspirator allegedly performing the overt act(s)) performed (an)(one or more) overt act(s), that is, (state the overt act(s) raised by the evidence), for the purpose of bringing about the object of the agreement.

(The agreement in a conspiracy does not have to be in any particular form or expressed in formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy, and this may be proved by the conduct of the parties. The agreement does not have to express the manner in which the conspiracy is to be carried out or what part each conspirator is to play.)

NOTE 2: Overt act. The overt act or acts which prove the conspiracy may be, but need not be, the commission of the substantive offense charged against the accused.

If you are satisfied beyond a reasonable doubt that the accused had entered into and continued to be a member of this conspiracy, then you must next determine whether the evidence establishes beyond a reasonable doubt that the offense with which we are concerned, that is, larceny (_____) was committed by a member of the conspiracy. The elements of (larceny) (_____) are as follows:

(1) That (state the time and place alleged), a certain person (state the name of the co-conspirator(s) who committed the illegal act, if known) wrongfully (took) (obtained) (withheld) certain property, that is, (describe the property alleged), from the possession of (state the name of the owner or other person alleged);

(2) That the property belonged to (state the name of the owner or other person alleged);

(3) That the property was of a value of (_____) (or of some lesser value, in which case the finding should be in the lesser amount); and

(4) That the (taking) (obtaining) (withholding) by (state the name of the co-conspirator(s) who committed the illegal act, if known) was with the intent (permanently to (deprive) (defraud) (state the name of the owner or other person alleged) of the use and benefit of the property) (or) (permanently to appropriate the property to (his/her) own use or the use of any person other than the owner).

NOTE 3: Including definitions and other instructions. Additional instructions found in Chapter 3, such as definitions and explanations may need to be given to fully advise the court members of the law relating to the substantive offense alleged.

NOTE 4: Concluding instructions on conspiracy offenses. The following instruction should be given after the elements of the substantive offense and any necessary definitions or explanations:

Finally, before you may find the accused guilty of this offense (under this theory), you must also be satisfied beyond a reasonable doubt either that this offense was committed in furtherance of that conspiracy or that the offense was an object of the conspiracy.

If you are satisfied beyond a reasonable doubt that, at the time this offense was committed, the accused had entered into and continued to be a member of an unlawful conspiracy as I have defined that for you; and if you find beyond a reasonable doubt that this offense was committed while the conspiracy continued to exist and in furtherance of that unlawful conspiracy or was an object of that conspiracy; then you may find the accused guilty of this offense, as a co-conspirator, even though (he) (she) was not the person who actually committed the criminal offense, that is, a principal, and even though (he) (she) was not an aider and abettor of the person who committed the offense.

However, if you are not satisfied beyond a reasonable doubt that the accused was a continuing member of an unlawful conspiracy or that this offense was committed in furtherance of an unlawful conspiracy or was an object of that conspiracy, then you must find the accused not guilty of this offense (unless you find beyond a reasonable doubt that the accused was an aider and abettor, or a principal, as I have previously defined those terms).

REFERENCES: Paragraph 5c(5), Part IV, MCM; United States v. Gaeta, 14 MJ 383 (CMA 1983); United States v. Woodley, 13 MJ 984 (ACMR 1982).

7–2. JOINT OFFENDERS

NOTE 1: Using this instruction. In a case involving multiple offenders (joint or common trial), the instructions must be carefully tailored to reflect the relationship between the alleged offenders. When two or more accused are tried at the same time for the same offenses, the following cautionary instruction should be given prior to instructing on the elements:

> (State the names of the accused) are charged with jointly committing the same offense(s) of (state the name of the offense(s)). You must consider the guilt or innocence of each accused separately. The guilt or innocence of any one accused must not influence your finding(s) as to the other accused.

NOTE 2: Subsequent instructions. The court should then be instructed on the elements of the offenses charged. When multiple accused are tried for the same offenses at the same trial, the elements of the offenses need not be repeated for each accused. A single instruction on the elements, modified as necessary to reflect the alleged joint commission of the offense, will suffice.

NOTE 3: Vicarious liability. If, in a joint trial, the evidence against one of the accused is predicated on the theory of aiding and abetting or some similar theory, the instruction on the elements should indicate the appropriate theory. After instructing on the elements and, if applicable, the law of principals, the following instruction should be given, followed by specific instructions on the use of a properly tailored Findings Worksheet:

> If you find one (or more) but not (both) (all) of the accused guilty of (any of) the joint offense(s) charged, but do not find the other accused guilty of (both) (all) of the offense(s) charged, you must modify your findings.

NOTE 4: Separate trial on a jointly committed offense. When an accused is being tried separately under a specification alleging that he/she committed an offense in conjunction with another person, the following instructions should be given instead of those above, except that an instruction on the law of principals should again be added as applicable:

> The accused is charged with committing the offense(s) in conjunction with or together with (state the name of the other alleged joint offender). In order to find the accused guilty, it is not necessary that you also find (state the name of the other alleged offender) guilty, nor is it required that you find that the accused committed the offense in conjunction with (state the name of the other alleged joint offender). If you are satisfied beyond a reasonable doubt that the accused is guilty, but have

reasonable doubt that the accused committed the offense in conjunction with (state the name of the alleged joint offender) you may still find (him) (her) guilty of the offense.

NOTE 5: Tailored Findings Worksheet. When appropriate, the military judge should ensure that the Findings Worksheet provides for a finding of guilty that excepts the phrase "in conjunction with."

NOTE 6: Confrontation problems in joint trials. Ordinarily evidence precluding confrontation by an accused, such as a deposition at which the accused was not present or which he/she did not approve, or a stipulation in which he/she did not join, admitted for or against a co-accused, should not be received in evidence when that evidence implicates an accused being tried jointly, or in common. For exceptions, see Instruction 7-5, Depositions, and Instruction 7-4, Stipulations.

NOTE 7: Use of pretrial statements by one co-accused in joint trials. Pretrial statements of a co-accused implicating another accused must not be admitted at a joint or common trial and reference to or admission of such statements will, upon request, ordinarily require a mistrial as to the accused, and a severance of his/her trial from the trial of the co-accused who made the statement. However, if such statements are inadvertently referred to or brought before the court, particularly toward the close of a lengthy trial, the military judge in his/her sound discretion, in lieu of declaring a mistrial and severance, may emphatically instruct the court: (a) That the statements or references are stricken and are to be completely disregarded; and, (b) that no adverse conclusion whatever may be drawn from them as to any accused who did not make the statement. In this determination, the military judge should consider such factors as the import and nature of the statements or references, their possible damaging effect, if any, and the views of counsel for the accused who did not make the statement.

NOTE 8: Inconsistent pleas by co-accused at a joint trial. If one accused in a joint or common trial pleads guilty, while a co-accused pleads not guilty, the military judge should state that he/she will entertain a motion for severance. If a motion is made by the defense counsel for the accused who pled not guilty, it must be granted. Such a motion by the defense counsel for the accused pleading guilty may be granted if cogent reasons are advanced by such counsel. In any event, a severance should be granted by the military judge, sua sponte, unless compelling reasons for continuation of the joint or common trial are advanced by the accused who pleads not guilty. In such exceptional cases, strong cautionary instructions are required to the effect that the guilty plea of one accused must not be considered as evidence of the guilt of the co-accused who pled not guilty.

REFERENCES: RCM 307(c)(5), 601(e)(3), 812, 906(b)(9), MCM; MRE 306.

7–3. CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. "Direct evidence" is evidence which tends directly to prove or disprove a fact in issue. If a fact in issue was whether it rained during the evening, testimony by a witness that he/she saw it rain would be direct evidence that it rained.

On the other hand, "circumstantial evidence" is evidence that tends to prove some other fact from which, either alone or together with some other facts or circumstances, you may reasonably infer the existence or nonexistence of a fact in issue. If there was evidence the street was wet in the morning, that would be circumstantial evidence from which you might reasonably infer it rained during the night.

There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the weight and value you believe it deserves.

NOTE 1: Justifiable inferences. If the military judge instructs the court members on a justifiable inference (i.e., an example of the use of circumstantial evidence), it should be referred to as a non-mandatory inference. When a military judge desires to instruct concerning a permissible inference, the court may be advised substantially as follows:

In this case, evidence has been introduced that (a letter correctly addressed and properly stamped was placed in the mail) (property was wrongfully taken from a certain place at a certain time under certain circumstances, and was shortly thereafter found in the exclusive possession of the accused) (_____). Based upon this evidence you may justifiably infer that (the letter was delivered to the addressee) (the accused wrongfully took the property from that place and at that time and under those circumstances) (_____). The drawing of this inference is not required and the weight and effect of this evidence, if any, will depend upon all the facts and circumstances as well as other evidence in the case.

NOTE 2: Proof of intent by circumstantial evidence. When specific intent is an essential element, and circumstantial evidence has been introduced which reasonably tends to

establish such intent, the circumstantial evidence instruction may be supplemented as follows:

> I have instructed you that (state the requisite intent) must be proved beyond a reasonable doubt. Direct evidence of intent is often unavailable. The accused's intent, however, may be proved by circumstantial evidence. In deciding this issue, you must consider all relevant facts and circumstances (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on intent and indicate the respective contentions of counsel for both sides)).

NOTE 3: Proof of knowledge by circumstantial evidence. When the accused's knowledge of a certain fact is an essential element or is otherwise necessary to establish the commission of an offense (e.g., to refute an affirmative defense of lack of knowledge) and circumstantial evidence has been introduced which reasonably tends to establish the requisite knowledge, the circumstantial evidence instruction may be supplemented as follows:

> I have instructed you that you must be satisfied beyond a reasonable doubt that the accused knew (state the required knowledge). This knowledge, like any other fact, may be proved by circumstantial evidence. In deciding this issue you must consider all relevant facts and circumstances (including, but not limited to (here the military judge may specify significant evidentiary factors bearing upon the accused's knowledge and indicate the respective contentions of counsel for both sides).

REFERENCES: United States v. Lyons, 33 MJ 88 (CMA 1991); RCM 918(c) (discussion).

7–4–1. STIPULATIONS OF FACT

NOTE 1: Using this instruction. Prior to receiving any written or oral stipulations, the military judge must determine that all parties to the stipulation join in the stipulation, and that the accused fully understands and agrees to what is involved. A suggested inquiry guide may be found at paragraphs 2-2-2, 2-7-24, 2-7-25, or 8-2-2. Any party may withdraw from an agreement to stipulate or from a stipulation prior to its receipt into evidence.

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

NOTE 2: Withdrawal from a stipulation. The military judge may, as a matter of discretion, permit a party to withdraw from a stipulation that has been received in evidence. When a stipulation is withdrawn or ordered stricken, the court must be instructed as follows:

The stipulation that (state the matter(s) to which the parties had stipulated) has been (withdrawn) (stricken) and must be completely disregarded by you.

NOTE 3: Joint or common trials. Generally, in joint or common trials, stipulations made by only one or some of the accused should not be received when there is any possibility that the stipulation could adversely affect those not joining in it, since the stipulation deprives the non-consenting party of the right of confrontation. However, in those rare cases in which there appears no possibility of prejudice in the admission of such stipulations, the following limiting instruction should be given:

This stipulation may be considered only as to (state the name(s) of the accused person(s) who joined in the stipulation), and may not in any way be considered as evidence as to (state the name(s) of the accused person(s) who did not join in the stipulation).

7–4–2. STIPULATIONS OF EXPECTED TESTIMONY

NOTE 1: Using this instruction. Prior to receiving any written or oral stipulations the military judge must determine that all parties to the stipulation join in the stipulation, and that the accused fully understands and agrees to what is involved. A suggested inquiry guide may be found at paragraphs 2-2-2, 2-7-24, 2-7-25, or 8-2-2. Any party may withdraw from an agreement to stipulate or from a stipulation prior to its receipt into evidence. When the stipulation is one of testimony rather than fact, and is in writing, the written stipulation may only be orally read into evidence and may not be shown to the court. When a stipulation as to testimony is received, whether written or oral, the following instruction should be given:

> The parties have stipulated or agreed what the testimony of (state the name of the person whose testimony is being presented by stipulation) would be if he/she were present in court and testifying under oath. This stipulation does not admit the truth of such testimony, which may be attacked, contradicted, or explained in the same way as any other testimony. You may consider, along with all other factors affecting believability, the fact that you have not had an opportunity to personally observe this witness.

NOTE 2: Withdrawal from a stipulation. The military judge may, as a matter of discretion, permit a party to withdraw from a stipulation that has been received in evidence. When a stipulation is withdrawn or ordered stricken, the court must be instructed as follows:

> The stipulation that (state the matter(s) to which the parties had stipulated) has been (withdrawn) (stricken) and must be completely disregarded by you.

NOTE 3: Joint or common trials. Generally, in joint or common trials, stipulations made by only one or some of the accused should not be received when there is any possibility that the stipulation could adversely affect those not joining in it, since the stipulation deprives the non-consenting party of the right of confrontation. However, in those rare cases in which there appears no possibility of prejudice in the admission of such stipulations, the following limiting instruction should be given:

> This stipulation may be considered only as to (state the name(s) of the accused person(s) who joined in the stipulation), and may not in any way be considered as evidence as to (state the name(s) of the accused person(s) who did not join in the stipulation).

7–5. DEPOSITIONS

NOTE 1: Using this instruction. After being received in evidence, transcribed depositions will be read, but not shown to the court members. In the discretion of the military judge, depositions recorded by videotape, audiotape, or sound film may be played for the court-martial, or may be transcribed and read to the members. Depositions will be marked as exhibits and incorporated into the record. In any case in which a deposition has been admitted, the following instruction may be given:

> The testimony of (state the name of the deponent), who is unavailable, has now been (read to) (shown to) (played for) you. His/her testimony may be attacked, contradicted, or explained in the same way as all other live testimony. You may consider, along with all other factors affecting credibility, that you have not had an opportunity to observe the appearance of the witness while testifying. The deposition itself, since it is the testimony of a witness, will not be given to you as an exhibit. However, if you want to have any of the deposition testimony (re-read) (shown again) (played again), you may ask for it in open court.

NOTE 2: Use of deposition testimony. Deposition testimony may be received in evidence when offered by either the trial counsel or defense except that in a capital case it may be received only from or with the express consent of the defense. When both capital and noncapital offenses involving the same accused but different transactions are tried together, a deposition relevant to only the noncapital offense may be introduced by the trial counsel. In such cases the following instruction should be given:

> The deposition of (state the name of the deponent) may be considered only as to the offense of (identify the noncapital offense). This deposition testimony may not be considered by you as to the offense of (identify the capital offense).

NOTE 3: Joint or common trials. Generally, in joint or common trials, depositions taken in the presence of or with the express approval of only one or some of the accused should not be received when there is any possibility that such deposition could adversely affect any other accused, since this would result in deprivation of the right of confrontation. However, in those rare instances in which there appears no possibility of prejudice in the admission of such depositions, the following limiting instruction should be given:

> The deposition of (state the name of the deponent) may be considered only as to (state the name(s) of the accused person(s) as to whom the deposition may be considered), and may not be considered as evidence

as to (state the name(s) of the accused person(s) as to whom the deposition may not be considered).

REFERENCES: RCM 702, MCM.

7–6. JUDICIAL NOTICE

NOTE 1: Using this instruction. A judicially noticed adjudicative fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resorting to resources whose accuracy cannot reasonably be questioned. The judge may take judicial notice, whether requested or not, but the parties must be informed in open court when the judge takes judicial notice of an adjudicative fact essential to establishing an element of the case. The judge must take judicial notice of an adjudicative fact if requested by a party and supplied with the necessary information showing it is a fact capable of being judicially noticed. A party is entitled to be heard as to the propriety of taking judicial notice. In the absence of prior notification, the request may be made after judicial notice has been taken. If the military judge is not convinced that the matter should be judicially noticed, the judge may resort to any source of relevant information. The procedural requirements discussed herein also apply to judicial notice of domestic law insofar as domestic law is a fact of consequence to the determination of the action. Judicial notice may be taken at any stage of the trial. When the judge takes judicial notice, the following instruction should be given:

> I have taken judicial notice that (state the matter judicially noticed). This means that you are now permitted to recognize and consider (those) (this) fact(s) without further proof. It should be considered by you as evidence with all other evidence in the case. You may, but are not required to, accept as conclusive any matter I have judicially noticed.

NOTE 2: Matter determined inappropriate for judicial notice. If the military judge, after consideration of all relevant sources of information, is not convinced that the matter may be judicially noticed, the judge should rule that the matter will not be judicially noticed. The parties may then submit any competent evidence to the court on the matter, just as they would with respect to any issue of fact.

NOTE 3: Writings used in judicial notice. If a writing is used by the court in aiding it to take judicial notice of a matter, the record should indicate that the writing was so used and, unless it is a statute of the United States, an executive order of the President, or an official publication of the Department of Defense or a military department, or the Headquarters of the Marine Corps or Coast Guard, the writing, or pertinent extracts therefrom, should be included in the record of trial as an appropriately marked exhibit.

REFERENCES: MRE 201 and 201A.

7–7–1. CREDIBILITY OF WITNESSES

NOTE 1: Using this instruction. The following instruction should be given upon request, or when otherwise deemed appropriate, and it must be given when the credibility of a principal witness or witnesses for the prosecution has been assailed by the defense:

You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness's intelligence, ability to observe and accurately remember, sincerity, and conduct in court, (friendships) (and) (prejudices) (and) (character for truthfulness). Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict.

(In weighing (a discrepancy) (discrepancies) (by a witness) (or) (between witnesses), you should consider whether (it) (they) resulted from an innocent mistake or a deliberate lie.)

Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth.

(The believability of each witness's testimony should be your guide in evaluating testimony, not the number of witnesses called.)

(These rules apply equally to the testimony given by the accused.)

NOTE 2: Other instructions. If character for truthfulness or untruthfulness has been raised, Instruction 7-8-1 or 7-8-3 normally should be given immediately following this instruction.

7–7–2. EYEWITNESS IDENTIFICATION

One of the issues in this case is the identification of the accused as the perpetrator of the crime.

The government has the burden of proving identity beyond a reasonable doubt. It is not essential that the witness(es) be free from doubt as to the correctness of his/her/their statement(s). However, you, the court members, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the accused before you may convict (him) (her). If you are not convinced beyond a reasonable doubt that the accused was the person who committed the crime, you must find the accused not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

1. Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

(In general, a witness bases any identification he/she makes on his/her perception through the use of his/her senses. Usually the witness identifies an offender by the sense of sight, but this is not necessarily so, and the witness may use his or her other senses.)

2. Are you satisfied that the identification made by the witness subsequent to the offense was the product of his/her own recollection?

You may take into account both the strength of the identification and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the accused was presented to him/her for identification, you should scrutinize the identification with great care. You may also consider the length of time that elapsed between the occurrence of the crime and the next opportunity of the witness to see the accused as a factor bearing on the reliability of the identification.

(You may also take into account that an identification made by picking the accused out of a group of similar individuals is generally more reliable than one which results from the presentation of the accused alone to the witness.)

3. You may take into account any occasions in which the witness failed to make an identification of the accused, or made an identification that was inconsistent with his/her identification at trial.

4. Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he/she is truthful, and consider whether the witness had the capacity and opportunity to make a reliable observation on the matter covered in his/her testimony.

I again emphasize that the burden of proof on the government extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the accused as the perpetrator of the crime with which (he) (she) stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must acquit the accused unless the other evidence that has been presented convinces you beyond a

reasonable doubt that the accused was the perpetrator of the crime with which (he) (she) stands charged.

7–8–1. CHARACTER—GOOD—OF ACCUSED TO SHOW PROBABILITY OF INNOCENCE

NOTE: Using this instruction. Evidence of a pertinent trait of character of the accused offered by an accused, or by the prosecution to rebut the same, is admissible to prove that the accused acted in conformity therewith on a particular occasion. When a pertinent character trait is in evidence, the court may be instructed substantially as follows:

To show the probability of (his) (her) innocence, the defense has produced evidence of the accused's:

(Character for (honesty) (truthfulness) (peacefulness) (_____) (if appropriate, specify pertinent military character trait, *e.g.*, obedience to orders, promptness, appearance)).

(In rebuttal the prosecution has produced evidence of _____.)

Evidence of the accused's character for _____ may be sufficient to cause a reasonable doubt as to (his) (her) guilt.

On the other hand, evidence of the accused's (good character for _____) (and) (good military record) may be outweighed by other evidence tending to show the accused's guilt (and the prosecution's evidence of the accused's ((bad) (_____) (character for _____) (and) ((bad) (_____) military record).

REFERENCES: United States v. Gagan, 43 MJ 200 (CAAF 1995).

7–8–2. CHARACTER—VICTIM—VIOLENCE OR PEACEFULNESS

NOTE 1: Using this instruction. When an issue of self-defense or defense of another exists in unlawful homicide or assault cases, or when in a murder trial an issue of adequate provocation has been raised on the theory that voluntary manslaughter and not murder has been committed; and evidence of the violent or peaceful character of the accused's alleged victim has been introduced, the court may be instructed substantially as follows. This instruction requires careful tailoring, particularly in cases where conflicting evidence has been presented concerning the alleged victim's character.

The (defense) (prosecution) has introduced evidence to show that (state the name of the alleged victim) (is) (was) a (violent) (peaceful) person. This evidence is important on the issue of (adequate provocation) (self-defense) (defense of another). The law recognizes that a person with a (violent) (peaceful) character is (more) (less) likely to become an aggressor than is a person with a (peaceful) (violent) character. Evidence that the alleged victim (is) (was) a (violent) (peaceful) person should be considered by you in determining whether it is (probable) (improbable) that the alleged victim was the aggressor.

NOTE 2: Accused aware of victim's character. If it is also shown by the evidence that the accused was aware of the victim's violent or peaceful character, or entertained a belief with respect to that character, the following instruction should be added:

Evidence that the accused was aware that the alleged victim (is) (was) a (violent) (peaceful) person, or had a belief as to that character, should also be considered by you in determining the question of the reasonableness and extent of (passion) (apprehension of danger) on the part of the accused.

7–8–3. CHARACTER FOR UNTRUTHFULNESS

NOTE: Using this instruction. When a witness, including an accused who testifies, has been impeached by evidence of his or her bad character for truthfulness, an instruction substantially as follows may be given:

Evidence has been received as to the (accused's) (_____) bad character for truthfulness.

(Evidence of good character for truthfulness has also been introduced.)

You may consider this evidence in determining (the accused's) (_____) believability.

7–9–1. EXPERT TESTIMONY

NOTE 1: Using this instruction. If expert testimony has been received, an instruction substantially as follows should be given:

You have heard the testimony of (name of the expert(s)). (He/She is) (They are) known as (an) "expert witness(es)" because his/her/their knowledge, skill, experience, training, or education may assist you in understanding the evidence or in determining a fact in issue. You are not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness. You should, however, consider his/her/their qualifications as (an) expert(s).

NOTE 2: Lay testimony or member "expertise." In appropriate cases the court members should be reminded that the testimony of lay witnesses should not be ignored merely because expert testimony has been introduced. For example, lay testimony is admissible on issues such as sanity, drunkenness, speed of an automobile, and handwriting identification. In a case involving an issue as to handwriting, the following might be added to the preceding instruction:

(You are free, however, to make your own comparison of the handwriting exemplars with the questioned writing(s).)

NOTE 3: Hypothetical questions. When an expert witness has expressed an opinion on direct or cross-examination upon a hypothetical question based on facts that the proponent of the question states will later be introduced in evidence, but which are not later introduced in evidence, the hypothetical question and its answer should be excluded and the members instructed to disregard it. In all cases in which hypothetical opinions based upon facts purportedly in evidence are permitted, substantially the instruction below should be given. However, when the opinion is adduced on cross-examination solely for the purpose of testing the credibility of the witness, the requirement that it be based on facts that will be in evidence is not applicable.

When an expert witness answers a hypothetical question, the expert assumes as true every asserted fact stated in the question. Therefore, unless you find that the evidence establishes the truth of the asserted facts in the hypothetical question, you cannot consider the answer of the expert witness to that hypothetical question.

NOTE 4: Limited purpose testimony—basis or weight of opinion. If in the course of stating the data on which an expert's opinion is based, the expert refers to matters that, if offered as general purpose evidence in the case would be inadmissible, the court must be instructed to consider such matters only with respect to the specific limited purpose (e.g.,

weight to be given to the expert opinion), and for no other purpose whatsoever. The following may be appropriate:

> You (heard testimony) (received evidence) that _____. You may consider this information only for the limited purpose (of evaluating the basis of the expert's opinion) (to illustrate the principle that _____) (in determining the weight to give the expert's opinion) (_____) and for no other purpose whatsoever.
>
> (Specifically, you may not consider this information for its tendency, if any, to show that (_____)).

NOTE 5: Expert testimony on witness credibility or opinion on whether offense has been committed. A long line of Court of Military Appeals/Court of Appeals for the Armed Forces cases makes clear that an expert may not testify as to the credibility of the victim or opine whether an offense has been committed, and that to permit such testimony is error. United States v. Armstrong, 53 MJ 76 (CAAF 2000) (plain error for an expert to testify that the victim a) had been abused and b) the accused was the abuser, even after two sets of curative instructions); United States v. Birdsall, 47 MJ 404 (CAAF 1998) ("Normally, expert testimony that a victim's conduct or statements are consistent with sexual abuse or consistent with the complaints of sexually abused children is admissible…." However, error for expert to testify that the victim had been abused and that the accused was the abuser); United States v. Suarez, 35 MJ 374 (CMA 1992) (proper for an expert to testify a) on the characteristics of Child Sex Abuse Accommodation Syndrome and b) that the victim's behavior was consistent with the Syndrome. The military judge instructed after the witness testified and in closing instructions before findings. These instructions, although they "might have been improved," were quoted in the opinion); United States v. Harrison, 31 MJ 330 (CMA 1990) ("It is impermissible for an expert to testify about his or her belief that a child is telling the truth regarding an alleged incident of sexual abuse.") Asking the expert directly whether the expert thought the victim had been abused was error. "An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms." The instructions following NOTEs 6 and 7 may be used when such issues arise.

NOTE 6: Expert testimony that may be confused with an opinion on credibility, guilt, or innocence. When an expert has expressed an opinion that might be construed as an opinion concerning the credibility of the alleged victim or that an offense was or was not committed, the following instruction should be given in addition to the other instructions on expert testimony. The instruction should be given immediately after the expert testifies, and then repeated in the closing instructions:

> Only you, the members of the court, determine the credibility of the witnesses and what the facts of this case are. No expert witness (or other witness) can testify that the (alleged victim's) (a witness's) account of what occurred is true or credible, that the (expert) (witness) believes

the (alleged victim) (another witness), or that (a sexual encounter) (_____) occurred. To the extent that you believed that (state the name of witness) testified or implied that he/she believes the (alleged victim) (a witness), that a crime occurred, or that the (alleged victim) (a witness) is credible, you may not consider this as evidence that a crime occurred or that the (alleged victim) (witness) is credible.

NOTE 7: Where belief in victim's allegations testified to by an expert for a proper, limited purpose. In limited cases, an expert may testify that he/she believed a victim to explain why the expert treated a victim or acted in a certain way. In such cases, the following may be appropriate and given immediately after the instruction following NOTE 6 above:

It may, however, be considered only for the limited purpose of explaining why (state the name of expert) acted as he/she did (in providing care or treatment to (state the name of alleged victim)) (_____).

REFERENCES: MRE 701-706.

7–9–2. POLYGRAPH EXPERT

NOTE 1: Using this instruction. Notwithstanding the provisions of MRE 707, there may be extremely unusual situations in which polygraph evidence could be admitted. United States v. Clark, 53 MJ 280 (CAAF 2000) (concurring opinions by Crawford and Everett, JJ., indicating that polygraph evidence might be admitted into evidence in spite of the language of MRE 707). In those extremely unusual cases, judges may use this instruction in lieu of a variant of Instruction 7-9-1. If one or more polygraph experts testify, the following instruction may be useful:

You have heard the testimony of _____ as to a polygraph examination administered by him/her to _____. (You have also heard the testimony of _____). _____ (is a) (are both) qualified polygraph examiner(s). A qualified polygraph examiner is known in the law as an expert witness because of his/her particular knowledge, skill, training and education in his/her field. As with any witness, it is your responsibility to determine the believability of an expert witness and the weight, if any, you wish to give such testimony. You are not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness. You should, however, consider the qualifications of the expert witness(es).

NOTE 2: Conflict among the experts. When two polygraphers testify, and they disagree, the military judge may use the following instruction:

When there is disagreement between expert witnesses, as there is in this case, it becomes your responsibility to determine which witness, if either, you will believe as to an issue or issues upon which there is disagreement. When resolving these issues, you may accept all or a portion of an expert witness's testimony, or you may reject his/her entire testimony.

NOTE 3: When the accused testifies about matters that the polygrapher also testifies. If the accused testifies to matters that were also testified to by the polygrapher, use the following:

You may consider the opinion of a polygraph examiner as a matter bearing upon the believability of the testimony of the accused at the trial. However, I caution you that the questions posed by _____ to the accused and (his) (her) responses thereto are not evidence that directly

relates to the guilt or innocence of the accused; but you may, if you wish, consider them along with the opinion of _____ as to the truthfulness of those responses at the time they were made, that is, at the time of the polygraph exam, when you are weighing the believability of the accused's testimony before you at trial. When you are weighing this testimony, please keep in mind my general instructions as to the credibility of all witnesses, including the accused.

7–10. ACCOMPLICE TESTIMONY

NOTE: Using this instruction. Instructions on accomplice testimony should be given whenever the evidence tends to indicate that a witness was culpably involved in a crime with which the accused is charged. The instructions should be substantially as follows:

A witness is an accomplice if he/she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness's believability, that is, a motive to falsify his/her testimony in whole or in part, because of an obvious self-interest under the circumstances.

(For example, an accomplice may be motivated to falsify testimony in whole or in part because of his/her own self-interest in receiving (immunity from prosecution) (leniency in a forthcoming prosecution) (_____).)

In deciding the believability of (state the name of the witness), you should consider all the relevant evidence (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

Whether (state the name of the witness), who testified as a witness in this case, was an accomplice is a question for you to decide. If (state the name of the witness) shared the criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other way criminally associated or involved himself/herself with the offense with which the accused is charged, he/she would be an accomplice.

As I indicated previously, it is your function to determine the credibility of all the witnesses, and the weight, if any, you will accord the testimony of each witness. Although you should consider the testimony of an accomplice with caution, you may convict the accused based solely upon the testimony of an accomplice, as long as that testimony was not self-contradictory, uncertain, or improbable.

REFERENCES: RCM 918(c), MCM; United States v. Bigelow, 57 MJ 64 (CAAF 2002); United States v. Williams, 52 MJ 218 (CAAF 2000); United States v. Gittens, 39 MJ 328 (CMA 1994); United States v. Gillette, 35 MJ 468 (CMA 1992); United States v. McKinnie, 32 MJ 141 (CMA 1991).

7–11–1. PRIOR INCONSISTENT STATEMENT

NOTE 1: Using this instruction. When evidence that a witness made a prior statement that is or may be inconsistent with the witness's testimony at trial is admitted and the prior statement is admitted only for the purposes of impeachment, the following limiting instruction should be given:

You have heard evidence that before this trial (state the name of the witness(es)) made (a) statement(s) that may be inconsistent with his/her/their testimony here in court.

If you believe that (an) inconsistent statement(s) ((was) (were)) made, you may consider the inconsistency in deciding whether to believe that witness's in-court testimony.

You may not consider the earlier statement(s) as evidence of the truth of the matters contained in the prior statement(s). In other words, you may only use (it) (them) as one way of evaluating the witness's testimony here in court. You cannot use (it) (them) as proof of anything else.

(For example, if a witness testifies in court that the traffic light was green, and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider that prior statement in evaluating the truth of the in-court testimony. You may not, however, use the prior statement as proof that the light was red.)

NOTE 2: Inconsistent statement as substantive evidence. If an inconsistent statement is admitted as substantive evidence; as when (1) it is evidence of a voluntary confession of a witness who is the accused, (2) it is a statement of the witness which is not hearsay, such as a prior statement made by the witness under oath subject to perjury at a trial, hearing, or other proceeding, or in a deposition, (3) it is a statement of the witness otherwise admissible as an exception to the hearsay rule, (4) the witness testifies that his inconsistent statement is true and thus adopts it as part of his testimony, or (5) it is admitted without objection and therefore may be considered for any relevant purpose; the judge should replace the preceding parenthetical with an explanation that the prior inconsistent statement may also be used for that additional purpose.

You have heard evidence that before this trial (state the name of the witness(es)) made (a) statement(s) that may be inconsistent with his/her/their testimony here in court. I have admitted into evidence (testimony concerning) the prior statements(s) of (state the name of the

witness(es)). You may consider (that statement) (these statements in deciding whether to believe (that witness's) (these witnesses') in-court testimony.

You may also consider (that statement) (these statements) along with all the other evidence in this case.

(For example if a witness testified in court that the traffic light was green and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider the prior statement as evidence that the light was, in fact, red, as well as to determine what weight to give the witness's in-court testimony.)

7–11–2. PRIOR CONSISTENT STATEMENT—RECENT FABRICATION

NOTE: Using this instruction. When a party seeks to impeach a witness on the ground of recent fabrication, improper influence or motive, and evidence of a prior statement consistent with the witness's trial testimony is offered in rebuttal, the following instruction should be given:

You have heard evidence that (state the name of the witness(es)) made (a) statement(s) prior to trial that may be consistent with his/her/their testimony at this trial. If you believe that such (a) consistent statement(s) (was) (were) made, you may consider (it) (them) for (its) (their) tendency to refute the charge of (recent fabrication) (improper influence) (improper motives). You may also consider the prior consistent statement as evidence of the truth of the matters expressed therein.

7–12. ACCUSED'S FAILURE TO TESTIFY

NOTE: Using this instruction. When the accused has not testified, the military judge should determine, outside the hearing of the court, that the accused has been advised of his/her testimonial rights and whether the defense desires an instruction on the effect of the failure of the accused to testify. If the defense requests it, the instruction will be given; but the defense may request that such an instruction not be given, and that election is binding on the military judge unless the judge determines the instruction is necessary in the interests of justice. When appropriate, an instruction substantially as follows may be used:

The accused has an absolute right to remain silent. You will not draw any inference adverse to the accused from the fact that (he) (she) did not testify as a witness (except for the purpose of _____). The fact that the accused has not testified (on any other matter) must be disregarded by you.

7–13–1. OTHER CRIMES, WRONGS, OR ACTS EVIDENCE

NOTE 1: <u>The process of admitting other acts evidence</u>. Whether to admit evidence of other crimes, wrongs, or acts is a question of conditional relevance under MRE 104(b). In determining whether there is a sufficient factual predicate, the military judge determines admissibility based upon a three-pronged test: (1) Does the evidence reasonably support a finding by the court members that the accused committed the prior crimes, wrongs, or acts? (2) Does the evidence make a fact of consequence more or less probable? (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or any other basis under MRE 403? If the evidence fails any of the three parts, it is inadmissible.

NOTE 2: <u>Using these instructions</u>. If the accused requests, trial counsel is required to provide reasonable notice, ordinarily in advance of trial, before offering evidence of other crimes, wrongs, or acts under MRE 404(b). When evidence of a person's commission of other crimes, wrongs, or acts is properly admitted prior to findings as an exception to the general rule excluding such evidence (<u>See</u> NOTE 1 on the process of admitting such evidence), the limiting instruction following this NOTE must be given upon request or when otherwise appropriate. When evidence of prior sexual offenses or child molestation has been admitted, the instructions following NOTEs 3 and 4 may be appropriate in lieu of the below instruction.

You may consider evidence that the accused may have (<u>state the evidence introduced for a limited purpose</u>) for the limited purpose of its tendency, if any, to:

(identify the accused as the person who committed the offense(s) alleged in _____)

(prove a plan or design of the accused to _____)

(prove knowledge on the part of the accused that _____)

(prove that the accused intended to _____)

(show the accused's awareness of (his) (her) guilt of the offense(s) charged)

(determine whether the accused had a motive to commit the offense(s))

(show that the accused had the opportunity to commit the offense(s))

(rebut the contention of the accused that (his) (her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))

(rebut the issue of _____ raised by the defense); (and) (_____).

You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies and that (he) (she) therefore committed the offense(s) charged.

NOTE 3: <u>Sexual assault and child molestation offenses – MRE 413 or 414 evidence</u>. In cases in which the accused is charged with a sexual assault or child molestation offense, MRE 413 and 414 permit the prosecution to offer, and the court to admit, subject to an MRE 403 balancing, evidence of the accused's commission of other sexual assault or child molestation offenses on any matter to which relevant. Unlike misconduct evidence that is not within the ambit of MRE 413 or 414, the members may consider this evidence on any matter to which it is relevant, to include the issue of the accused's propensity or predisposition to commit these types of crimes. The government is required to disclose to the accused the MRE 413 or 414 evidence that is expected to be offered, at least 5 days before trial, or at such later time as the military judge may find for good cause. When evidence of the accused's commission of other offenses of sexual assault under MRE 413, or of child molestation under MRE 414, is properly admitted prior to findings as an exception to the general rule excluding such evidence, the MJ <u>must</u> give the following appropriately tailored instruction based on the evidence admitted (the optional portions of the instruction should be given when requested by counsel or when otherwise raised by the evidence).

You heard evidence that the accused may have committed (another) (other) offense(s) of (sexual assault) (child molestation). The accused is not charged with (this) (these) other offense(s). This evidence may have no bearing on your deliberations unless you first determine by a preponderance of the evidence, that is more likely than not, (this) (these) uncharged offense(s) occurred. If you determine by a preponderance of the evidence (this) (these) other uncharged offense(s) occurred, you may then consider the evidence of (that) (those) offense(s) for its bearing on any matter to which it is relevant only in relation to (<u>list the specification(s) for which the members may consider the evidence</u>).

(You may consider the evidence of such other act(s) of (sexual assault) (child molestation) for its tendency, if any, to show the accused's propensity or predisposition to engage in (sexual assault) (child molestation) (,)) (as well as its tendency, if any, to:

(identify the accused as the person who committed the offense(s) alleged in _____)

(prove a plan or design of the accused to_____)

(prove knowledge on the part of the accused that_____)

(prove that the accused intended to _____)

(show the accused's awareness of (his) (her) guilt of the offense(s) charged)

(determine whether the accused had a motive to commit the offense(s))

(show that the accused had the opportunity to commit the offense(s))

(rebut the contention of the accused that (his/her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))

(rebut the issue of _____ raised by the defense); (and) (_____).

You may not, however, convict the accused solely because you believe (he) (she) committed (this) (these) other offense(s) or solely because you believe the accused has a propensity or predisposition to engage in (sexual assault) (child molestation). In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt. (However, by pleading guilty to a lesser included offense, the accused has relieved the government of its burden of proof with respect to the elements of that offense.)

Each offense must stand on its own and you must keep the evidence of each offense separate. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of (each) (the) offense(s) charged. Proof of one charged

offense carries with it no inference that the accused is guilty of any other charged offense.

NOTE 4: Use of charged MRE 413 or 414 evidence. There will be circumstances where evidence relating to one charged sexual assault or child molestation offense is relevant to another charged sexual assault or child molestation offense. If so, the following instruction may be used, in conjunction with NOTE 3, as applicable.

(Further), evidence that the accused committed the (sexual assault) (act of child molestation) alleged in (state the appropriate Specification(s) and Charge(s)) may have no bearing on your deliberations in relation to (state the appropriate Specification(s) and Charge(s)) unless you first determine by a preponderance of the evidence, that is more likely than not, the offense(s) alleged in (state the appropriate Specification(s) and Charge(s)) occurred. If you determine by a preponderance of the evidence the offense(s) alleged in (state the appropriate Specification(s) and Charge(s)) occurred, even if you are not convinced beyond a reasonable doubt that the accused is guilty of (that) (those) offense(s), you may nonetheless then consider the evidence of (that) (those) offense(s) for its bearing on any matter to which it is relevant in relation to (list the offense(s) for which the members may consider the evidence). (You may also consider the evidence of such other act(s) of (sexual assault) (child molestation) for its tendency, if any, to show the accused's propensity or predisposition to engage in (sexual assault) (child molestation).)

You may not, however, convict the accused solely because you believe (he) (she) committed (this) (these) other offense(s) or solely because you believe the accused has a propensity or predisposition to engage in (sexual assault) (child molestation). In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt. (By pleading guilty to a lesser included offense, the accused has relieved the government of its burden of proof with respect to the elements of that offense.)

Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one (sexual assault) (act of child molestation) creates no inference that the accused is guilty of any other (sexual assault) (act of child molestation). (However, it may demonstrate that the accused has a propensity to commit that type of offense.) The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of each offense charged. Proof of one charged offense carries with it no inference that the accused is guilty of any other charged offense.

NOTE 5: Use of other acts evidence in sentencing proceedings. When evidence has been admitted on the merits for a limited purpose raising an inference of uncharged misconduct by the accused, there is normally no sua sponte duty to instruct the court members to disregard such evidence in sentencing, or to consider it for a limited purpose. Although the court in sentencing is ordinarily permitted to give general consideration to such evidence, it should not be unnecessarily highlighted. Evidence in aggravation, however, must be within the scope of RCM 1001(b). A limiting instruction on sentencing may be appropriate sometimes, for example, when evidence of possible uncharged misconduct has been properly introduced but subsequently completely rebutted, or when the inference of possible misconduct has been completely negated. For example, if there were inquiry of a merits character witness whether that witness knew the accused had been arrested for an uncharged offense, to impeach that witness's opinion, and it was then shown that the charges underlying the arrest were dismissed or that the accused was acquitted, it may be appropriate on sentencing to instruct that the arrest be completely disregarded in determination of an appropriate sentence. In such case, there is actually no proper evidence of uncharged misconduct remaining at all, and the court members might improperly consider the inquiry regarding the arrest alone as being adverse to the accused. Instruction 7-18, "Have You Heard" Questions To Impeach Opinion is appropriate when "have you heard/do you know questions" regarding uncharged misconduct have been asked.

REFERENCES:

(1) MRE 105, 403, 404(b), 413, and 414.

(2) Application of Federal Rules of Evidence and MRE 413 and 414; United States v. Wright, 53 MJ 476 (CAAF 2000); United States v. Henley, 53 MJ 488 (CAAF 2000); United States v. Parker, 54 MJ 700 (ACCA 2001) (disclosure requirements); United States v. Myers, 51 MJ 570 (NMCCA 1999).

(3) Test for admissibility under MRE 404(b); United States v. Mirandez-Gonzalez, 26 MJ 411 (CMA 1988); United States v. Reynolds, 29 MJ 105 (CMA 1989); Huddleston v. United States, 485 U.S. 681 (1988).

7–13–2. PRIOR CONVICTION TO IMPEACH

NOTE: Using this instruction. When evidence that the accused was convicted of a crime involving moral turpitude or otherwise affecting the accused's credibility is admitted to impeach his/her credibility as a witness, the following instruction should be given:

The evidence that the accused was convicted of (state the offense(s)) by a (civil) (military) court may be considered by you for the limited purpose of its tendency, if any, to weaken the credibility of the accused as a witness. You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that (he) (she), therefore, committed the offense(s) charged.

7–14. PAST SEXUAL BEHAVIOR OF NONCONSENSUAL SEX VICTIM

NOTE: Using this instruction. In a prosecution for a nonconsensual sexual offense, evidence of the victim's past sexual behavior is generally inadmissible. Other evidence, however, of the victim's past sexual behavior, except reputation or opinion evidence, may be admissible under MRE 412. If the accused desires to present evidence of specific instances of the victim's past sexual behavior, the military judge and trial counsel must receive notice accompanied by an offer of proof. If the judge determines that the offer of proof contains evidence described in subdivision (b) of MRE 412, the judge must conduct a hearing (which must be closed) outside the presence of the court members to determine if the evidence is (a) constitutionally required; (b) evidence of past sexual behavior with persons other than the accused on the issue of whether or not the accused was the source of semen or injury; or (c) evidence of past sexual behavior with the accused on the issue of whether the alleged victim consented to the offense charged. When such evidence has been admitted, the following instruction should be given either upon request or when otherwise deemed appropriate:

Evidence has been introduced indicating that (state the name of the alleged victim) has engaged in past acts of (specify the specific instances of past sexual behavior) with (the accused) (_____). This evidence should be considered by you (on the issue of whether (state the name of the alleged victim) consented to the sexual act(s) with which the accused is charged) (on the issue of whether or not the accused was the source of (semen) (and) (injury) to the victim) (and) (_____).

7–15. VARIANCE—FINDINGS BY EXCEPTIONS AND SUBSTITUTIONS

NOTE 1: Using this instruction. Whenever the evidence indicates that an alleged offense may have been committed, but at a time, place, or in another aspect different from that alleged, the court members should be instructed substantially as follows:

If you have doubt about the (time) (place) (manner in which the injuries described in the specification were inflicted) (_____), but you are satisfied beyond a reasonable doubt that the offense (or a lesser included offense) was committed (at a time) (at a place) (in a particular manner) (_____) that differs slightly from the exact (time) (place) (manner) (_____) in the specification, you may make minor modifications in reaching your findings by changing the (time) (place) (manner in which the alleged injuries described in the specification were inflicted) (_____) described in the specification, provided that you do not change the nature or identity of the offense (or the lesser included offense).

NOTE 2: Modifying findings by exceptions and substitutions. The following form is also appropriate for use in giving the court members instructions on modifying their findings in any case in which the court may make findings by exceptions, or exceptions and substitutions. The Findings Worksheet should provide alternative language for findings by exceptions and substitutions and any lesser included offenses.

As to (The) Specification (___) of (The) (Additional) Charge (___), if you have doubt that _____, you may still reach a finding of guilty so long as all the elements of the offense (or a lesser included offense) are proved beyond a reasonable doubt, but you must modify the specification to correctly reflect your findings.

NOTE 3: When a specification alleges that the offense occurred on "divers occasions" or on a specified number of occasions, and if a variance instruction is warranted or findings by exceptions and substitutions are likely based on the evidence, the MJ should consider Instruction 7-25.

7–16. VARIANCE —VALUE, DAMAGE, OR AMOUNT

NOTE 1: Using this instruction. Depending upon the content of the specification and the evidence in a case involving an offense under Articles 103, 108, 109, 121, 123a, 126, 132, or 134 (knowingly receiving stolen property), it may be advisable for the court, after being instructed on the elements of the offense, to be further advised concerning the element of value or damages as follows:

If you have a reasonable doubt that the (property was of the value alleged) (damages amounted to the sum stated), but you are satisfied beyond a reasonable doubt that the (property was of a lesser value) (damages amounted to a lesser sum), and that all other elements have been proved beyond a reasonable doubt, you may still reach a finding of guilty. Should this occur, you must modify the specification to correctly reflect your findings.

(You may change the amount described in the specification and substitute any lesser specific amount as to which you have no reasonable doubt (or you may change the amount described in the specification and substitute (one of) the following phrase(s): (more than $500.00) ($500.00 or less) (some value).)

NOTE 2: Official price list used. When the property involved is an item issued or procured from government sources or evidence has been received showing the price listed in an official publication for that property at the time alleged in a specification, the court should be instructed:

Value is a question of fact. The price listed in an official publication is evidence of its value at the time of the offense provided the item was in the same condition as the item listed in the official price list. (The price listed in an official price list does not necessarily prove the value of an item. In determining the actual value of the item you must consider all the evidence concerning condition and value.)

NOTE 3: Mandatory instruction. Whether or not proof of value includes evidence of a price listed in an official publication, the court should be instructed:

In determining the question of value in this case, you should consider (the expert testimony you have heard) (evidence as to the selling price of similar property on the legitimate market) (the purchase price recently

paid on the legitimate market by the owner) (age and serviceability of the property) (_____) and all other evidence concerning the fair market value of the property described in the specification on (state the time and place of the offense).

(The value of property is determined by its fair market value at the time and place of the offense described in the specification.)

(If this property, because of (its character) (or) (the place where it was) had (no fair market value at the time and place alleged) (no easily discoverable value at the time and place described in the specification) its value may be determined by its fair market value in the United States at the time of the offense described in the specification, or by its replacement cost at that time, whichever is less.)

7–17. "SPILLOVER"—FACTS OF ONE CHARGED OFFENSE TO PROVE ANOTHER

NOTE 1: Using this instruction. When unrelated but similar offenses are tried at the same time, there is a possibility that the court members may use evidence relating to one offense to convict of another offense. Another danger is that the members could conclude that the accused has a propensity to commit crime. In United States v. Hogan, 20 MJ 71 (CMA 1985) the Court of Military Appeals recommended that an instruction be given to preclude this spillover effect. The following instruction should be given whenever there is a possibility that evidence of an offense might be improperly considered with respect to another offense:

An accused may be convicted based only on evidence before the court (not on evidence of a (general) criminal disposition). Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that (he) (she) committed any other offense.

If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant. (For example, if a person were charged with stealing a knife and later using that knife to commit another offense, evidence concerning the knife, such as that person being in possession of it or that person's fingerprints being found on it, could be considered with regard to both offenses. But the fact that a person's guilt of stealing the knife may have been proven is not evidence that the person is also guilty of any other offense.)

The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

NOTE 2: Uncharged misconduct on the merits. Notwithstanding the instruction at NOTE 1 that proof of one offense may not be considered with respect to another and carries no inference of guilt of another offense, there are circumstances under MRE 404(b) when evidence relating to one charged offense may be relevant to a similar, but unrelated charged offense. The following instruction, used in conjunction with the instruction

following NOTE 1, may be used in lieu of Instruction 7-13-1, Other Crimes, Wrongs or Acts Evidence, for this evidence.

I just instructed you that you may not infer the accused is guilty of one offense because (his) (her) guilt may have been proven on another offense, and that you must keep the evidence with respect to each offense separate. However, there has been some evidence presented with respect to (state the offense) (as alleged in (The) Specification (___) of (The) (Additional) Charge (___) that also may be considered for a limited purpose with respect to (state the other offense) (as alleged in (The) Specification (___) of (The) (Additional) Charge (___)).

This evidence, that (state the evidence that may be considered under MRE 404(b)) may be considered for the limited purpose of its tendency, if any, to:

(identify the accused as the person who committed the offense of _____);

(prove a plan or design of the accused to_____);

(prove knowledge on the part of the accused that_____);

(prove that the accused intended to _____);

(show the accused's awareness of (his/her) guilt of the offense of _____);

(prove the motive of the accused to _____);

(show that the accused had the opportunity to commit the offense of _____);

(rebut the contention of the accused that his participation in the offense of _____ was the result of (accident) (mistake) (entrapment);

(rebut the issue of _____ raised by the defense); (and/or)

(_____) with respect to the offense of (state the offense) (as alleged in (The) Specification (___) of (The) (Additional) Charge (___).

You may not consider this evidence for any other purpose and you may not conclude or infer from this evidence that the accused is a bad person or has criminal tendencies, and that therefore (he) (she) committed the offense(s) of (_____).

REFERENCES: MRE 403 and 404(b); United States v. Palacios, 37 MJ 366 (CMA 1993); United States v. Haye, 29 MJ 213 (CMA 1989).

7–18. "HAVE YOU HEARD" QUESTIONS TO IMPEACH OPINION

NOTE 1: Using this instruction. Counsel may ask "Did you know" or "Have you heard" questions to test an opinion or to rebut character evidence. There must be a good faith belief the matter asked about is true, and the military judge must balance the question under MRE 403. MRE 405(a) should also be consulted when the question is asked to rebut character evidence.

NOTE 2: Witness denies knowledge of the subject matter inquired into and no extrinsic evidence is admitted. When the question is permitted and the witness denies knowledge of the subject of the question, in the absence of extrinsic evidence of the subject matter, there is no evidence of the subject matter of the question. In such cases, the following instruction should be given:

> During the testimony of (state the name of the witness), he/she was asked whether he/she (knew) (had heard) (was aware) (_____) that the accused (state the matter inquired into). That was a permissible question; however, there is no evidence that the accused (state the matter inquired into). This question was permitted to test the basis of the witness's opinion and to enable you to assess the weight you accord his/her testimony. You may not consider the question for any other purpose.

NOTE 3: When the witness has knowledge of the subject matter inquired into. When the witness indicates knowledge or awareness of the subject matter of the "Did you know" or "Have you heard" question, the following instruction must be given:

> During the testimony of (state the name of the witness), he/she was asked whether he/she (knew) (had heard) (was aware) (_____) that the accused (state the matter inquired into). This was a permissible question. You may consider the question and answer only to (test the basis of the witness's opinion and to enable you to assess the weight you accord to his/her testimony) (and) (to rebut the opinion given). You may not consider the question and answer for any other purpose. You may not infer from this evidence that the accused is a bad person or has criminal tendencies and that the accused, therefore, committed the offense(s) charged.

NOTE 4: Reference to matter during argument. The military judge has a sua sponte duty to interrupt argument and give appropriate instructions when counsel refer to the subject

matter of "Did you know" or "Have you heard" questions and there is no evidence of these matters.

NOTE 5: AR 27-26, Rules of Professional Conduct for Lawyers. Rule 3.4(e) states, "A lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence...."

REFERENCES: MRE 403, 404(b), and 405(a); Michelson v. United States, 335 U.S. 469 (1948); United States v. White, 36 MJ 306 (CMA 1993); United States v. Pearce, 27 MJ 121 (CMA 1988); United States v. Donnelly, 13 MJ 79 (CMA 1982); United States v. Pauley, 24 MJ 521 (AFCMR 1987); United States v. Kitching, 23 MJ 601 (AFCMR 1986), pet. denied, 24 MJ 441 (CMA 1987).

7–19. WITNESS TESTIFYING UNDER A GRANT OF IMMUNITY OR PROMISE OF LENIENCY

NOTE 1: Using this instruction. When a witness testifies under a grant of immunity or promise of leniency, the following instructions should be given. Careful tailoring is required depending on the type and terms of immunity given or the leniency promised. One or more of the instructions following NOTEs 2, 3, or 4 should be given. The instruction following NOTE 5 is always given. These instructions should be given immediately after Instruction 7-7-1, Credibility of Witnesses.

NOTE 2: Witness granted use (testimonial) immunity. If the terms of the immunity are that the witness's testimony cannot be used against him, the following should be given:

(Name of witness testifying under grant of immunity) testified under a grant of immunity. This means that this witness was ordered to testify truthfully by the convening authority. Under this grant of immunity, nothing the witness said, and no evidence derived from that testimony, can be used against that witness in a criminal trial.

NOTE 3: Witness granted transactional immunity. If the terms of the immunity are that the witness will not be prosecuted, the following should be given:

(Name of witness testifying under grant of immunity) testified under a grant of immunity. Under the terms of this grant, the witness was ordered to testify truthfully by the convening authority and cannot be prosecuted for any offense about which he/she testified.

NOTE 4: Witness promised leniency. When a witness has been promised leniency in exchange for testimony, the following instruction may be useful in preparing a tailored instruction:

(Name of witness testifying under promise of leniency) testified in exchange for a promise from the convening authority to ((reduce) (suspend) (_____) the sentence the witness received in another court-martial by _____) (_____).

NOTE 5: Mandatory instruction. The following instruction is always given:

If the witness did not tell the truth, the witness can be prosecuted for perjury. In determining the credibility of this witness, you should consider the fact this witness testified under a (grant of immunity) (promise of

leniency) along with all the other factors that may affect the witness's believability.

NOTE 6: Accomplice instruction. Witnesses who testify under a grant of immunity or in exchange for leniency are often accomplices. When an accomplice testifies, Instruction 7-10, Accomplice Testimony, must be given upon request. United States v. Gillette, 35 MJ 468 (CMA 1992).

REFERENCES:

(1) MRE 301(c)(2) when the government must give notice that a witness has been granted immunity or leniency.

(2) RCM 704 as to grants of immunity generally.

7–20. CHAIN OF CUSTODY

NOTE: Using this instruction. This instruction may be useful in cases involving laboratory evidence, particularly in urinalysis cases.

The evidence in this case has placed into issue the question of the "chain of custody" of the sample of (urine) (_____) allegedly given by the accused.

The "chain of custody" of an exhibit is simply the path taken by the sample from the time it is given until it is tested in the laboratory. In making your decision in this case you must be satisfied beyond a reasonable doubt that the sample tested was the accused's, and that it was not tampered with or contaminated in any significant respect before it was tested and analyzed in the laboratory. You are also advised that the government is not required to maintain or show a perfect chain of custody. Minor administrative discrepancies do not necessarily destroy the chain of custody.

Similarly, you must be satisfied that the laboratory properly analyzed the sample and produced an accurate result.

You are entitled to infer that the procedures in the laboratory for handling and testing the sample were regular and proper unless you have evidence to the contrary. However, you are not required to draw this inference.

The weight and significance to be attached to this evidence is a matter for your determination.

7–21. PRIVILEGE

NOTE: Using this instruction. The following instruction may be useful when issues of testimonial privileges arise during the course of trial.

During the testimony of (the accused) (state the name of the witness), the (accused) (state the name of the witness) claimed what is known as the (attorney-client privilege) (clergy-penitent privilege) (husband-wife privilege) (_____ privilege). This is one of several privileges recognized in the law. These communications are protected because they support highly significant public policy interests by encouraging and protecting certain kinds of communications.

The assertion of a privilege is entirely proper. As a result, you may not draw any adverse inference against (the accused) (state the name of the witness) because of the assertion of privilege. Further, you may not draw any inference against any party as a result of this assertion of privilege.

I caution you not to speculate as to what (the accused) (state the name of the witness) would have testified to if he/she had not claimed the privilege. In your deliberations, you must set aside this matter of privilege and decide the case on the evidence submitted to you by both the prosecution and the defense.

7–22. FALSE EXCULPATORY STATEMENTS

NOTE 1: Using this instruction. If evidence that the accused made a false exculpatory statement or gave a false explanation for the alleged offenses(s) has been introduced and the government contends that an inference of consciousness of guilt should be drawn from the evidence, the following instruction may be given. Ordinarily, Instruction 7-3, Circumstantial Evidence, should be given prior to giving the following:

There has been evidence that after the offense(s) (was) (were) allegedly committed, the accused may have (made a false statement) (given a false explanation) (_____) about the alleged offense(s), specifically (that (he) (she) told an investigator that (he) (she) was at another place when the crime was committed) (that (his) (her) positive urinalysis test was caused by medication (he) (she) was taking at the time) (_____).

Conduct of an accused, including statements made and acts done upon being informed that a crime may have been committed or upon being confronted with a criminal charge, may be considered by you in light of other evidence in the case in determining the guilt or innocence of the accused.

If an accused voluntarily offers an explanation or makes some statement tending to establish (his) (her) innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt. You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish (his) (her) innocence. The drawing of this inference is not required.

Whether the statement was made, was voluntary, or was false is for you to decide.

(You may also properly consider the circumstances under which the statement(s) (was) (were) given, such as whether they were given under oath, and the environment (such as (fear of law enforcement officers) (a desire to protect another) (a mistake) (_____)) under which (it was) (they were) given.)

Whether evidence as to an accused's voluntary explanation or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence, are matters for determination by you, the court members.

NOTE 2: Basis for instruction. First recognized in Wilson v. United States, 162 U.S. 613 (1896), this instruction has long been accepted by courts. United States v. McDougal, 650 F.2d 532 (4th Cir. 1981). The instruction has been validated in three military cases: United States v. Opalka, 36 CMR 938 (AFBR), pet. denied, 36 CMR 541 (CMA 1966); United States v. Colcol, 16 MJ 479 (CMA 1983); and United States v. Mahone, 14 MJ 521 (AFCMR 1982).

NOTE 3: General denial of guilt. This instruction is not appropriate if the alleged false statement is a general denial of guilt. United States v. Colcol, supra, or the determination of the falsity of the statement turns on the ultimate question of guilt or innocence of the accused. Unless the alleged false statement is inherently incredible, independent evidence of the falsity of the statement should be required. United States v. Littlefield, 840 F.2d 143 (1st Cir. 1988), cert denied, 109 S.Ct. 155.

NOTE 4: Disclosure of statements required. The accused's exculpatory pretrial statements are required to be disclosed to the defense under MRE 304, and any motion to suppress should be litigated prior to trial. If the prosecution does not disclose the statement prior to arraignment, MRE 304(d)(2)(B) applies.

7–23. "CLOSED TRIAL SESSION" - IMPERMISSIBLE INFERENCE OF GUILT

NOTE 1: Using this instruction. Whenever a court-martial, or a portion thereof, is closed to the public because purportedly classified evidence is to be presented, the military judge has the sua sponte duty to instruct the court members that the security measures taken at the trial will not permit any inference of guilt against the accused. The judge must give instructions similar to those at NOTEs 3 and 4, below. The term "closed trial session" is used to distinguish sessions closed to the public for security reasons from closing the court for deliberations. Before excusing the members at the close of the trial, the instruction following NOTE 5 should also be given.

NOTE 2: Security briefings. A Security Officer may be required to brief the members about safeguarding and not revealing what is purportedly classified information. If this is done, that briefing must be held in the presence of all parties and the accused, and be part of the record. The contents of the security briefing will determine whether the briefing is given in an open or closed trial session. A copy of any documents the members are required to sign by virtue of being exposed to purportedly classified information must be included as an Appellate Exhibit. Finally, the military judge should review the Security Officer's briefing before it is given so that the Security Officer is not appearing to give evidence that the members WILL be exposed to classified information or that documents ARE classified in the manner classification markings would indicate.

NOTE 3: Prefatory instructions to members in trials where there will be a closed trial session. Give the following instruction at the beginning of the trial or prior to the first closed trial session.

> Members of the court, we are about to have a closed trial session. That means this session of the court will not be open to the general public or to anyone else who does not have the appropriate security clearance and need to know the evidence that will be presented during this portion of the trial. A closed trial session to consider purportedly classified evidence is the most satisfactory method for resolving the competing needs of the government for protection of the purportedly classified information and the rights of the accused to a public trial.
>
> (I caution you that if you take notes during the closed trial session, then your notes must be secured. The way we will handle your note-taking during any closed trial session will be for you to put your notes into a sealed envelope with your signature across the seal. The designated Security Officer will secure those notes for you until the next closed trial session. You may also have these notes for your use during

deliberations, but when you have completed your deliberations, the Security Officer must collect and destroy them.)

(The designated Security Officer is responsible for ensuring that all purportedly classified evidence is properly protected. If we are in an open trial session and if it appears that classified information is being mentioned in an improper environment, the Security Officer will so indicate and we will either have a closed trial session at that point, or we will discuss the matter at another time when we do have a closed trial session. We will try to be economical in the use of closed trial sessions, for example, saving several issues for one closed trial session. Your patience and understanding about the need for these procedures is appreciated.)

As military personnel, you are aware of the sensitivity of purportedly classified matters and the need to protect them. You are advised that neither the marking of a particular classification on an item of evidence, nor the presentation of evidence in closed trial sessions, can be used to infer that the accused is guilty of any offense. You also may not infer from the classification markings or the closed trial session that the evidence or testimony during the closed trial session is either true or is in fact classified. You must evaluate open and closed session evidence and witnesses using the same standards.

In addition to the other instructions about not discussing the evidence until the appropriate time in the proceedings, you may not discuss what is presented during closed trial sessions at any time except, of course, once you have heard all the evidence, heard argument of counsel, been instructed on the law, and the court has been closed for your deliberations. (You must also adhere to the instructions given to you during the security briefing you received earlier. In that regard, you are reminded that the security briefing is not evidence and the Security Officer is not a source of information from which you can conclude that information or documents are either true or are in fact classified.)

Do you have any questions about these matters?

NOTE 4: Necessary instructions during findings. Give the following instructions as a part of concluding instructions on findings.

I remind you that you may not infer that the accused is guilty of any offense from the use of a particular classification marking on an item of evidence, or the presentation of evidence in closed trial sessions. You also may not infer from the classification markings, security precautions, or the fact that a session of the trial was closed to the public that the evidence or testimony presented was either true or was in fact classified.

You must evaluate open and closed session evidence and witnesses using the same standards.

Classified evidence also does not permit any inference as to the guilt of the accused. You may not infer from the fact that the evidence was presented in a closed trial session that the accused knew the evidence was (classified) (and) (or) (related to the national security of the United States).

Again, closed trial sessions to consider purportedly classified evidence are the most satisfactory method for resolving the competing needs of the government for protection of the purportedly classified information and the rights of the accused to a public trial. You may not hold the fact there have been closed trial sessions in any way against the accused. Closed trial sessions do not erode the presumption of innocence which the law guarantees the accused.

NOTE 5: Instructing the members upon their excusal at the close of the trial. The following instruction should be given to the members when the trial is completed and the members are excused.

Court members, before I excuse you, let me advise you of one matter. In the event you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, the 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. In addition, you are reminded (of the security briefing you received and) that you may not discuss or reveal anything that was presented in a closed trial session or any testimony or the contents of any exhibits that were identified or marked as classified. Thank you for your service. You are excused. Counsel and the accused will remain.

REFERENCES: United States v. Fleming, 38 MJ 126 (CMA 1993); United States v. Grunden, 2 MJ 116 (CMA 1977); and MRE 505.

7–24. BRAIN DEATH

NOTE 1: Death and brain death of victim in issue. If the purported victim is still hospitalized or the evidence otherwise raises the question of when a victim died, brain death may be in issue. The victim is "dead" if the victim is brain dead. The following instruction should be given when brain death of the victim is in issue.

"Death" is defined as either the irreversible cessation of spontaneous respiration and circulatory functions or the irreversible cessation of all functions of the entire brain, including the brain stem. The irreversible cessation of the brain function occurs when, based upon ordinary and accepted standards of medical practice, there has been a total and irreversible cessation of spontaneous brain functions and further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions. The burden is on the government to establish death beyond a reasonable doubt. This burden can be satisfied by proof beyond a reasonable doubt of either: (1) the irreversible cessation of spontaneous respiration and circulatory functions or (2) the irreversible cessation of all functions of the entire brain, including the brain stem.

NOTE 2: Removal from life support. When brain death is in issue and the victim has been removed from life support and then died, the evidence may raise the issue of whether the victim's removal from life support was an independent, intervening cause of death. If there is evidence that would allow the court members to conclude that removing the victim from life support was a proximate cause of death, give the instructions following NOTE 4 (proximate cause), NOTE 5 (independent, intervening cause), and NOTE 6 (more than one contributor to proximate cause) of Instruction 5-19, Lack of Causation, Intervening Cause, or Contributory Negligence. Additionally, the court may be instructed substantially as follows:

If you determine beyond a reasonable doubt that death, as I have defined that term for you, occurred before the cessation of life support, then the removal of (state the name of the alleged victim) from life support was not a proximate cause of death.

REFERENCES: United States v. Gomez, 15 MJ 954 (ACMR), pet. denied *sub nom.*, United States v. Kamyal, 17 MJ 22 (CMA 1983); United States v. Taylor, 44 MJ 254 (CAAF 1996); Swafford v. Indiana, 421 N.E. 2d 596 (Ind. 1981); *Black's Law Dictionary*; *Uniform Determination of Death Act*, Section 549.

7–25. DIVERS OR SPECIFIED OCCASIONS

NOTE 1: Divers occasions. When a specification alleges that the offense occurred on "divers occasions," the court members should be instructed substantially as follows:

"Divers occasions" means two or more occasions.

NOTE 2: When a specification alleges that the offense occurred on "divers occasions" or on a specified number of occasions and the members return a verdict substituting "one" for "divers" or reducing the number of occasions, IAW United States v. Walters, 58 MJ 391 (CAAF 2003), the court members should be instructed as follows:

Your verdict appears to be in the proper form, with the exception of (The) Specification(s) (___) of (The) (Additional) Charge(s) (___). Because you have substituted (one) (_____) for the language ("divers occasions, ") ("__ occasions, "), your findings must clearly reflect the specific instance(s) of conduct upon which your findings are based. That may be reflected on the Findings Worksheet by filling in (a) relevant date(s), or other facts clearly indicating which conduct served as the basis for your findings. Two thirds of the members, that is ___ members, must agree on the specific instance(s) of conduct upon which your findings are based. If two-thirds or ___ members do not agree on (at least one) (a) (the) specific instance(s) of conduct, then your finding as to (The) Specification(s) (___) of (The) (Additional) Charge(s) (___) [and (The) (Additional) Charge(s) (___)] must be changed to a finding of "Not Guilty."

NOTE 3: The military judge should ordinarily provide a supplemental Findings Worksheet to assist the court members in identifying the date(s) or specific instance(s) of conduct upon which the finding of guilty is based. Counsel for both sides should be consulted before the supplemental Findings Worksheet is provided to the court members.

NOTE 4: When the government has pled a course of conduct specification or a specification alleging conduct on "divers occasions," the military judge should carefully consider the strength of the evidence adduced. If a variance instruction is warranted or findings by exceptions and substitutions are likely, careful tailoring of the original Findings Worksheet may obviate the necessity to give the instruction in NOTE 2 above.

Chapter 8
TRIAL PROCEDURE AND INSTRUCTIONS FOR A CAPITAL CASE

This procedural guide outlines the sequence of events normally followed in a case that has been referred capital. In addition to serving as a procedural guide in a capital case, it provides the majority of standard, non-evidentiary instructions on findings and sentencing in a capital case. The order in which the guide and instructions appear generally corresponds with the point in the trial when the particular wording or instruction is needed or is otherwise appropriate.

Section I
Initial Session Through Arraignment

8–1. 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 Number ___, HQ, _____, dated _____ (as amended by CMCO No. ___, same Headquarters, dated _____), and referred capital as reflected on the charge sheet; copies of which have been furnished the military judge, counsel, and the accused, and which will be inserted at this point in the record.

NOTE: The MJ should examine the convening order(s) and any amendments for accuracy. If not a capital case, go to Chapter 2.

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

NOTE: Only minor changes may be made at trial to the convening orders. Any correction which affects the identity of the individual concerned must be made by an amending or correcting order.

TC: The charges have been properly referred to this court for trial and were served on the accused on _____. The five day statutory waiting period has (not) expired.

NOTE: The MJ must pay attention to the date of service. In peacetime, for a GCM, if less than five (5) days have elapsed from the date of service, the MJ must inquire. If the accused objects, the MJ must grant a continuance. (When computing days, do not count the day of service or day of trial, RCM 602.) If a waiver must be obtained, a suggested guide can be found at paragraph 2–7–1, <u>WAIVER OF STATUTORY WAITING PERIOD</u>.

TC: The prosecution is ready to proceed (with the arraignment) in the case of <u>United States v. _____</u>. The accused and the following persons detailed to this court are present: _____, military judge; _____, 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).

NOTE: The reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of each opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.

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 which might tend to disqualify (me) (us) in this court-martial.

> ***NOTE: <u>Oaths for Counsel</u>. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the military judge:***
>
> *"Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?"*

8–1–1. RIGHTS TO COUNSEL

MJ: _____, you have the right to be represented by _____, your detailed military defense counsel. He/She is provided at no expense to you. You also have the right to request a different military lawyer to represent you. If the person you request is reasonably available, he or she would be appointed to represent you free of charge.

If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are only entitled to one military lawyer. You may ask his/her superiors to let you keep your detailed counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would have to be provided by you at no expense to the government.

If you are represented by a civilian lawyer, you can keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer. 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: a. Pro Se: If the accused elects pro se representation, see applicable inquiry at paragraph 2–7–2, PRO SE REPRESENTATION.

b. Conflict of Interest: 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 applicable inquiry at paragraph 2–7–3, WAIVER OF CONFLICT-FREE COUNSEL.

MJ: Defense Counsel will announce by whom (he/she) (they) (was) (were) detailed and (his/her) (their) qualifications.

NOTE: The MJ should require all defense counsel to place on the record their background(s) in detail, to specifically include capital litigation experience. In United States v. Murphy, 50 MJ 4 (CAAF 1999), the CAAF suggests defense counsel place on the record the following: training, experience, how long admitted to bar, the number of cases tried, experience in contested felony cases with panel members, experience in requesting mental health evaluations, dealings with forensic psychiatrists, the kinds of investigative assistance or other resources that are available, and knowledge or experience in the use of collateral resources.

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 which might tend to disqualify (me) (us) in this court-martial.

CDC: 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.

(OATH FOR CIVILIAN COUNSEL:) MJ: 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)?

CDC: (Responds.)

MJ: I have been properly certified, sworn, and detailed (myself) (by_____) to this court-martial. Counsel for both sides appear to have the requisite qualifications and all personnel of the court 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 (are) _____. The charge(s) (was) (were) preferred by _____, (and) forwarded with recommendations as to disposition by _____; (and investigated by _____). (The Article 32 investigation was waived.)

NOTE: If the accused waived the Article 32 investigation, the MJ should inquire to ensure that it was a knowing and voluntary waiver. The script at paragraph 2–7–8, PRETRIAL AGREEMENT: ARTICLE 32 WAIVER may be used, but if the waiver was not IAW a pretrial agreement, the first sentence of the first question should be omitted. A plea of

guilty may not be received to an offense for which the death penalty may be imposed by the court-martial (RCM 910).

TC: Your Honor, are you aware of any matter which might be a ground for challenge against you?

MJ: (I am not.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Responds.)

8–1–2. FORUM RIGHTS

MJ: _____, you have a right to be tried by a court consisting of at least twelve 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 (company) (battery) (troop) (detachment).

You are also advised that no member of the court would be junior in rank to you. Because this case is referred to be tried as a capital case, that is, a case in which imposition of death may be a possible punishment if convicted, you may not be tried by military judge alone.

Do you understand what I have said so far?

ACC: (Responds.)

MJ: Now, in a trial 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. If that sentence included confinement for more than 10 years, then three-fourths would have to agree.

For the death penalty to be adjudged, all court members would have to agree on both the findings of guilt and the sentence. In this case, that means that the court members must have a unanimous vote of guilty on the charge(s) and (its) (their) specification(s) for which death is an authorized sentence, that is, Specification(s) _____ of Charge(s) _____, (a) violation(s) of (premeditated murder (_____), in order for the case to remain a capital case during any sentencing phase of the trial.

To impose a death sentence, the court members must: (1) unanimously find, beyond a reasonable doubt, that you are guilty of an offense for which death is an authorized punishment under the law; (2) unanimously find, beyond a reasonable doubt, evidence of (the) (at least one) aggravating factor; (3) unanimously find that any extenuating or mitigating circumstance(s) (is) (are) substantially

outweighed by any aggravating circumstance(s), including the aggravating factor(s); and (4) unanimously vote to impose death. If any one of these four votes is not unanimous, then death may not be adjudged.

MJ: Do you understand what I've told you so far?

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.)

8–1–3. 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: (Reads the charge(s).) 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.

DC/ACC: (Comply.)

MJ: (PVT) (_____) _____, 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 at this time).

> ***NOTE: Whenever factual issues are involved in ruling on a motion, the MJ shall state essential findings of fact. If the trial counsel gives notice that the government desires a continuance to file an 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 the accused enters a plea of guilty to an offense for which death is not an authorized punishment, continue at Section II, GUILTY PLEA INQUIRY. In a case which has been referred capital, if the accused attempts to plead guilty to an offense for which death is a possible punishment, you must refuse to accept the plea and enter a plea of Not Guilty on the accused's behalf (Article 45, UCMJ and RCM 910(a)).

IF NOT GUILTY, mark the flyer as an appellate exhibit; ensure each court member packet contains a copy of the flyer, convening orders, note paper, and witness question forms; then go to Section III, COURT MEMBERS (CONTESTED).

Section II
Guilty Plea Inquiry

8–2–1. GUILTY PLEA INTRODUCTION

MJ: _____, your counsel has entered a plea of guilty for you to (one) (several) 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 wish to consult with your defense counsel prior to answering any of my questions. If, at any time, 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, in fact, guilty. If you do not believe that you are guilty, then you should not, for any reason, plead guilty. Do you understand what I've 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 offenses 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 any of these rights?

ACC: (Responds.)

MJ: Do you understand that, by pleading guilty, you voluntarily give up these rights?

ACC: (Responds.)

MJ: If you continue with your plea of guilty, you will be placed under oath and I will question you to determine whether you are, in fact, 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 be used to establish certain elements of the charged offense, in the event 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.

ACC: (Complies.)

TC: Do you (swear) (affirm) that the statements that 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 8-2-3, GUILTY PLEA FACTUAL BASIS. If a stipulation exists, continue below.***

8–2–2. STIPULATION OF FACT INQUIRY

MJ: Please have the stipulation marked as a prosecution exhibit, present it to me, and make sure that 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, your 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, 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, in fact, guilty of the offense(s) to which you have pled guilty; and second, the trial counsel may read it to the members of the court 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. 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 whatsoever in this 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 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 objection 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(s).

8–2–3. 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, whether 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 (The) Specification (_____) of (The) (Additional) Charge (_____), in 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 believe you are guilty of the offense listed in (The) Specification (____) of (The) (Additional) 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 and/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 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: Does either counsel believe any further inquiry is required?

TC/DC: (Respond.)

8–2–4. MAXIMUM PUNISHMENT INQUIRY

MJ: Trial Counsel, what do you calculate to be the maximum punishment authorized in this case, based solely on the accused's plea of guilty?

TC: (Responds.)

MJ: Defense Counsel, do you agree?

DC: (Responds.)

MJ: _____, the maximum punishment authorized in this case, based solely on your guilty plea, is _____. A fine may also be adjudged.

> ***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: On your plea of guilty alone, this court could sentence you to the maximum punishment which I just stated. Do you understand that?

ACC: (Responds.)

MJ: Do you have any questions as to the sentence that could be imposed as a result of your guilty plea?

ACC: (Responds.)

MJ: Trial Counsel, is there a pretrial agreement in this case?

TC: (Responds.)

> ***NOTE: If a pretrial agreement exists, continue below. If no such agreement exists, proceed to paragraph 8-2-6, IF NO PRETRIAL AGREEMENT EXISTS.***

8–2–5. PRETRIAL AGREEMENT

> ***NOTE: If there is a pretrial agreement in a case referred capital, the MJ must determine if it has a provision providing for a noncapital referral by operation of the pretrial agreement. If so, the military judge should follow the procedural guide for a PTA with members but not review the quantum portion of the PTA. The MJ should make the following inquiry:***

MJ: Paragraph ___ of the pretrial agreement states that, if you comply with the provisions of the pretrial agreement, the Convening Authority will refer the case as a noncapital case. This means that the death penalty could not be adjudged. Do you understand that?

ACC: (Responds.)

MJ: Counsel, do you agree that, although, under the Code, the court may not accept a guilty plea to an offense for which the death penalty may be adjudged, that, in this case and under this agreement, the court may accept the accused's guilty plea to the capital offense?

TC/DC: (Respond.)

MJ: The court is aware of Article 45 of the Code and the appellate history of guilty pleas to capital offenses. However, under the circumstances which I am about to list, the court does not believe that Article 45 prohibits acceptance of a guilty plea. These circumstances are:

An offense was referred to trial as a capital offense.

In pretrial negotiations, both the Convening Authority and the accused agreed that, if the accused successfully pled guilty to the capital offense(s) (and also did _____), the case would be tried as a noncapital case.

The military judge has conducted a thorough providence inquiry and has found the accused's plea of guilty to the capital offense(s) to be provident.

The military judge has conducted a thorough inquiry concerning the pretrial agreement and has found that both sides agree with the military judge's interpretation and has found that the agreement was voluntary.

The military judge is prepared to accept the plea of the accused and enter findings thereon.

The military judge will enforce the agreement by not allowing the case to go forward, after entry of findings, as a capital case.

The public policy behind Article 45 and the appellate concern for entry of guilty pleas in capital cases are not violated by accepting the plea of guilty.

MJ: Do both sides agree that those circumstances exist in this case?

TC/DC: (Respond.)

MJ: Do both sides further agree that, upon entry of findings in this case, and based on the pretrial agreement and the circumstances I have just explained, the case is referred for trial only as a noncapital case?

TC/DC: (Respond.)

NOTE: After the case is referred noncapital by operation of the pretrial agreement, the military judge must advise the accused of his forum rights as he/she would for any case that was not referred capital. After the accused makes his selection, the military judge should follow the procedural guide for a noncapital case. [NOTE: If the accused still selects trial by court members, then the military judge may review the quantum portion of the PTA and conduct the discussion with the accused as provided at paragraph 2–2–7.]

8–2–6. IF NO PRETRIAL AGREEMENT EXISTS

MJ: Counsel, even though there is no formal pretrial 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.)

8–2–7. 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: 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 1325.7 Enclosure 27: 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: 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 government is going forward on any offense, 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: 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.

MJ: Accused and Defense Counsel, please rise.

DC/ACC: (Comply.)

MJ: _____, in accordance with your plea of guilty, this court finds you: _____.

Section III
Court Members (Contested)

8–3. PRELIMINARY INSTRUCTIONS

MJ: Bailiff, call the court members.

NOTE: Whenever the members enter the courtroom, all persons except the MJ and the 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 persons are absent: _____, _____, and _____.

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.

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 or 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 determine whether the accused is guilty or not guilty and, if you find (him) (her) guilty, to adjudge an appropriate sentence.

Under the law, the accused is presumed to be innocent of the offense(s). The government has the burden of proving the accused's guilt by legal and competent evidence beyond a reasonable doubt. 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. The fact that charges 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 of the evidence and received the instructions, it is of vital importance that you keep an open mind until all of the evidence has been presented and the instructions have been given. I will instruct you fully before you begin your deliberations. In doing so, 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 assist you in the performance of 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 of 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 will soon 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.

Some of the grounds for challenge would be if you were the accuser in the case, if you had investigated any offense charged, if you have formed or expressed an opinion as to the guilt or innocence of the accused, (as to any enlisted member, that you belong to the same company-sized unit as the accused,) or any matter that may affect your impartiality. 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.

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 any preconceived idea or formula as to either the type or the amount of punishment which 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) (prior to any witness being permanently excused). The way we handle that is to require you to write out the question 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 the questions of counsel, are subject to objection. (There are forms provided to you for your use if you desire to question any witness.) I will conduct any needed examination. There are a couple of things that 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 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.

During any recess or adjournment, you may not discuss the case with anyone, not even among yourselves. You must not listen to or read any account of the trial or consult any source, written or otherwise, as to matters involved in the case. You must hold your discussion of the case until you are all together in your closed session deliberations so that all of the panel members have the benefit of your discussion. Do not purposely visit the scene of any incident alleged in the specification(s) or involved in the trial. You must also avoid contact with witnesses or potential witnesses in this case. If anyone attempts to discuss the case in your presence during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session.

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 too 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).

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 (at least one of) the convening order(s). If it is not, please let me know.

(Pause.)

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 _____; forwarded with recommendations as to disposition by _____; (and investigated 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.

MBRS: (Respond.) or

TC: (Negative response from the court members.) (_____.)

MJ: Members, before I or counsel ask you any questions, it is appropriate that I give you some additional instructions.

> ***[NOTE: The instruction immediately below is structured for the usual peace-time death penalty case, i.e., for an accused charged with premeditated and/or felony murder under Article 118(1) or (4), UCMJ, which prescribe the mandatory minimum penalty of confinement for life. The military judge may have a case referred capital for some other offense, where the death penalty is a possible penalty, but no mandatory minimum is specified (such as wartime assault on or willful disobedience of a commissioned officer, Article 90; compelling a superior to surrender, Article 100; willfully hazarding a vessel, Article 110; rape, Article 120; or wartime misbehavior before the enemy or by a sentinel, Articles 99 or 113, respectively). In such cases, appropriately tailored instructions concerning other possible sentences should be inserted at this point.]***

Members, this is a capital (murder) (_____) case. I want to direct your attention specifically to (the) (those) offense(s), (a) violation(s) of _____, commonly referred to as (premeditated murder) (_____). If the accused is convicted of (premeditated murder) (_____) by a unanimous vote, then the court may, but is not required to, impose the death penalty. In the sentencing phase of the trial, the death penalty is a permissible punishment only if: (1) the court members unanimously find, beyond a reasonable doubt, that (an) (the) aggravating factor exists and, (2) the court members unanimously find that any and all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, to include any aggravating factor(s). If you unanimously find those two items, then, the death penalty will be a possible punishment, but only if you vote unanimously to impose death. You must bear in mind that, even if death is a possible sentence, the decision whether or not to vote for the death penalty is within the discretion of each member.

If the accused is convicted of (premeditated murder) (_____), but, the vote for conviction was not unanimous, the death penalty may not be adjudged.

Because one possible punishment is death, it will be necessary to ask you questions regarding your views concerning the death penalty. This inquiry has no relationship at all to whether or not the accused is guilty or not guilty of any offense. As I stated before, the accused is presumed not guilty of (this) (these) offense(s).

8–3–1. 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 specifications?

3. 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?

4. Does anyone have any prior knowledge of the facts or events in this case?

5. Members, this case has received attention in the (local) (and) (national) media. Is there any member who has seen or heard any mention of this case in the media?

> ***NOTE: To the members who have seen or heard mention of this case in the media, continue with Questions 6-11; if none, go to Question 12.***

6. Members, regarding the media and media reporting, is there any member who has participated in a military operation that received press coverage?

7. To those who have been in operations that received press coverage: with respect to that coverage, did any member find that the press coverage was 100 percent accurate and complete?

8. Is there any member who believes that, merely because the press reports something, it is, in fact, the truth?

9. Do all members agree with the proposition that press reports of military affairs or about any kind of event may be incorrect or inaccurate?

10. Is there, then, any member who believes that the reports that he or she received from the media about this case are always completely accurate and truthful?

11. For any member who has seen mention of this case in the media, will you put aside all the matters which you have heard, read, or seen in the media and decide this case, based solely upon the evidence you receive in this court and the law as I instruct you?

12. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

13. (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?

14. If so, will that experience influence the performance of your duties as a court member in this case in any way?

> ***NOTE: If Question 14 is answered in the affirmative, the military judge may want to ask any additional questions concerning this out of the hearing of the other members.***

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

16. (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?

17. 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?

18. 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?

19. You are all basically familiar with the military justice system, and you know that the accused has been charged and his charges 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 charges have been referred to trial?

20. 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?

21. 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?

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

23. Has anyone had any legal training or experience other than that generally received by military personnel of your rank or position?

24. 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?

25. 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 doing so, 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 not 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?

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

NOTE: If Question 26 is answered in the affirmative, the military judge may want to ask questions 27 and 28 out of the hearing of the other members.

27. (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?

28. (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?

29. 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?

30. 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?

31. 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. What that means, Members, is that you believe that the commission of "Crime X" must always result in "Punishment Y." Later, if it becomes necessary, I will advise you on the range of punishments that may be adjudged in this case. Can each of you assure the court that you will consider the full range of punishments?

32. Members, as I have told you earlier, if the accused is convicted of (premeditated murder) (_____) by a unanimous vote, one of the possible punishments is death. Is there any member, due to his/her religious, moral, or ethical beliefs, who would be unable to give meaningful consideration to the imposition of the death penalty?

33. Is there any member who, based on your personal, moral, or ethical values, believes that the death penalty must be adjudged in any case involving (premeditated murder) (_____)?

34. If sentencing proceedings are required, you will be instructed in detail before you begin your deliberations. 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?

35. 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?

36. 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(s) of which the accused may be convicted?

37. 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 desired (see paragraph 2–5–2).

8–3–2. 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 (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 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 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 480 (CAAF 2008). The following is a suggested procedure for an Article 39(a) session.

MJ: Members of the Court, there are some matters that we must now take up outside of your presence. Please return to the deliberation room.

MBRS: (Comply.)

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.)

MJ: (Granted/Denied.)

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 THE MJ IS GRANTING THE CHALLENGE) MJ: The challenge is granted.

(FOR EACH CHALLENGE THE MJ IS DENYING) 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 (_____).

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

TC: (Responds.)

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

DC: (Responds.)

NOTE: The MJ will verify that a quorum remains and, if enlisted members are detailed, at least one-third are enlisted. If any member is excused as a result of a challenge, the member will be informed that s/he has been excused; the seating for the remaining members will be rearranged according to rank.

MJ: Call the members.

8–3–3. ANNOUNCEMENT OF PLEA

TC: All parties are present as before, to now include the court members (with the exception of _____, who (has) (have) been excused).

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 8-3-4, 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 8-3-4, 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.

8–3–4. 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 court members.) 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. (If the motion is made before the court members and is denied, give the instruction at paragraph 2-7-13, MOTION FOR FINDING OF NOT GUILTY.)

8–3–5. 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.

8–3–6. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Trial Counsel, any rebuttal?

TC: (Responds / presents case.)

MJ: Defense Counsel, any surrebuttal?

DC: (Responds / presents case.)

NOTE: After rebuttal and surrebuttal, if any, 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, have them marked as appellate exhibits, show them to the TC and the DC, 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.)

8–3–7. 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:

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 in this case?

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.

8–3–8. 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.

MJ: You will hear 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.

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.

NOTE: If lesser included offenses are in issue, continue; if no lesser included offenses are in issue, go to paragraph 8–3–10, OTHER APPROPRIATE INSTRUCTIONS.

8–3–9. 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 included offenses, if any. The members will not be instructed on lesser

included offenses that are barred by the statute of limitations unless the accused waives the bar. These instructions may be stated substantially as follows:

8-3-9a. 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.

8-3-9b. LIO Differences

MJ: The offense charged, _____, and the lesser included offense of _____ differ primarily (in that the offense charged requires, as (an) essential 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) (but does require that you be satisfied beyond a reasonable doubt that (state any different element(s) applicable only to the lesser offense)).

8-3-9c. Other LIO's Within the Same Specification

MJ: Another lesser included offense of the offense alleged in (_____) (The) Specification (_____) (of) (The) (Additional) Charge (_____) is the offense of _____, in violation of Article ____. To find the accused guilty of this lesser offense, you must be convinced beyond a reasonable doubt of the following elements: (list the elements).

This lesser included offense differs from the lesser included offense I discussed with you previously in that this offense does not require as (an) essential element(s) that the accused (state the element(s) applicable only to the greater offense) but does require that you be satisfied beyond a reasonable doubt that (state any different element(s) applicable only to the lesser offense)).

NOTE: Repeat the above as necessary to cover all LIO's.

8–3–10. 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.

8–3–11. 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 a 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 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.

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(s), 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.

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 of the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind that you may properly believe one witness and disbelieve several other witnesses whose testimony is in conflict with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

You must disregard any comment, statement, expression, or ruling 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 in accordance with the law I have given you, the evidence admitted in court, and your own conscience.

8–3–12. FINDINGS ARGUMENT

MJ: At this time, you will hear argument by counsel. 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: (Respond.)

(MJ: Counsel have made reference to instructions that I have given you and 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.)

8–3–13. 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 of the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote.

(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.

Table 8–1
Votes Needed for a Finding of Guilty

No. of Members	Two-thirds
5	4
6	4
7	5
8	6
9	6
10	7
11	8
12	8

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding of guilty. Since we have ____ members, that means that ____ members must concur in any finding of guilty.

If you have 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 has 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: Bear in mind, as I just said, that a finding of guilty results if at least two-thirds of the members vote for a finding of guilty (of the offense(s) of (_____); however, the president of the court must note whether the vote was unanimous concerning the capital offense(s) charged, that is (The) Specification(s) (____) of (The) (Additional) Charge(s) (____). If the accused is found guilty of a capital offense and if the vote was unanimous, the president will announce such unanimity as part of the announcement of the finding of guilt. If the accused is found guilty of a capital offense but the vote is not unanimous, no announcement as to lack of unanimity should be made. A format for proper announcement of your findings is contained on the Findings Worksheet(s) you will receive, and (it) (they) contain(s) language for each of three possible findings as to the capital offense(s) charged; that is, not guilty, guilty, or guilty by unanimous vote.

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 further instructions on the procedure for reconsideration.

NOTE: The reconsideration instruction is at paragraph 2-7-14.

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 will 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(s) _____, the first portion will be used if the accused is completely acquitted of (The) (all) Charge(s) and Specification(s). The second part will be used if the accused is convicted, as charged, of (The) (all) Charge(s) and Specification(s); (and the third portion will be used if the accused is convicted of some but not all of the offenses). (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.)

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.

MJ: You will note that the Findings Worksheet(s) (has) (have) been modified to reflect the words that should 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 whatsoever. The worksheet(s) (is) (are) provided only as an aid in finalizing your decision.

MJ: 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 the trial, you must all remain together in the deliberation room during deliberations. While in your closed-session deliberations, you may not make communications to or receive communications from anyone outside the deliberation room, by telephone or otherwise. If you have need of a recess, if you have a question, or when you have reached 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. Further, during your deliberations, you may not consult the Manual for Courts-Martial or any other legal publication unless it has been admitted into evidence.

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?
MBRS: (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 Exhibit(s) _____ (and Defense Exhibit(s) _____) for use during the court's deliberations.

TC/BAILIFF: (Complies.)

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

MJ: The court is closed.

8–3–14. 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 offense(s) 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, yourself, 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 or in writing or both. It may be made by you or by your counsel on your behalf or by both you and your counsel. 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 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 ____ day(s) 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: (Comply.)

MJ: Is there anything else by either side?

TC/DC: (Respond.)

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

8–3–15. 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(s)?

PRES: (Responds.)

MJ: Please fold the worksheet(s) and give (it) (them) to the Bailiff so that I may examine (it) (them).

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 reconsideration procedures are required (see Instruction 2-7-14).***

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: Defense Counsel and Accused, please rise.

DC/ACC: (Comply.)

MJ: (COL) (____) _____, please announce the findings of the court.

PRES: (Complies.)

MJ: Defense Counsel and Accused may be seated.

DC/ACC: (Comply.)

MJ: (Trial Counsel) (Bailiff), please retrieve all exhibits from the President.

TC/BAILIFF: (Complies.)

> ***NOTE: If there are findings of guilty of a capital offense by a unanimous vote, go to the sentencing proceedings. If not, return to paragraph 2-5-17 for sentencing proceedings. If acquitted, 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 that 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 of what happened 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. This court-martial is adjourned.

8–3–16. SENTENCING PROCEEDINGS

NOTE: If the MJ has not previously advised the accused of his allocution rights at paragraph 8-3-14, 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 a recess?)

PRES/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: (Reads the data).

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

TC: (Responds and presents case on sentencing.)

TC: The government rests.

MJ: Defense Counsel, you may proceed.

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

8–3–17. 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 of 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 _____.

(The members withdraw from the courtroom.)

8–3–18. DISCUSSION OF SENTENCING INSTRUCTIONS

MJ: All parties are present, 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 the maximum sentence to be based upon the findings of the court?

TC/DC: (Respond.)

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.***

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

DC: (Responds.)

MJ: Counsel, I intend to give the following sentencing instructions (as well as _____).

> ***NOTE: The military judge may require the defense counsel to provide in writing a list of all mitigating factors/circumstances that the defense counsel wants the MJ to instruct upon to the panel.***

MJ: Do counsel have any requests for any special instructions?

TC/DC: (Respond.)

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

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

DC: (Responds.)

MJ: Call the members.

8–3–19. 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 inquiry to ascertain if the accused knowingly and intelligently agrees with the counsel's argument with respect to the discharge. If the matter is raised before argument is made, the MJ should caution the DC to limit the request to a bad-conduct discharge. See paragraph 2-7-27.***

8–3–20. 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 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.

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.

8–3–21. MAXIMUM PUNISHMENT

Note: Confinement for Life without Eligibility for Parole. Section 856a of The Defense Authorization Act of 1998 adds Article 56a, which provides for a sentence to life without eligibility for parole.

The act applies to offenses occurring after 19 November 1997. When an accused is eligible to be sentenced to death for an offense occurring after 19 November 1997, the MJ must instruct that confinement for life without eligibility for parole is also a permissible sentence.

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

a. Reduction to the grade of E-1;

b. Forfeiture of all pay and allowances;

c. (A dishonorable discharge) (dismissal from the Service); and

d. (Confinement for life) (Confinement for life without eligibility for parole) (To be put to death).

The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser sentence, except as to confinement, of which I will instruct you later.

In adjudging a sentence, there are several matters which you should consider in determining an appropriate sentence. Bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are:

(1) Rehabilitation of the wrongdoer,

(2) Punishment of the wrongdoer,

(3) Protection of society from the wrongdoer,

(4) Preservation of good order and discipline in the military, and

(5) Deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses.

NOTE: Lack of rehabilitative potential is not a proper consideration.

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.

8–3–22. TYPES OF PUNISHMENT

MJ: I will now instruct you on the various kinds of punishments to which you can sentence the accused:

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

8–3–23. 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. In addition, a punitive discharge terminates the accused's military status and the benefits that flow from this status, including the possibility of becoming a military retiree and receiving retired pay.

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. See 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.)

> ***NOTE: Vested benefits. Before giving the optional instruction concerning vested benefits contained in the below instructions, see United States v. McElroy, 40 MJ 368 (CMA 1994).***

8–3–24. DISHONORABLE DISCHARGE

MJ: This court may adjudge either a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a dishonorable discharge or a bad-conduct discharge that would terminate the accused's current term of service.)

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.

8–3–25. BAD-CONDUCT DISCHARGE

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).

8–3–26. DISMISSAL

MJ: This court may adjudge a dismissal. 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 deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army 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.

8–3–27. FORFEITURES OF 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-_) (O-_) 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 $_____.

If reduced to the grade of E-____, the accused's total basic pay would be $_____.

NOTE: Continue as necessary.

MJ: This court may adjudge any forfeiture up to and including forfeiture of all pay and allowances.

8–3–28. EFFECT OF ARTICLE 58b IN GCM

MJ: Any sentence that includes either (1) confinement for more than six months (or death), or (2) confinement for six months or less 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 or pay and allowances, the court should explicitly state the forfeiture as a separate element of the sentence.

NOTE: The following instruction may be given in the discretion of the MJ:

(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, any sentence that includes confinement for more than six months or confinement for six months or less and a punitive discharge (or death) will result in the accused forfeiting all pay and allowances 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.)

8–3–29. PRETRIAL CONFINEMENT CREDIT (IF APPLICABLE)

MJ: In determining an appropriate sentence in this case, you should consider the fact that the accused has spent _____ day(s) in pretrial confinement. The day(s) 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.

8–3–30. CONFINEMENT

MJ: The law imposes a mandatory minimum sentence of confinement for life for the offense(s) of _____. Confinement for life without eligibility for parole is also a permissible sentence.

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. A sentence to "confinement for life," by comparison, means the accused will be confined for the rest of (his) (her) life but that (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 for military prisoners. "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. In determining whether to adjudge either "confinement for life without eligibility for parole" or "confinement for life" in the sentence, bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating 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.

8–3–31. 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 an NCO grade to a specialist grade or vice versa.)

8–3–32. EFFECT OF ARTICLE 58a–U.S. 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: 1) a punitive discharge (meaning in this case, a (bad-conduct discharge) (or a dishonorable discharge); or 2) 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. 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.

8–3–33. DEATH

MJ: The court may sentence the accused to be put to death.

8–3–34. CLEMENCY (RECOMMENDATION FOR SUSPENSION)

MJ: Although you have no authority to suspend either a portion of or the entire sentence that you impose, you may recommend such suspension. However, you must keep in mind during deliberation that such a recommendation is not binding on the Convening or higher Authority. Therefore, in arriving at a sentence, you must be satisfied that 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.

MJ: If fewer than all members of the court wish to recommend suspension of a portion of or the entire sentence, then the names of those making such a recommendation 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 portion of or the sentence in its entirety is solely a matter within the discretion of the court.

However, you should keep in mind your responsibility to adjudge a sentence which you regard as fair and just at the time it is imposed, and not a sentence which will become fair and just only if your recommendation is adopted by the Convening or higher Authority.

8–3–35. 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.)

8–3–36. ACCUSED'S NOT TESTIFYING

(MJ: The court will not draw any adverse inference from the fact that the accused elected not to testify.)

8–3–37. ACCUSED'S 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 that 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. The accused cannot be cross-examined by the prosecution or interrogated by the court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut any statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement was 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.)

8–3–38. 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 whatsoever in your determination of an appropriate sentence unless you conclude that the accused did testify falsely under oath to this court.

Second, such false testimony must have been, in your view, willful and material before it may be considered in your deliberations; and

Finally, you may consider this factor only insofar as you conclude that it, along with all 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.)

8–3–39. ARGUMENT FOR A SPECIFIC SENTENCE

(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.

> ***NOTE: The MJ must instruct the court members on the two tests which must be met before a death sentence may be adjudged. First, the court members must determine unanimously and beyond a reasonable doubt that one or more of the aggravating factors specified by the trial counsel under the provisions of RCM 1004(c) have been proven. If so, then the court members must find that the aggravating circumstances substantially outweigh any extenuating or mitigating circumstances before a sentence of death may be adjudged. Even if aggravating circumstances are found, the court members must propose sentences and vote on them, beginning with the lightest, as in noncapital cases.***

MJ: Members of the Court, because death may become a possible sentence in this case, your deliberations require the following procedures.

8–3–40. CONCLUDING SENTENCING INSTRUCTIONS

When you close to deliberate and vote, only the members will be present. 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 deliberation should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of the members in the exercise of their judgment.

You may adjudge a sentence of death only under certain circumstances.

First, a death sentence may not be adjudged unless all of the court members find, beyond a reasonable doubt, that (an) (one or more) aggravating factor(s) existed. The alleged aggravating factor(s) (is) (are) as follows: (read the aggravating factor(s) specified by the trial counsel upon which some evidence has been introduced). (This) (These) alleged aggravating factor(s) (is) (are) also set out on Appellate Exhibit ____, the Sentence Worksheet, which I will discuss in a moment.

All of the members of the court must agree, beyond a reasonable doubt, that (this) (one or more of the) aggravating factor(s) existed at the time of the offense(s) or resulted from the offense(s).

> ***NOTE: If more than one aggravating factor is involved, the following instruction should be given.***

MJ: It is not sufficient that some members find that one aggravating factor existed, while the remaining members find that a different aggravating factor existed; rather, all of you must find, beyond a reasonable doubt, that the same aggravating factor or factors existed before a sentence of death may be adjudged.

MJ: In this regard, you are again advised that the term "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 caused 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.

> ***NOTE: The military judge should also give additional definitional or explanatory instructions relevant to the specified aggravating factors, such as "national security" (RCM***

1004(c)), proof of intent or knowledge by circumstantial evidence (Instruction 7-3), "persons in execution of office" (Instructions 3-15-1, 3-15-3, or 3-104-1), or the elements of any substantive offense relevant to the aggravating factor(s).

MJ: Members, in making the determination of whether or not (the) (an) aggravating factor(s) existed, you may consider all of the evidence in the case, including the evidence presented prior to the findings of guilty, as well as any evidence presented during the sentencing hearing. Your deliberations on the aggravating factor(s) should properly include a full and free discussion on all of the evidence that has been presented.

After you have completed your discussion, then voting on (the) (each) aggravating factor must be accomplished (separately) by secret, written ballot, and all members are required to vote. The junior member will collect and count the ballots. The count will be checked by the President, who will immediately announce the results of the ballot to the other members of the court.

If you fail to find unanimously that (at least one of) the aggravating factor(s) existed, then you may not adjudge a sentence of death.

If, however, you do find by unanimous vote that (at least one) (the) aggravating factor(s) existed, then proceed to the next step. In this next step, you may not adjudge a sentence of death unless you unanimously find that any and all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including (such) (the) factor(s) as you have found existed in the first step of this procedure. Thus, in addition to the aggravating factor(s) that you have found by unanimous vote, you may consider the following aggravating circumstances:

(Previous convictions),

(Prior Article 15s),

(Prosecution exhibits, stipulations, etc.),

(Rebuttal testimony of _____),

(Nature of weapon used in the commission of the offense),

(Nature and extent of injuries suffered by the victim),

(Nature of the harm done to national security), and/or

(Other_____).

NOTE: After consulting with the DC, the MJ should instruct on applicable extenuating and mitigating circumstances, including, but not limited to, the following:

MJ: You must also consider all evidence in extenuation and mitigation and balance them against the aggravating circumstances using the test I previously instructed you upon. Thus, you should consider the following extenuating and mitigating circumstances:

1. The accused's age

2. The accused's good military character

3. The accused's (record) (reputation) in the service for (good conduct) (efficiency) (bravery) (_____)

4. The prior honorable discharge(s) of the accused

5. The combat record of the accused

6. The (family) (domestic) difficulties or conditions experienced by the accused

7. The financial difficulties experienced by the accused

8. The accused's (mental condition) (mental impairment) (behavior disorder) (personality disorder) (character disorder) (nervous disorder) (_____)

9. The accused's (physical disorder) (physical impairment) (addiction)

10. The duration of the accused's pretrial confinement or restriction

11. The accused's GT score of _____

12. The accused's education, which includes: _____

13. That the accused is a graduate of the following service schools:_____

14. That the accused's (OER's) (EER's) indicate: _____

15. That the accused is entitled to wear the following medals and awards: _____

16. (The accused's civilian records which indicate: _____)

17. (The lack of (previous convictions) (or Article 15 punishments))

18. (The accused's past performance and conduct in the Army as reflected by (his) (her) DA Form(s) _____)

19. (Defense Exhibits _____)

20. (The character evidence testimony of _____)

21. (The accused's (testimony) (statement))

22. (The testimony of _____)

MJ: You are also instructed to consider in extenuation and mitigation any other aspect of the accused's character, background, and any other aspect of the offense(s) you find appropriate. In other words, that list of extenuating and mitigating circumstances I just gave you is not exclusive.

You may consider any matter in extenuation and mitigation, whether it was presented before or after findings and whether it was presented by the prosecution or the defense. Each member is at liberty to consider any matter which he or she believes to be a matter in extenuation and mitigation, regardless of whether the panel as a whole believes that it is a matter in extenuation and mitigation.

Once again, Members, your deliberation should begin with a full and free discussion on the aggravating circumstances and the extenuating and mitigating circumstances. After you have completed your discussions, then you will vote on whether or not the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances. The vote will be by secret written ballot and all members of the court are required to vote.

The junior member will collect and count the ballots. The count will then be checked by the President, who will immediately announce the results of the ballot to the other members of the court. If the court does not determine unanimously that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, then a sentence of death will not be a possible punishment.

MJ: If you unanimously find (the) (one or more) aggravating factor(s) and even if you unanimously determine that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, you still have the absolute discretion to decline to impose the death sentence.

Members, at this point, you will know, because you have gone through the aforementioned steps, whether or not death is among the punishments that may be proposed.

Members, any proposed sentence must include at least confinement for life, because that is the mandatory minimum sentence.

However, no proposed sentence may include both, (1) confinement for life or confinement for life without eligibility for parole and (2) death. Those two are inconsistent.

A sentence of death may be adjudged only upon the unanimous vote of all of the members. A sentence of death includes a (dishonorable discharge) (dismissal), and confinement which is a necessary incident of a sentence of death but not a part of it. If you adjudge the death sentence, the accused will be confined until the death sentence is carried out. Thus, if you adjudge death, you need not announce (dishonorable discharge) (dismissal) and confinement as part of your sentence.

MJ: Members, you are again advised that the mandatory minimum sentence is confinement for life. The imposition of any other lawful punishment is totally within your discretion.

Members, even if you have found, in accordance with the instructions I have given you, that (an) (the) aggravating factor(s) exist(s) and that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, each member still has the absolute discretion to not vote for a death sentence. Even if death is a possible sentence, the decision to vote for death is each member's individual decision.

Members, the (only) offense(s) that (is) (are) punishable by a death sentence is Specification(s) _____ of Charge(s) _____, i.e., a violation of _____.

Again, your deliberations on an appropriate sentence 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 in an attempt to control the independence of the members in the exercise of their judgment.

When you have completed your discussions, 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. The junior member collects the proposed sentences and submits them to the President, who will arrange them in order of their severity.

The court will then vote by secret, written ballot on each proposed sentence in its entirety, beginning with the least severe and continuing with the next least severe, until a sentence is adopted by the required concurrence. You are reminded that the most severe punishment is the death penalty. To adopt a sentence that does not include the death penalty, the required concurrence is three-fourths. That is _____ of the _____ members present. Members, in this connection, you are again advised that the mandatory minimum sentence is confinement for life.

The junior member will collect and count the votes. The count will then be checked by the President, who shall immediately announce the result of the ballot to the other members of the court.

If you vote on all of the proposed sentences without reaching the required concurrence, repeat the process of discussion, proposal, and voting.

Once a sentence has been reached, any member of the court may propose that it be reconsidered prior to its being announced in open court. If, after you determine your sentence, any member suggests that you reconsider the sentence, open the court and the President should announce that reconsideration has been proposed, without reference to whether the proposed reballot concerns increasing or decreasing the sentence. I will then give you detailed instructions in open court on how to reconsider it.

(Note: The reconsideration instruction is at paragraph 2-7-19.)

Mr. President, as an aid in putting the sentence in proper form, you will have the use of the Sentence Worksheet(s), Appellate Exhibit _____.

MJ: Bailiff, please give the President of the court Appellate Exhibit _____.
BAILIFF: (Complies.)

MJ: As a reminder, you must first vote on (the) (each) aggravating factor which (is) (are) listed on the worksheet in Part A, and then reflect the court's vote on (the) (each) aggravating factor in the space provided. (Then strike out any factor not unanimously found by the members.) If (this) (these) vote(s) result in a unanimous finding that (the) (one or more) factor(s) (has) (have) been proven, then the court members should go to Part B of Appellate Exhibit _____. On the other hand, if the court does not find unanimously that (the) (any) aggravating factor has been proven, you should then line out Part A (Aggravating Factor(s)) and Part B (Balancing of Aggravating Circumstances and Extenuating and Mitigating Circumstances) by marking a large "X" across them and the President should not read any of the language from Parts A and B, because a death sentence cannot be considered.

If the court members unanimously find (the) (any) aggravating factor(s) in accordance with the instructions I've previously given you, then you should next direct your attention to Part B (Balancing Aggravating Circumstances, including the aggravating factor(s), against Extenuating and Mitigating Circumstances).

The members must then vote on whether the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, including the aggravating factor(s) specifically found as indicated in Part A.

If the court members do not unanimously find that the extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances, including the aggravating factor(s) specifically found as indicated in Part A, then you may not adjudge a sentence of death and Parts A and B of Appellate Exhibit _____ should be lined out by marking a large "X" across them, and the President should not read any of the language from Parts A and B of Appellate Exhibit _____.

Mr. (COL) (____)_____, as I have previously instructed you, a sentence to (1) death and (2) confinement for life or life without eligibility for parole are inconsistent. You may not return a sentence that contains both of them.

Now, (COL) (____)_____, please turn your attention to Part C of the Sentence Worksheet, Appellate Exhibit _____.

If the sentence does not include death, then where it says "signature of President," only you as the President will sign there, because all of the members are not required to sign. If the sentence does include death, all of the court members will then sign at the appropriate place as indicated on the Sentence Worksheet, Appellate Exhibit _____, at the end of Part C.

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 any 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 best serves 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. When the court returns, I will examine the Sentence Worksheet and the President will then announce the sentence.

MJ: Do counsel object to the instructions as given or request additional 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 of the exhibits with you when you return to announce the sentence.

MJ: The court is closed. Counsel and the accused will remain.

8–3–41. POST–TRIAL AND APPELLATE RIGHTS ADVICE

MJ: This Article 39(a) session is called to order. All parties are present. The members are absent. Defense Counsel, have you advised the accused orally and in writing of (his) (her) post-trial and appellate rights?

DC: (Responds.)

MJ: _____, I am now showing you Appellate Exhibit _____, a post-trial and appellate rights advice form. Is that your signature on Appellate Exhibit _____?

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: Did your defense counsel explain to you what matters you may submit to the convening authority for his/her consideration under RCM 1105 and RCM 1106?

ACC: (Responds.)

MJ: Did your defense counsel explain to you that under RCM 1105 and RCM 1106 you may submit any matters to the convening authority to include, but not limited to, a personal letter and documents, letters and documents from any other person, requests for deferment and waiver of forfeitures, and any other matter you desire for the convening authority to consider before taking action on your case?
ACC: (Responds.)

MJ: Do you understand that it is your responsibility to keep in contact with your defense counsel and let him/her know your desires in this regard?
ACC: (Responds.)

MJ: Do you understand that if your defense counsel cannot locate you it will be difficult for him/her to know what to submit for you to the convening authority?
ACC: (Responds.)

MJ: Now, if your defense counsel tries to contact you but is unsuccessful, do you authorize him or her to submit clemency matters on your behalf to the Convening authority as he or she deems appropriate?
ACC: (Responds.)

MJ: _____, do you have any questions about your post-trial and appellate rights?
ACC: (Responds.)

MJ: Do you fully understand your post-trial and appellate rights?
ACC: (Responds.)

8–3–42. IF MORE THAN ONE DEFENSE COUNSEL

MJ: Which counsel will be responsible for post-trial actions in this case and upon whom is the Staff Judge Advocate's post-trial recommendation to be served?
DC: (Responds.)

MJ: Are there any other matters to take up at this time?
TC/DC: (Respond.)

MJ: This Article 39(a) session is terminated to await sentence of the court.

8–3–43. 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 the "HUNG JURY" INSTRUCTION at paragraph 2-7-18.)

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.

PRES/BAILIFF: (Complies.)

MJ: I have examined the Sentence Worksheet and it appears (to be in proper form) (_____). Bailiff, you may return it to the President.

BAILIFF: (Complies.)

MJ: Defense Counsel and Accused, please rise.

DC/ACC: (Comply.)

MJ: _____, please announce the sentence of the court.

PRES: (Complies.)

MJ: Accused and Counsel, please be seated.

DC/ACC: (Comply.)

MJ: (Trial Counsel) (Bailiff), please retrieve the exhibit(s) from the President.

TC/BAILIFF: (Comply.)

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, the 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 of what happened in the courtroom and how the process of a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused.

Ch 8, §III, para 8-3-43

MBRS: (Withdraw.)

MJ: This court is adjourned.

Appendix A
References

Section I
Required Publications

Manual for Courts–Martial, United States.

Section II
Related Publications

This section contains no entries.

Section III
Prescribed Forms

This section contains no entries.

Section IV
Referenced Forms

This section contains no entries.

Appendix B
Findings Worksheets

1. Sample Findings Worksheets for each of the various situations which may arise are located at B-1 through B-4. An alternative Findings Worksheet is located at B-5.

2. The Findings Worksheet must be carefully reviewed by the military judge after the conclusion of the evidence in the case. It must be tailored for each case to ensure that the worksheet allows the court members to reach findings on all theories of the case which have been raised by the evidence. The worksheet should be made as simple as possible.

3. In cases in which the evidence requires that the court members reach findings by exceptions and/or substitutions, the military judge should attempt to have both sides agree on amendments to the specification in question. This will substantially reduce the problems involved with exceptions and substitutions. Use of the instruction on variance will also ensure that the panel members focus on the guilt or innocence factors, rather than the specific day or amount or nomenclature.

4. Counsel for both sides should consent to the Findings Worksheet on the record before it is given to the court members. This is especially important in cases involving lesser included offenses.

5. The military judge should keep a copy of the worksheet in order to review it with the President prior to the court closing.

6. When the court members return from deliberations, the military judge must review the Findings Worksheet to insure that the findings are lawful and in proper form. The military judge must have the President correct any mistake or omissions prior to announcement of the findings.

Appendix B-1
Findings Worksheet—No Lesser Included Offenses

Table B–1
Sample Findings Worksheet—No Lesser Included Offenses

United States **v.** SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	))))))))	FINDINGS WORKSHEET

NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (The) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge I: (Not Guilty) (Guilty)
Of Specification 2 of Charge I: (Not Guilty) (Guilty)
Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge II: (Not Guilty) (Guilty)
Of Specification 2 of Charge II: (Not Guilty) (Guilty)
Of Charge II: Guilty

_____
(Signature of President)

Appendix B-2
Findings Worksheet—Lesser Included Offenses

Table B–2
Sample Findings Worksheet—Lesser Included Offenses

United States **v.** SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	))))))))	FINDINGS WORKSHEET

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (The) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge I: (Not Guilty) (Guilty)
(Not Guilty of Burglary but Guilty of Housebreaking. As to Specification 1 of Charge I, Not Guilty of a Violation of Article 129, but Guilty of a Violation of Article 130.)
Of Specification 2 of Charge I: (Not Guilty) (Guilty)
Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge II: (Not Guilty) (Guilty)
Of Specification 2 of Charge II: (Not Guilty) (Guilty)
(Not Guilty of Aggravated Assault, but Guilty of Assault Consummated by a Battery.)
Of Charge II: Guilty

_____
(Signature of President)

Appendix B-3
Findings Worksheet—Capital Cases

Table B–3
Sample Findings Worksheet—Capital Cases

United States **v.** SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	))))))))	FINDINGS WORKSHEET

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal

Of (The) (all) Charge(s) and (its) (their) Specification(s):
Not Guilty

II. Mixed Findings

Of the Specification of Charge I:
a. Not Guilty
b. By unanimous vote of all members, Guilty

_____
President

_____
COL James Member

_____
LTC Joyce Member

_____
CSM Brenda Member

_____
1SG Sally Member

_____
SFC Steven Member

c. Guilty
d. Not Guilty of premeditated murder, but Guilty of unpremeditated murder

Of Charge I: (Not Guilty) (Guilty)

Of Charge II and its Specification: (Not Guilty) (Guilty)

Of The Specification of the Additional Charge:

a. Not Guilty
b. By unanimous vote of all members, Guilty

_____
President

_____
COL James Member

_____
LTC Joyce Member

_____
CSM Brenda Member

_____
1SG Sally Member

_____
SFC Steven Member

c. Guilty
d. Not guilty of felony murder, but guilty of unpremeditated murder

Of The Additional Charge: (Not Guilty) (Guilty)

_____
(Signature of President)

Appendix B-4
Findings Worksheet—Exceptions and Substitutions

Table B–4
Sample Findings Worksheet— Exceptions and Substitutions

United States **v.** SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	))))))))	FINDINGS WORKSHEET

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (The) (all) Charge(s) and (its) (their) Specification(s):

(Not Guilty) (Guilty)

II. Mixed Findings

Of Charge I and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge I: (Not Guilty) (Guilty)
(Guilty, Except the [word(s)] [figure(s)] [word(s) and figure(s)]:
_____
_____
Of the excepted [word(s)] [figure(s)] [word(s) and figure(s)]:
Not Guilty)
Of Specification 2 of Charge I: (Not Guilty) (Guilty)
Of Charge I: Guilty

Of Charge II and its Specifications: (Not Guilty) (Guilty)
or
Of Specification 1 of Charge II: (Not Guilty) (Guilty)
(Guilty, Except the [word(s)] [figure(s)] [word(s) and figure(s)]:
_____
_____
Substituting therefor the [word(s)] [figure(s)] [word(s) and figure(s)]:
_____
_____
Of the excepted [word(s)] [figure(s)] [word(s) and figure(s)]:

Not Guilty
Of the substituted [word(s)] [figure(s)] [word(s) and figure(s)]:
Guilty)

Of Specification 2 of Charge II: (Not Guilty) (Guilty)
Of Charge II: Guilty

_____
(Signature of President)

Appendix B-5
Alternative Findings Worksheet

Table B–5
Sample Findings Worksheet—Sample Alternative Findings Worksheet

United States **v.** SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	))))))))	FINDINGS WORKSHEET

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial finds you:

I. Full Acquittal or Full Conviction

Of (The) (all) Charge(s) and (its) (their) Specification(s):
[a] Not Guilty
[b] Guilty

II. Mixed Findings

Charge I (Breaking Restriction)

Of Charge I and its Specification:
[a] Not Guilty
[b] Guilty

Charge II (Burglary)

Of Specification 1 of Charge II:
[a] Not guilty
[b] Guilty
[c] Not Guilty, but Guilty of Housebreaking, in violation of Article 130
[d] Not Guilty, but Guilty of Housebreaking with intent to commit indecent assault therein, in violation of Article 130
[e] Not Guilty, but Guilty of Unlawful Entry in violation of Article 134
[f] Guilty, except the [word(s)] [figure(s)] [word(s) and figure(s)]

_____
_____

(and substituting therefor the [word(s)] [figure(s)] [word(s) and figure(s)]

_____
_____

of the excepted [word(s)] [figure(s)] [word(s) and figure(s)], Not Guilty, of the substituted [word(s)][figure(s)] [word(s) and figure(s)], Guilty.

Of Specification 2 of Charge II:

[a] Not Guilty
[b] Guilty
[c] Not Guilty, but Guilty of Housebreaking in violation of Article 130
[d] Not Guilty, but Guilty of Unlawful Entry in violation of Article 134
[e] Guilty, except the [word(s)] [figure(s)] [word(s) and figure(s)]

_____
_____

(and substituting therefor the [word(s)] [figure(s)] [word(s) and figure(s)]

_____
_____

of the excepted [word(s)] [figure(s)] [word(s) and figure(s)], Not Guilty, of the substituted [word(s)] [figure(s)] [word(s) and figure(s)], Guilty.

Of Charge II

[a] Not Guilty
[b] Guilty

Charge III (Rape)

Of the specification of Charge III:

[a] Not Guilty, and of Charge III, Not Guilty
[b] Guilty, and of Charge III, Guilty
[c] Not Guilty, but Guilty of attempted rape in violation of Article 80
[d] Not Guilty, but Guilty of assault with intent to commit rape, in violation of Article 134
[e] Not Guilty, but Guilty of indecent assault, in violation of Article 134
[f] Not Guilty, but Guilty of assault consummated by a battery, in violation of Article 128

_____
(Signature of President)

Appendix C
Sentence Worksheets

1. Sample Sentence Worksheets for the various types of courts-martial are located at C-1 through C-4.

2. The Sentence Worksheet must be carefully reviewed by the military judge before it is given to the court members. The samples should be modified to insure that the court is not given the opportunity to adjudge an unlawful sentence or one that is inappropriate. Examples include:

a. Fines. The fine heading and sentence element should be removed unless there is an unjust enrichment or some other colorable basis for imposing a fine. The trial counsel may announce that the government does not intend to argue for imposition of a fine, in which case the military judge may elect to delete that punishment from the worksheet. The contingent confinement language is rarely appropriate.

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

3. Counsel for both sides should consent to the Sentence Worksheet on the record prior to it being given to the court members. In a capital case, the court must ensure that the aggravating factors listed on the Sentence Worksheet are the same factors of which the accused was given notice.

4. When the court members return from deliberations, the military judge must review the Sentence Worksheet to ensure that the sentence is lawful and in proper form. The military judge must have the President correct any mistakes or omissions prior to announcement of the sentence.

Appendix C-1
Sentence Worksheet—Special Court-Martial Not Authorized to Adjudge a Bad-Conduct Discharge

Table C–1
Sample Sentence Worksheet—Special Court-Martial Not Authorized to Adjudge a Bad-Conduct Discharge

United States **v.** SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	))))))))	SENTENCE WORKSHEET

[NOTE: After the court members have reached their sentence, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial sentences you:

NO PUNISHMENT

1. To no punishment.

REPRIMAND

2. To be reprimanded.

REDUCTION

3. To be reduced to the grade of _____.

FINE AND FORFEITURES

4. To pay the United States a fine of $_____ (and to serve (additional) confinement of _____ [day(s)] [month(s)] if the fine is not paid).

5. To forfeit $_____ pay per month for _____ month(s).

RESTRAINT AND HARD LABOR

6. To be restricted for _____ day(s) to the limits of:

_____

_____

7. To perform hard labor without confinement for _____ day(s).

8. To be confined for _____ [day(s)] [month(s)] [year].

_____
(Signature of President)

Appendix C-2
Sentence Worksheet—Special Court-Martial Authorized to Adjudge a Bad-Conduct Discharge

Table C–2
Sample Sentence Worksheet—Special Court-Martial Authorized to Adjudge a Bad-Conduct Discharge

United States **v.** SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	))))))))	SENTENCE WORKSHEET

[NOTE: After the court members have reached their sentence, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial sentences you:

NO PUNISHMENT

1. To no punishment.

REPRIMAND

2. To be reprimanded.

REDUCTION

3. To be reduced to the grade of _____.

FINE AND FORFEITURES

4. To pay the United States a fine of $_____ (and to serve (additional) confinement of _____ [day(s)] [month(s)] if the fine is not paid).

5. To forfeit $_____ pay per month for _____ month(s).

RESTRAINT AND HARD LABOR

6. To be restricted for _____ day(s) to the limits of:

_____

_____

7. To perform hard labor without confinement for _____ day(s).

8. To be confined for _____ [day(s)] [month(s)] [year].

PUNITIVE DISCHARGE

9. To be discharged from the service with a bad-conduct discharge.

_____

(Signature of President)

Appendix C-3
Sentence Worksheet—General Court-Martial (Noncapital)

Table C–3
Sample Sentence Worksheet—General Court-Martial (Noncapital)

United States **v.** SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	))))))))	SENTENCE WORKSHEET

[NOTE: After the court members have reached their sentence, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, this court-martial sentences you:

NO PUNISHMENT

1. To no punishment.

REPRIMAND

2. To be reprimanded.

REDUCTION

3. To be reduced to the grade of _____.

FINE AND FORFEITURES

4. To pay the United States a fine of $_____ (and to serve (additional) confinement of _____ [day(s)] [month(s)] [year(s)] if the fine is not paid).

5. To forfeit $_____ pay per month for _____ month(s).

6. To forfeit all pay and allowances.

RESTRAINT AND HARD LABOR

7. To be restricted for _____ day(s) to the limits of:

_____

_____

8. To perform hard labor without confinement for _____ day(s).

9. To be confined for _____ [day(s)] [month(s)] [year(s)] [life with eligibility for parole] [life without eligibility for parole].

PUNITIVE DISCHARGE

10. To be discharged from the service with a bad-conduct discharge.

11. To be dishonorably discharged from the service.

12. To be dismissed from the service.

_____
(Signature of President)

Appendix C-4
Sentence Worksheet—General Court-Martial (Capital Case)

Table C–4
Sample Sentence Worksheet—General Court-Martial (Capital Case)

United States **v.** SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	))))))))	SENTENCE WORKSHEET

[NOTE: If the court-martial adjudges a death sentence, the court shall indicate below which aggravating factor(s) have been proven. The factor(s) which are not proven shall be lined out. If the sentence does not include death, the aggravating factors portion of this worksheet and the extenuating and mitigating circumstances portion of this worksheet shall be nullified by marking a large 'X' across them. The President will not read the language in bold print.]

AGGRAVATING FACTORS

Specialist James D. Jones, this court-martial unanimously finds that the following aggravating factor(s) (has) (have) been proven beyond a reasonable doubt:

Proven Not Proven

1. ( ) ( ) That you committed the offense of premeditated murder with the intent to avoid hazardous duty.

2. ( ) ( ) That you committed the offense of premeditated murder with the intent to avoid or to prevent lawful apprehension.

3. ( ) ( ) That you committed the offense of premeditated murder and at the time you knew that the victim was a commissioned officer of the armed services of the United States in the execution of his office.

_____
(Signature of President)

[NOTE: If the sentence includes death, all members must sign the Sentence Worksheet below.]

_____
COL James Member

_____
LTC Samuel Member

_____
CPT Sally Member

_____
CSM Patricia Member

_____
1SG Ralph Member

_____
SFC Joyce Member

EXTENUATING AND MITIGATING CIRCUMSTANCES

Specialist James D. Jones, this court-martial unanimously finds that any extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances, including the aggravating factors specifically found by the court and listed above.

_____
(Signature of President)

[NOTE: If the sentence includes death, all members must sign the Sentence Worksheet below.]

_____
COL James Member

_____
LTC Samuel Member

_____
CPT Sally Member

_____
CSM Patricia Member

_____
1SG Ralph Member

_____
SFC Joyce Member

[NOTE: After the court members have reached a sentence, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the sentence by reading the remaining language. The President will not read the language in bold print.]

Specialist James D. Jones, it is my duty as president of this court-martial to announce that the court-martial, (all) (three-fourths) of the members concurring, sentences you:

REPRIMAND

1. To be reprimanded.

REDUCTION

2. To be reduced to the grade of _____.

FINE AND FORFEITURES

3. To pay the United States a fine of _____ (and to serve (additional) confinement of ____ (days) (months) (years) if the fine is not paid).

4. To forfeit $_____ pay per month for _____ months.

5. To forfeit all pay and allowances.

CONFINEMENT

6. To be confined for _____ (days) (months) (years) (the length of your natural life with eligibility for parole) (the length of your natural life without eligibility for parole).

PUNITIVE DISCHARGE

7. To be discharged from the service with a bad-conduct discharge.

8. To be dishonorably discharged from the service.

9. To be dismissed from the service.

DEATH

10. To be put to death.

_____
(Signature of President)

[NOTE: If the sentence includes death, all court members must sign the Sentence Worksheet below.]

_____
COL James Member

_____
LTC Samuel Member

_____
CPT Sally Member

APPENDIX C

_____

CSM Patricia Member

_____

1SG Ralph Member

_____

SFC Joyce Member

Appendix D
Rehearings and Proceedings in Revision

NOTE 1: <u>Rehearings are governed by Article 63, UCMJ, and RCM 810</u>. Proceedings in revision are governed by RCM 1102. Trial participants should be familiar with those provisions, as well as the procedures below. While generally the procedures are the same as in an original trial, rehearings and proceedings in revision require certain modifications to the "standard" court-martial procedures.

D-1. SENTENCE REHEARING

NOTE 2: The military judge should conduct an early RCM 802 with counsel for both parties to ascertain the likely choices for counsel and forum, and to discuss special evidentiary considerations. An Article 39(a) session should be held promptly to consider such matters as: (a) motions for appropriate relief; (b) sufficiency and timeliness of the written notice of rehearing served upon the accused; (c) examination of prior appellate decisions, if any, and applicable promulgating orders (in this regard, the trial counsel should be cautioned that when announcing the general nature of the charges, only those charges and specifications on which findings of guilty stand affirmed should be announced); (d) stipulations, portions of the original record of trial for the trial on the merits, and other evidence and information normally offered in sentencing proceedings (in this regard, the counsel should be reminded not to disclose improperly the adjudged sentence or the approved sentence from the original trial); (e) examination of Sentence Worksheet; (f) determination of the maximum punishment; (g) and other sentencing matters. The trial should proceed as below.

MJ: The Court is called to order.

TC: Your Honor, Appellate Exhibit __ is the charge sheet for this case, originally referred on _____. Appellate Exhibit __ is the promulgating order for the prior proceedings, issued by HQ, _____, dated _____. The _____ authorized a sentence rehearing in this case in its (published opinion located at __ MJ ___) (unpublished opinion marked as Appellate Exhibit __). Appellate Exhibit __ is the memorandum from _____ to the Commander, _____, designating him/her as the convening authority authorized to order this sentence rehearing. Appellate Exhibit __ is the advice from the Staff Judge Advocate to the convening authority and the convening authority's order referring this case for a sentence rehearing.

TC: This court-martial is convened by Court-Martial Convening Order No. __, Headquarters, _____, dated _____ (as amended by court-martial convening order No. __, same Headquarters, dated _____) copies of which, as well as copies of the mentioned Appellate Exhibits, have been furnished to the military judge, counsel, and the accused, and will be inserted in the record.

NOTE 3: The MJ should examine the convening order(s) and any amendments for accuracy. IF A CAPITAL CASE, GO TO CHAPTER 8.

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

NOTE 4: 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.

TC: The prosecution is ready to proceed in the sentence rehearing in the case of United States v. (PVT) (___)_____.

TC: The accused and the following persons detailed to this court are present: _____, Military Judge; _____, Trial Counsel; and _____, Defense Counsel. The members (and the following persons detailed to this court) are absent _____.

TC: _____ has been detailed reporter to this court-martial and (has been previously sworn) (will now be sworn).

NOTE 5: When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of each opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.

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). (I have not) (No member of the prosecution has) acted in any way that may tend to disqualify (me) (us) in this court-martial.

NOTE 6: <u>Oaths for counsel</u>. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the MJ:

"Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?"

D-1-1. RIGHTS TO COUNSEL

MJ: At your original trial, the military judge explained your rights to counsel to you. Regardless of the choices that you made at your original trial with regard to counsel, you have all of the following rights during this rehearing.

You have the right to be represented by _____, your detailed military counsel. (He/She) is provided to you at no expense to you.

You also have the right to request a different military lawyer to represent you. If the person that you request is reasonably available, he or she would be appointed to represent you free of charge. If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are entitled to only one military lawyer.

You may ask (his/her) superiors to let you keep your detailed defense counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would need to be provided by you at no expense to the government. If you are represented by a civilian lawyer, you may also keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer.

Again, I want to stress that you are not limited in exercising any of these choices by any choices you made at your first trial or while your case was on appeal. 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 7: If the accused elects pro se representation, see applicable inquiry at 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 applicable inquiry at paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.

NOTE 8: If the original defense counsel from trial is not present, the MJ should inquire or explain as applicable why the attorney-client relationship has ceased (e.g., former defense counsel left active duty or accused claimed ineffective assistance of counsel against former defense counsel.) In any situation where it appears the accused may have a legal right to the assistance of a former defense counsel, the MJ should obtain from the accused an affirmative waiver of that former defense counsel's presence.

(MJ: _____ is no longer on active duty and cannot be detailed by military authority to represent you at this rehearing. However, you could attempt to retain _____ as civilian counsel. Accordingly, _____ has been detailed to represent you at this rehearing. Do you wish to proceed with this hearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this rehearing?)

(MJ: Because you have made allegations after trial that _____ was ineffective in (his/her) former representation of you, (he/she) has not been detailed to represent you at this rehearing. Accordingly, _____ has been detailed to represent you at this rehearing. Do you wish to proceed with this rehearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this rehearing?)

MJ: Defense Counsel will announce by whom (he/she/they) (was) (were) detailed and (his/her/their) qualifications.

DC: (I) (All detailed members of the defense) have been detailed to this hearing 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 proceeding.

CDC: 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 that might tend to disqualify me in this proceeding.

NOTE 9: (OATH FOR CIVILIAN COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of civilian 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 hearing. Counsel for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn.

TC: Your honor, are you aware of any matter that might be a ground for challenge against you?

MJ: (I am not. I was the trial judge for the _____ portion of this case.) (I am not. I was not the trial judge for any prior proceedings in this case, whether pretrial, trial, or post-trial.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Respond.)

MJ: Defense Counsel, do you have any challenges to the jurisdiction of this sentence rehearing?

DC: (Responds.)

D-1-2. MAXIMUM PUNISHMENT

NOTE 10: <u>See</u> RCM 810(d) for sentence limitations in a rehearing. The military judge should be alert for potential changes in the maximum punishment that may have taken effect since the original trial. The maximum punishment that can be adjudged at the rehearing for the offenses of which the accused stands convicted is limited to the maximum

punishment for those offenses that was in effect at the time of the original trial. The military judge should remind counsel not to improperly disclose the adjudged sentence or the approved sentence from the original trial. When the case is to be tried before military judge alone, if the military judge has become aware of the previously adjudged sentence or the previously approved sentence from reading the appellate opinion or otherwise, the military judge may not consider that when determining an appropriate sentence. See United States v. Cruse, 53 MJ 805, 809 (ACCA 2000).

MJ: Government, what do you calculate to be the maximum punishment for the offenses of which the accused stands convicted?

TC: (Responds.)

MJ: Defense, do you agree?

DC: (Responds.)

MJ: _____, the maximum punishment for the offenses of which you stand convicted is _____. However, because this is a sentence rehearing, the punishment that the convening authority approves as a result of this rehearing cannot exceed the punishment that was approved by the convening authority at your original trial. In other words, (I am) (the members are) free to impose any lawful sentence up to and including the maximum I just stated, however, the convening authority cannot approve any adjudged sentence that exceeds the sentence approved by the convening authority at your original trial. Do you understand that?

ACC: (Responds.)

D-1-3. INQUIRY ON PRESENTATION OF EVIDENCE

NOTE 11: Regardless of the forum, the fact finder will likely not know anything about the offenses except what is on the flyer. At an RCM 802 conference, the military judge should establish that the parties understand the special rules regarding evidence from the prior trial as set forth in RCM 810(a)(2). The military judge should be alert to prevent any improperly admitted evidence from the first trial being shown to the fact finder. As to RCM 810(a) (2)(A) matters from the trial on the merits during the prior trial, the military judge should ask counsel whether any of those matters can be: 1) presented as a stipulation of fact; 2) after appropriate redaction, provided as written exhibits for the members to read silently to themselves in open court and then be returned to counsel; or 3) read aloud to the fact finder from the original case's record of trial. After considering the views of the parties, the military judge should conduct an Article 39(a) session and rule on these and other presentencing evidentiary issues.

MJ: Trial Counsel, how do you propose to present evidence to the court about the circumstances of the offenses and the background of the accused?

TC: (Responds.)

MJ: Defense Counsel, do you object to the government's proposal?

DC: (Responds.)

D-1-4. FORUM RIGHTS

MJ: At your original trial, the military judge also explained your forum rights to you. Regardless of the choice that you made at your original trial with regard to forum, you have all of the following rights during this rehearing.

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 (company) (battery) (troop) (detachment) (unit).

MJ: 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: Now, if you are tried by court members, the members will vote by secret, written ballot and two-thirds of the members must 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 12: 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 have the right to request a trial by military judge alone, and if approved there will be no court members and the judge alone will determine your sentence. Do you understand the difference between trial before members and trial before military judge alone?

ACC: (Responds.)

MJ: Again, I want to stress that you are not limited in exercising any of these choices by any choice you made at your first trial. Do you understand that?

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 13 If accused elects trial before members, proceed to paragraph D-1-6 below. If accused elects trial by judge alone, continue with paragraph D-1-5 below:

D-1-5. TRIAL BEFORE MILITARY JUDGE ALONE

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?

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 14: 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 15: Go to Chapter 2, Section IV, JUDGE ALONE (SENTENCING) and complete the script, as in an original trial.

D-1-6. TRIAL BEFORE MEMBERS

MJ: Trial Counsel, has the flyer been marked as an appellate exhibit?

TC: (Responds.)

MJ: Trial Counsel, does the flyer reflect only the offenses for which the accused stands convicted?

TC: (Responds.)

MJ: Defense Counsel, do you have any objection to Appellate Exhibit __?

DC: (Responds.)

MJ: Trial Counsel, have you completed the Sentence Worksheet and has it been marked as an appellate exhibit?

TC: (Responds.)

MJ: Defense Counsel, have you reviewed the Sentence Worksheet? Do you have any objections to the Sentence Worksheet?

DC: (Responds.)

MJ: Do both sides agree that I should inform the members that this is a sentence rehearing, so they'll not be confused or distracted by references to events or proceedings that happened long ago?

TC/DC: (Respond.)

MJ: _____, during this sentence rehearing, 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, yourself, 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, or 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: Is there anything else by either side before we call the members?

TC/DC: (Respond.)

MJ: Bailiff, call the members.

NOTE 16: 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 17: Members who have been relieved (viced) by orders need not be mentioned.

TC: The prosecution is ready to proceed with the sentence rehearing 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 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.

PRELIMINARY INSTRUCTIONS.

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

MJ: The accused has already been found guilty at a prior court-martial of certain offenses. Those findings appear on the flyer you have in the folder in front of you, which you should now remove and review.

MBRS: (Comply.)

MJ: The accused stands convicted of, but unsentenced for, the offenses listed on the flyer. These proceedings are being held so that you may determine an appropriate sentence for the accused for the commission of such offense(s). In this connection, there has been a prior trial of this case. This is what is called a "rehearing" and more specifically a "sentence rehearing." I bring this to your attention solely to remove confusion and speculation from your mind. There may be references to a "prior trial" or a "prior hearing." There may be a time gap concerning some dates on documents. (There may be testimony concerning the accused's conduct at the (USDB) (_____) (since _____).)

The fact the accused was sentenced for these offenses in a prior trial is not evidence. What is an appropriate sentence in this case must be decided only on whatever legal and competent evidence is presented for your consideration. Legal error(s) occurred at the first trial. Therefore, you may not consider, for any reason, that earlier trial, unless evidence from that trial is admitted in this trial.

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 of the evidence presented and the instructions that I 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 on the law, it is of vital importance that you keep an open mind until all the evidence has been presented and instructions have been presented to you.

NOTE 18: Go to Chapter 2, Section VI, paragraph 2-6-1, PRELIMINARY INSTRUCTIONS, beginning with the third paragraph, then complete the script as in an original trial.

D-2. FULL REHEARING

NOTE 19: The military judge should conduct an early RCM 802 conference with counsel for both parties to ascertain the likely choices for counsel and forum, and to discuss special evidentiary considerations. An Article 39(a) session should be held promptly to consider such matters as: (a) motions for appropriate relief; (b) sufficiency and timeliness of the written notice of rehearing served upon the accused; (c) examination of prior appellate decisions, if any, and applicable promulgating orders (in this regard, the trial counsel should be cautioned that when announcing the general nature of the charge(s), only the charges and specifications subject to rehearing should be announced); and (d) evidentiary considerations. The trial should proceed in open session as below.

MJ: The Court is called to order.

TC: Your Honor, Appellate Exhibit __ is the charge sheet for this case, originally referred on _____. Appellate Exhibit __ is the promulgating order for the prior proceedings, issued by HQ, _____, dated _____. The _____ authorized a full rehearing in this case in its (published opinion located at __ MJ ___) (unpublished opinion marked as Appellate Exhibit __). Appellate Exhibit __ is the memorandum from _____ to the Commander, _____, designating him/her as the convening authority authorized to order this full rehearing. Appellate Exhibit __ is the advice from the Staff Judge Advocate to the convening authority and the convening authority's order referring this case for a full rehearing. A copy of Appellate Exhibit __, the charge sheet, was served on the accused and defense counsel on _____.

TC: This court-martial is convened by Court-Martial Convening Order No. __, Headquarters, _____, dated _____ (as amended by court-martial convening order No. __, same Headquarters, dated _____) copies of which, as well as copies of the Appellate Exhibits mentioned, have been furnished to the military judge, counsel, and the accused, and will be inserted in the record.

NOTE 20: The MJ should examine the convening order(s) and any amendments for accuracy. IF A CAPITAL CASE, GO TO CHAPTER 8.

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

NOTE 21: 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.

TC: The prosecution is ready to proceed in the full rehearing in the case of United States versus (PVT) (___) _____.

TC: The accused and the following persons detailed to this court are present: _____, Military Judge; _____, Trial Counsel; and _____, Defense Counsel. The members (and the following persons detailed to this court) are absent (_____).

TC: _____ has been detailed reporter to this court-martial and (has been previously sworn) (will now be sworn).

NOTE 22: When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of each

opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.

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). (I have not) (No member of the prosecution has) acted in any way that may tend to disqualify (me) (us) in this court-martial.

NOTE 23: <u>Oaths for counsel</u>. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the MJ:

"Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?"

D-2-1. RIGHTS TO COUNSEL

MJ: At your original trial, the military judge explained your rights to counsel to you. Regardless of the choices that you made at your original trial with regard to counsel, you have all of the following rights during this rehearing.

You have the right to be represented by _____, your detailed military counsel. He/She is provided to you at no expense to you.

You also have the right to request a different military lawyer to represent you. If the person that you request is reasonably available, he or she would be appointed to represent you free of charge. If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are entitled to only one military lawyer. You may ask his/her superiors to let you keep your detailed defense counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would need to be provided by you at no expense to the government. If you are represented by a civilian lawyer, you may also keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer.

Again, I want to stress that you are not limited in exercising any of these choices by any choices you made at your first trial or while your case was on appeal. 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 24: If the accused elects pro se representation, see applicable inquiry at 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 applicable inquiry at paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.

NOTE 25: If the original defense counsel from trial is not present, the MJ should inquire or explain as applicable why the attorney-client relationship has ceased (e.g., former defense counsel left active duty or accused claimed ineffective assistance of counsel against former defense counsel.) In any situation where it appears the accused may have a legal right to the assistance of a former defense counsel, the MJ should obtain from the accused an affirmative waiver of that former defense counsel's presence.

(MJ: _____ is no longer on active duty and cannot be detailed by military authority to represent you at this rehearing. However, you could attempt to retain _____ as civilian counsel. Accordingly, _____ has been detailed to represent you at this rehearing. Do you wish to proceed with this rehearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this rehearing?)

(MJ: Because you have made allegations after trial that _____ was ineffective in his/her former representation of you, he/she has not been detailed to represent you at this rehearing. Accordingly, _____ has been detailed to represent you at this rehearing. Do you wish to proceed with this rehearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this rehearing?)

MJ: Defense Counsel will announce by whom (he/she/they) (was) (were) detailed and (his/her/their) qualifications.

DC: (I) (All detailed members of the defense) have been detailed to this hearing 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 proceeding.

CDC: 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 that might tend to disqualify me in this proceeding.

NOTE 26: (OATH FOR CIVILIAN COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of civilian 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 hearing. Counsel for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn.

TC: Your honor, are you aware of any matter that might be a ground for challenge against you?

MJ: (I am not. I was the trial judge for the _____ portion of this case.) (I am not. I was not the trial judge for any prior proceedings in this case, whether pretrial, trial, or post-trial.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Respond.)

MJ: Defense Counsel, do you have any challenges to the jurisdiction of this full rehearing?

DC: (Responds.)

D-2-2. FORUM RIGHTS

MJ: At your original trial, the military judge also explained your forum rights to counsel to you. Regardless of the choice that you made at your original trial with regard to forum, you have all of the following rights during this rehearing.

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 (company) (battery) (troop) (detachment) (unit).

MJ: 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: Now, 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 of the members 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 27: 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 have the right to request a trial by military judge alone, and if approved there will be no court members and the judge alone will decide whether you are guilty or not guilty, and if found guilty, the judge alone will determine your sentence. Do you understand the difference between trial before members and trial before military judge alone?

ACC: (Responds.)

MJ: Again, I want to stress that you are not limited in exercising any of these choices by any choice you made at your first trial. Do you understand that?

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 28: If the accused elects trial by judge alone, continue with paragraph D-2-3 below. If the accused elects trial before members, go to Chapter 2, Section I, paragraph 2-1-3, ARRAIGNMENT. At the conclusion of the arraignment, if the accused pleads not guilty, go to paragraph D-2-4 below. If the accused pleads guilty, go to Chapter 2, Section II, paragraph 2-2-1 and follow the script to Chapter 2, Section VI; then go to paragraph D-2-5 below.***

D-2-3. TRIAL BEFORE MILITARY JUDGE ALONE

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?

DC: (Responds).

MJ: _____, Appellate Exhibit ___, is a request for trial by military judge alone. Is this 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 29: 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 30: For Judge Alone cases, go to Chapter 2, Section I, paragraph 2-1-3 ARRAIGNMENT, and follow the appropriate guidance at the end of that paragraph, based on the plea.

D-2-4. TRIAL BEFORE MEMBERS (Contest)

NOTE 31: Insert the following paragraphs in place of the instructions and NOTEs beginning with Chapter 2, Section V, paragraph 2-5, PRELIMINARY INSTRUCTIONS, up to the third paragraph of that instruction (beginning with the phrase "Under the law…"). Then begin with the third paragraph of those PRELIMINARY INSTRUCTIONS and continue to completion of the script, as in an original trial.

MJ: Trial Counsel, has the flyer been marked as an appellate exhibit?

TC: (Responds.)

MJ: Trial Counsel, does the flyer reflect only the offenses for which a full rehearing has been authorized?

TC: (Responds.)

MJ: Defense Counsel, do you have any objection to Appellate Exhibit __?

DC: (Responds.)

MJ: Do both sides agree that I should inform the members that this is a full rehearing, so they'll not be confused or distracted by references to events or proceedings that happened long ago?

TC/DC: (Respond.)

MJ: Bailiff, call the members.

NOTE 32: 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 33: Members who have been relieved (viced) by orders need not be mentioned.

TC: The prosecution is ready to proceed with the rehearing 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 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 the military judge is to ensure that the trial is conducted in a fair, orderly, and impartial manner in accordance with the law. I will preside over the open sessions of the trial, rule upon objections, and instruct you on the law that is applicable to this case. You are required to follow my instructions on the law, and you may not consult any other source as to the law that pertains to this case unless it is admitted into evidence. This rule applies throughout the trial, including closed sessions and periods of recess or adjournment. Any questions you have of me should be asked in open court.

MJ: There has been a prior trial in this case. This is what is known as a "rehearing" and is being conducted because the prior trial was conducted improperly. I bring this to your attention for one reason only. There has been a time gap between the alleged offenses and today. There may be references to a "prior trial" or "first trial." Documents may appear old or outdated. I bring this to your attention only to remove any confusion or speculation from your mind and to allow you to concentrate on what you hear in court during this rehearing.

You will not be told of the results of that prior trial; your duty as court members is to determine whether the accused is guilty of any of the offenses on the flyer, and if guilty, adjudge an appropriate sentence, based only on what legal and competent evidence is presented for your consideration in this trial. The fact that there has been a prior trial is not evidence of guilt, nor is it evidence that you can use for sentencing, if sentencing is required. The fact that there has been a prior trial must be totally disregarded by you.

NOTE 34: Continue with Chapter 2, Section V, paragraph 2-5, PRELIMINARY INSTRUCTIONS, beginning with the third paragraph, through completion of the script, as in an original trial.

D-2-5. TRIAL BEFORE MEMBERS (Guilty Plea)

NOTE 35: Insert the following paragraphs in place of the instructions and NOTEs beginning with Chapter 2, Section VI, and prior to the second paragraph of Chapter 2, Section VI, paragraph 2-6-1, PRELIMINARY INSTRUCTIONS (beginning with "At a session held earlier…"). Then continue with the second paragraph of Chapter 2. Section VI, paragraph 2-6-1, PRELIMINARY INSTRUCTIONS and the script, to completion as in an original trial.

MJ: Do both sides agree that I should inform the members about the prior trial, so they'll not be confused or distracted by references to events or proceedings that happened long ago?

TC/DC: (Respond.)

MJ: _____, during this sentence phase of the rehearing, 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, yourself, 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, or 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 that could be offered now?

TC/DC: (Respond.)

MJ: Is there anything else by either side before we call the members?

TC/DC: (Respond.)

MJ: Bailiff, call the members.

NOTE 36: 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 37: Members who have been relieved (viced) by orders need not be mentioned.

TC: The prosecution is ready to proceed with sentence rehearing 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 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 the military judge is to ensure that the trial is conducted in a fair, orderly, and impartial manner in accordance with the law. I will preside over the open sessions of the trial, rule upon objections and instruct you on the law that is applicable to this case. You are required to follow my instructions on the law, and you may not consult any other source as to the law that pertains to this case unless it is admitted into evidence. This rule applies throughout the trial, including closed sessions and periods of recess or adjournment. Any questions you have of me should be asked in open court.

MJ: This is what is called a "rehearing" and I bring this to your attention solely to remove confusion and speculation from your mind. There may be references to a "prior trial" or a "prior hearing." There may be a time gap concerning some dates on documents. (There may be testimony concerning the accused's conduct at the (USDB) (_____) (since _____).)

The fact the accused was sentenced for these offenses in a prior trial is not evidence. What is an appropriate sentence in this case must be decided only on whatever legal and competent evidence is presented for your consideration. Legal error(s) occurred at the first trial. Therefore, you may not consider, for any reason, that earlier trial, unless evidence from that trial is admitted in this trial.

> ***NOTE 38: Continue with Chapter 2, Section VI, paragraph of 2-6-1, PRELIMINARY INSTRUCTIONS, beginning with the second paragraph, through completion of the script, as in an original trial.***

D-3. COMBINED REHEARING

> ***NOTE 39: <u>Combined Rehearing</u>. In some situations, a rehearing on the merits for all original offenses has been authorized. In other situations, a rehearing on the merits has been authorized for some offenses and only a sentence rehearing on others. Whether the matters to be reheard involve a full rehearing, a sentence rehearing, or a combination of the two, new charges may be referred for trial at the same time. The military judge should conduct an early RCM 802 conference with counsel for both parties to ascertain the likely choices for counsel and forum, and to discuss special evidentiary considerations. An Article 39(a) session should be held promptly to consider such matters as: (a) motions to***

dismiss or for other appropriate relief; (b) sufficiency and timeliness of the written notice of rehearing served upon accused; (c) examination of prior appellate decisions, if any, and applicable promulgating orders (in this regard, the trial counsel should be cautioned that when announcing the general nature of the charges, only the additional charges and specifications and those charges and specifications subject to a full rehearing should be announced (see RCM 810(a)(3)); (d) stipulations, portions of the record of trial for the original trial on the merits for charges and specifications subject to a sentence rehearing, and other evidence and information normally offered in sentencing proceedings (in this regard, the counsel should be reminded not to improperly disclose the adjudged sentence or the approved sentence from the original trial); (e) examination of Sentence Worksheet; and (f) determination of the maximum punishment and other sentence matters. After that session, the trial should proceed in open session as below.

MJ: The Court is called to order.

TC: Your Honor, Appellate Exhibit __ is the charge sheet for this case, originally referred on _____. Appellate Exhibit __ is the charge sheet reflecting the new Additional Charges. Appellate Exhibit __ is the promulgating order for the prior proceedings, issued by HQ, _____, dated _____. The _____ authorized a (full) (sentence) rehearing in this case in its (published opinion located at __ MJ ___) (unpublished opinion marked as Appellate Exhibit __). Appellate Exhibit __ is the memorandum from _____ to the Commander, _____, designating him/her as the convening authority authorized to order this (full) (sentence) rehearing. Appellate Exhibit __ is the advice from the Staff Judge Advocate to the convening authority regarding the charges to be reheard and the new charges, and the convening authority's order referring all charges, to be tried together. Copies of Appellate Exhibit __ and Appellate Exhibit __, the charge sheets, were served on the accused and defense counsel on _____.

TC: This court-martial is convened by Court-Martial Convening Order No. __, Headquarters, _____, dated _____ (as amended by court-martial convening order No. __, same Headquarters, dated _____) copies of which, as well as copies of the Appellate Exhibits above, have been furnished to the military judge, counsel, and the accused, and will be inserted in the record.

NOTE 40: The MJ should examine the convening order(s) and any amendments for accuracy IF A CAPITAL CASE, GO TO CHAPTER 8.

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

NOTE 41: 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.

TC: The prosecution is ready to proceed in the combined rehearing in the case of United States versus. (PVT) (___) _____.

TC: The accused and the following persons detailed to this court are present: _____, Military Judge; _____, Trial Counsel; and _____, Defense Counsel. The members (and the following persons detailed to this court) are absent _____.

TC: _____ has been detailed reporter to this court-martial and (has been previously sworn) (will now be sworn).

NOTE 42: When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of each opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.

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). (I have not) (No member of the prosecution has) acted in any way that may tend to disqualify (me) (us) in this court-martial.

NOTE 43: <u>Oaths for counsel</u>. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the MJ:

"Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?"

D-3-1. RIGHTS TO COUNSEL

MJ: At your original trial, the military judge explained your rights to counsel to you. Regardless of the choices that you made at your original trial with regard to counsel, you have all of the following rights during this rehearing:

You have the right to be represented by _____, your detailed military counsel. He/She is provided to you at no expense to you.

You also have the right to request a different military lawyer to represent you. If the person that you request is reasonably available, then he or she would be appointed to represent you free of charge. If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are entitled to only one military lawyer. You may ask his/her superiors to let you keep your detailed defense counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would need to be provided by you at no expense to the government. If you are represented by a civilian lawyer, you may also keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer.

Again, I want to stress that you are not limited in exercising any of these choices by any choices you made at your first trial or while your case was on appeal. 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 44: If the accused elects pro se representation, see applicable inquiry at 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 applicable inquiry at paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.

NOTE 45: If the original defense counsel from trial is not present, the MJ should inquire or explain as applicable why the attorney-client relationship has ceased (e.g., former defense counsel left active duty or accused claimed ineffective assistance of counsel against former defense counsel). In any situation where it appears the accused may have a legal right to the assistance of a former defense counsel, the MJ should obtain from the accused an affirmative waiver of that former defense counsel's presence.

(MJ: _____ is no longer on active duty and cannot be detailed by military authority to represent you at this rehearing. However, you could attempt to retain _____ as civilian counsel. Accordingly, _____ has been detailed to represent you at this rehearing. Do you wish to proceed with this rehearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this rehearing?)

(MJ: Because you have made allegations after trial that _____ was ineffective in (his) (her) former representation of you, (he) (she) has not been detailed to represent you at this rehearing. Accordingly, _____ has been detailed to represent you at this rehearing. Do you wish to proceed with this rehearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this rehearing?)

MJ: Defense Counsel will announce by whom (he/she/they) (was) (were) detailed and (his/her/their) qualifications.

DC: (I) (All detailed members of the defense) have been detailed to this hearing 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 proceeding.

CDC: 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 that might tend to disqualify me in this proceeding.

NOTE 46: (OATH FOR CIVILIAN COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of civilian 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 hearing. Counsel for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn.

TC: Your Honor, are you aware of any matter that might be a ground for challenge against you?

MJ: (I am not. I was the trial judge for the _____ portion of this case.) (I am not. I was not the trial judge for any prior proceedings in this case, whether pretrial, trial, or post-trial.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Respond.)

MJ: Defense Counsel, do you have any challenges to the jurisdiction of this combined rehearing?

DC: (Responds.)

D-3-2. FORUM RIGHTS

MJ: At your original trial, the military judge also explained your forum rights to you. Regardless of the choice that you made at your original trial with regard to forum, you have all of the following rights during this rehearing.

You have a right to be tried by a court consisting of a 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 (company) (battery) (troop) (detachment) (unit).

MJ: 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: Now, 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 of the members 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 47: 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 have the right to request a trial by military judge alone, and if approved there will be no court members and the judge alone will decide whether you are guilty or not guilty, and if found guilty, the judge alone will determine your sentence. Do you understand the difference between trial before members and trial before military judge alone?

ACC: (Responds.)

MJ: Again, I want to stress that you are not limited in exercising any of these choices by any choice you made at your first trial. Do you understand that?

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 48: If the accused elects trial before military judge alone, go to D-3-3 below. If the accused elects trial before members, go to Chapter 2, Section 1, paragraph 2-1-3 ARRAIGNMENT. At the conclusion of the arraignment, if the accused has pleaded not guilty, go to D-3-4 below. If the accused has pleaded guilty, go to Chapter 2, Section II, paragraph 2-2-1, and follow the script to Chapter 2, Section VI, paragraph 2-6-1 PRELIMINARY INSTRUCTIONS, then go to paragraph D-3-5 below.

D-3-3. TRIAL BEFORE MILITARY JUDGE ALONE

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?

DC: (Responds).

MJ: _____, Appellate Exhibit ___, is a request for trial by military judge alone. Is this 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 49: 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 50: For judge alone cases, go to Chapter 2, Section I, paragraph 2-1-3, ARRAIGNMENT, and follow the instructions in the NOTE at the end of that paragraph, based on the plea.***

D-3-4. TRIAL BEFORE MEMBERS (Contest)

> ***NOTE 51: Insert the following paragraphs in place of the instructions and NOTEs beginning with Chapter 2, Section V, paragraph 2-5, PRELIMINARY INSTRUCTIONS, up to the third paragraph of that instruction (beginning with the phrase "Under the law,…"). Then begin with the third paragraph of those PRELIMINARY INSTRUCTIONS and continue with the script to the end of Chapter 2, Section V, paragraph 2-5-16.***

MJ: Trial Counsel, has the flyer been marked as an appellate exhibit?

TC: (Responds.)

MJ: Trial Counsel, does the flyer reflect only the offenses for which a full rehearing has been authorized and the new charge(s) and specification(s)?

> ***NOTE 52: If the rehearing involves matters reheard for sentence only, those matters should not be disclosed until completion of findings. Accordingly, those matters should not be listed on the flyer until sentencing. <u>See</u> RCM 810(a) (3).***

TC: (Responds.)

MJ: Defense Counsel, do you have any objection to Appellate Exhibit __?

DC: (Responds.)

MJ: Do both sides agree that I should inform the members that this is a combined rehearing, so they will not be confused or distracted by references to events or proceedings that happened long ago ?

TC/DC: (Respond.)

MJ: Bailiff, call the members.

Bailiff: (Complies.)

NOTE 53: 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 54: Members who have been relieved (viced) by orders need not be mentioned.

TC: The prosecution is ready to proceed with the rehearing 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 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 the military judge is to ensure that the trial is conducted in a fair, orderly, and impartial manner in accordance with the law. I will preside over the open sessions of the trial, rule upon objections, and instruct you on the law that is applicable to this case. You are required to follow my instructions on

the law, and you may not consult any other source as to the law that pertains to this case unless it is admitted into evidence. This rule applies throughout the trial, including closed sessions and periods of recess or adjournment. Any questions you have of me should be asked in open court.

(ONLY IF THE ACCUSED CONTESTS BOTH NEW AND REHEARD CHARGES:) (MJ: There has been a prior trial in this case. This is what is known as a "rehearing" and is being conducted because the prior trial was conducted improperly. This is a combined rehearing because some of the offenses charged were the subject of a prior trial, while others of more recent origin were not. I bring this to your attention for one reason only. There has been a considerable time gap between some of the alleged offenses and today. There may be references to a "prior trial" or "first trial." Documents may appear old or outdated. I bring this to your attention only to remove any confusion or speculation from your mind and to allow you to concentrate on what you hear in court during this rehearing.

You will not be told of the results of that prior trial. Your duty as court members is to determine whether the accused is guilty of any of the offenses on the flyer—whether new or old—and if guilty, adjudge an appropriate sentence, based only on the legal and competent evidence that is presented for your consideration in this trial. The fact that there has been a prior trial is not evidence of guilt, nor is it evidence that you can use for sentencing, if sentencing is required. The fact that there has been a prior trial must be totally disregarded by you.)

NOTE 55: Continue with Chapter 2, Section V, paragraph 2-5, PRELIMINARY INSTRUCTIONS, beginning with the third paragraph, and continue with the script to the end of Chapter 2, Section V, paragraph 2-5-16.

PRESENTATION OF SENTENCING EVIDENCE

NOTE 56: The following should be inserted in place of the NOTE and instruction at the end of Chapter 2, Section V, paragraph 2-5-16.

NOTE 57: Because charges referred for a sentence rehearing only are not to be brought to the attention of the members prior to sentencing, a new flyer must be prepared to include those charges.

MJ: Members of the Court, there is a brief matter that we need to discuss outside your presence. You are excused until approximately _____.

MBRS: (Comply.)

MJ: The court is in recess for preparation of a sentencing flyer.

(Recess)

MJ: All parties previously present are again present, except the court members who are absent. Trial Counsel, has the sentencing flyer, which reflects the court's findings of guilty and those charges referred for sentence rehearing, been marked as an appellate exhibit?

TC: (Responds.)

MJ: Defense Counsel, do you have any objections to Appellate Exhibit __?

DC: (Responds.)

MJ: Trial Counsel, has each member been provided with a copy of the sentencing flyer?

TC: (Responds.)

> ***NOTE 58: Regardless of the forum, the fact finder will likely not know anything about the offenses referred for sentence rehearing except what is on the flyer. At an RCM 802 conference, the military judge should establish that the parties understand the special rules regarding evidence from the prior trial as set forth in RCM 810(a)(2). The military judge should be alert to prevent any improperly admitted evidence from the first trial being shown to the fact finder. As to RCM 810(a)(2)(A) matters from the prior trial, the military judge should ask counsel whether any of those matters can be: 1) presented as a stipulation of fact; 2) after appropriate redaction, provided as written exhibits for the members to read silently to themselves in open court and then be returned to counsel; or 3) read aloud to the fact finder from the original case's record of trial. After considering the views of the parties, the military judge should conduct an Article 39(a) session and rule on these and other presentencing evidentiary issues.***

MJ: Trial Counsel, how do you propose to present evidence to the court about the circumstances of the offenses and the background of the accused regarding the offenses submitted for sentence rehearing?

TC: (Responds.)

MJ: Defense Counsel, do you object to the government's proposal?

DC: (Responds.)

MJ: Is there anything else from either side?

TC/DC: (Respond.)

MJ: Bailiff, call the members.

Bailiff: (Complies.)

ADDITIONAL CHALLENGES AND PRELIMINARY INSTRUCTIONS ON SENTENCING

> ***NOTE 59: RCM 810(a)(3) provides for additional challenges for cause prior to the sentencing portion of a combined rehearing. Add the following immediately following the***

first line of Chapter 2, Section V, paragraph 2-5-17. Note that this instruction must be appropriately tailored depending on whether the accused pleaded guilty to offenses referred for a full rehearing, whether there are offenses referred for sentencing rehearing only, or both.

MJ: Members of the Court, in addition to the findings you have just made, the accused (was found guilty in (his) (her) prior trial of) (and) (pleaded guilty at an earlier session to) certain other offenses of which you are not aware.

(ADD THIS COMMENT IF ANY OFFENSE IS BEING REHEARD FOR SENTENCING ONLY: Under the Rules for Courts-Martial, it was not appropriate for you to be told of these earlier guilty findings until after you had determined findings for the contested offenses.) These earlier guilty findings are now being provided to you on the sentencing flyer, marked Appellate Exhibit ___, a copy of which has been provided for each member. Please take a few moments to read that, and look up when you are ready to proceed.

MBRS: (Comply.)

MJ: Members, the accused has been found guilty of the offenses listed on the sentencing flyer, either at this trial or at the prior trial. Your duty at this point is to determine an appropriate sentence for all of the offenses listed on the sentencing flyer, regardless of whether the findings of guilty are from this trial or from the prior trial. You will not be told if the accused was sentenced for any findings from the prior trial or what, if any, that sentence may have been. You are not to speculate as to that matter and you must completely disregard that matter. What the appropriate sentence is, for all of the crimes of which the accused has been found guilty, is a matter that must be decided by you, the members of this court, after considering only the legal, competent evidence that is presented for you during this rehearing. In short, you must not give any thought or consideration to the earlier trial except as to specific matters that may be admitted during this rehearing. Of course, you are allowed, and indeed required, to recognize that the prior trial already determined the accused guilty of the particular offenses shown on the sentencing flyer. Those findings are binding on you, but you have complete discretion under the law to decide what sentence is appropriate for all of the offenses for which the accused stands convicted.

Your duty to determine an appropriate sentence is a grave responsibility, requiring the exercise of wise discretion. Your determination must be based on all of the evidence presented, and the instructions that I give you as to the applicable law. Since you cannot properly reach your determination until you have heard all of the evidence and received all of my instructions, it is of vital

importance that you keep an open mind until all the evidence and instructions have been presented to you.

The Rules for Court-Martial provide that counsel again be given an opportunity to ask you questions and exercise challenges.

I remind you of the instructions that I gave you prior to the findings portion of this trial regarding voir dire and challenges; those instructions apply equally here. Does any member want me to repeat any or all of those instructions again?

MBRS: (Respond.)

MJ: I also remind you of the preliminary questions I asked you prior to the findings portion of this trial; they also apply equally here. Does any member want me to ask any or all of those preliminary questions again?

MBRS: (Respond.)

MJ: Am I correct that your answers to those preliminary questions remain unchanged?

MBRS: (Respond.)

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

> ***NOTE 60: TRIAL COUNSEL and DEFENSE COUNSEL will conduct voir dire if desired, and individual voir dire will be conducted if required.***

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, however, 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.)

CHALLENGES

NOTE 61: 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 (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 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 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 480 (CAAF 2008). The following is a suggested procedure for an Article 39(a) session.

MJ: Members of the Court, there are some matters that we must now take up outside of your presence. Please return to the deliberation room.

MBRS: (Comply.)

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.)

MJ: (Granted/Denied.)

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 THE MJ IS GRANTING THE CHALLENGE) MJ: The challenge is granted.

(FOR EACH CHALLENGE THE MJ IS DENYING) 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 (_____).

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

TC: (Responds.)

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

DC: (Responds.)

NOTE 62: The MJ will verify that a quorum remains and, if enlisted members are detailed, at least one-third are enlisted. If any member is excused as a result of a challenge, the member will be informed that s/he has been excused; the seating for the remaining members will be rearranged according to rank.

MJ: Call the members.

Bailiff: (Complies.)

NOTE 63: Continue with Chapter 2, Section V, paragraph 2-5-17, to the conclusion of the script.

D-3-5. TRIAL BEFORE MEMBERS (Guilty Plea)

NOTE 64: Insert the following paragraphs in place of the instructions and NOTEs beginning with Chapter 2, Section VI, and prior to the third paragraph of Chapter 2, Section VI, paragraph 2-6-1, PRELIMINARY INSTRUCTIONS (beginning with "At a session held earlier…"). Then continue with the third paragraph of Chapter 2. Section VI, paragraph 2-6-1, PRELIMINARY INSTRUCTIONS and the script, to completion as in an original trial.

MJ: Do both sides agree that I should inform the members about the prior trial, so they will not be confused or distracted by references to events or proceedings that happened long ago?

TC/DC: (Respond.)

MJ: Trial Counsel, have you prepared a sentencing flyer reflecting the court's findings of guilty and those charges referred for sentence rehearing? Has that been marked as an appellate exhibit?

TC: (Responds.)

MJ: Defense Counsel, have you reviewed the sentencing flyer? Do you have any objections to the sentencing flyer?

DC: (Responds.)

> ***NOTE 65: Regardless of the forum, the fact finder will likely not know anything about the offenses referred for sentence rehearing except what is on the flyer. At an RCM 802 conference, the military judge should establish that the parties understand the special rules regarding evidence from the prior trial as set forth in RCM 810(a)(2). As to RCM 810(a)(2)(A) matters from the prior trial, the military judge should ask counsel whether any of those matters can be: 1) presented as a stipulation of fact; 2) after appropriate redaction, provided as written exhibits for the members to read silently to themselves in open court and then be returned to counsel; or 3) read aloud to the fact finder from the original case's record of trial. After considering the views of the parties, the military judge should conduct an Article 39(a) session and rule on these and other presentencing evidentiary issues.***

MJ: Trial Counsel, how do you propose to present evidence to the court about the circumstances of the offenses and the background of the accused regarding the offenses submitted for sentence rehearing?

TC: (Responds.)

MJ: Defense Counsel, do you object to the government's proposal?

DC: (Responds.)

MJ: _____, during this sentence phase of the rehearing, 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, yourself, 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, or 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 that could be offered now?

TC/DC: (Respond.)

MJ: Is there anything else by either side before we call the members?

TC/DC: (Respond.)

MJ: Bailiff, call the members.

MBRS: (Comply.)

NOTE 66: 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 67: Members who have been relieved (viced) by orders need not be mentioned.

TC: The prosecution is ready to proceed with sentence rehearing 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 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 the military judge is to ensure that the trial is conducted in a fair, orderly, and impartial manner in accordance with the law. I will preside over the open sessions of the trial, rule upon objections, and instruct you on the law that is applicable to this case. You are required to follow my instructions on the law, and you may not consult any other source as to the law that pertains to this case unless it is admitted into evidence. This rule applies throughout the trial, including closed sessions and periods of recess or adjournment. Any questions you have of me should be asked in open court.

MJ: This is what is called a "rehearing" and I bring this to your attention solely to remove confusion and speculation from your mind. There may be references to a "prior trial" or a "prior hearing." There may be a time gap concerning some dates on documents. (There may be testimony concerning the accused's conduct at the (USDB) (_____) (since _____.)

The fact the accused was sentenced for these offenses in a prior trial is not evidence. What an appropriate sentence is, in this case, must be decided only on the legal and competent evidence that is presented for your consideration. Legal error(s) occurred at the first trial. Therefore, you may not consider, for any reason, that earlier trial, unless evidence from that trial is admitted in this trial.

> ***NOTE 68: Continue with Chapter 2, Section VI, paragraph 2-6-1, PRELIMINARY INSTRUCTIONS, beginning with the third paragraph, through completion of the script, as in an original trial.***

D-4. PROCEEDING IN REVISION.

> ***NOTE 69: A revision proceeding is a method by which a court-martial reconvenes for the purpose of revising its action or correcting its record. The following guide illustrates two typical uses of a revision proceeding:***

MJ: This Article 39(a) session is called to order.

TC: Let the record reflect that all parties present when the court last adjourned are once again present. There have been no changes in the convening orders since the last date of trial, _____.

MJ: I've called this session for the purpose of clarifying the record in this case in accordance with Article 62(b) of the Uniform Code of Military Justice, and RCM 1102 of the Manual for Courts-

Martial. We will follow, insofar as applicable, the procedural guide for this type of hearing contained in The Military Judges' Benchbook. These proceedings in revision have been undertaken by the court (on its own motion pursuant to RCM 1102) (pursuant to the following communication: _____ which will be inserted at this point in the record). The purpose is to correct an unintended omission in my discussion with the accused of (the maximum punishment in this case) (the request for trial by military judge alone) (_____). I determined that this matter does not involve a substantive error which would preclude such revision, and, in accordance with RCM 1102 of the Manual, I would point out that (in reading the record of trial for authentication, I noted on page(s) ____ (and ____), I did not include in my discussion of the maximum punishment with the accused that it included confinement for six months) (I noted after adjournment that, in discussing the request for trial by military judge alone, I had failed to discuss with the accused the requirement that in a trials with members, a sentence which includes confinement for more than 10 years requires a concurrence of three-fourths of the members) (_____). Although, in accordance with RCM 1102, witnesses may not be called or recalled at this type of session, the accused may be questioned as to (his) (her) understanding of the subject matter under inquiry.

> ***NOTE 70: <u>Procedures when error was as to maximum punishment</u>. The military judge may use the following guide when the proceedings in revision involve an error as to the maximum punishment:***

MJ: (PVT) (___) _____, do you recall our discussion of the maximum punishment at the prior session of your court-martial?

ACC: (Responds.)

MJ: At the prior session of your court-martial, your defense counsel stated he/she had advised you of the maximum punishment and that he/she advised you that the maximum included, among other things (confinement for six months) (_____). Do you recall him/her making that statement?

ACC: (Responds.)

MJ: Do you recall discussing (the maximum punishment) (_____) with your defense counsel prior to submitting your offer to plead guilty?

ACC: (Responds.)

MJ: Do you recall that he/she told you (the maximum punishment in your case would include confinement for six months) (_____)?

ACC: (Responds.)

MJ: Did you understand that at the time he/she discussed that with you?

ACC: (Responds.)

MJ: Did you understand at the time you entered your plea of guilty at the prior session that the maximum punishment for the offenses to which you pleaded guilty included (confinement for six months) (_____)?

ACC: (Responds.)

MJ: Do you understand now that the maximum punishment for the offenses to which you pleaded guilty was: (to be separated from the service with a bad-conduct discharge) (to be confined for six months; to forfeit two-thirds of your pay per month for six months, and to be reduced to the lowest enlisted grade, E-1) (_____)?

ACC: (Responds.)

MJ: I reaffirm my findings that the accused's plea of guilty was providently made. Now, do counsel for either side perceive any other matters that we should take up at this time?

TC/DC: (Respond.)

MJ: This court is adjourned.

> ***NOTE 71: Procedures when the error was as to forum request. The military judge may use the following guide when the proceedings in revision involve an error in the forum request:***

MJ: (PVT) (___) _____, do you recall in our discussion earlier with regard to your request for trial by military judge alone, I told you that, in a trial before a court which included members, two-thirds of those members present voting by secret written ballot would have to agree in any findings of guilty against you?

ACC: (Responds.)

MJ: Did you understand that then?

ACC: (Responds.)

MJ: Do you understand it now?

ACC: (Responds.)

MJ: Do you also recall that I advised you that, in a trial with a court consisting of members, two-thirds of the members present voting by secret written ballot would have to agree before there could be any sentence adjudged against you in the event that there was a guilty finding?

ACC: (Responds.)

MJ: I failed to advise you at that time, but I advise you now, that (, if the findings of such a court, that is, a court with members, were to adjudge a sentence that included confinement for more than 10 years, then three-fourths of the members present, voting by secret, written ballot, would have to concur in that sentence) (_____). Do you understand that?

ACC: (Responds.)

MJ: Now, understanding (that requirement of three-fourths concurrence in any sentence which included confinement for more than 10 years, do you wish to renew your request for trial before me as military judge alone) (_____)? In other words, would you still want to be tried (by me as judge alone, or would you prefer to be tried by court members) (_____)?

ACC: (Responds.)

MJ: In view of the accused's response, I reaffirm my finding that the accused's request for trial before me as military judge alone was voluntarily made, that it was an informed and knowing request, and I reaffirm my approval of the request for trial by military judge alone. There being no other matters to be taken up, this court is adjourned.

Appendix E
Contempt Procedure

NOTE 1: ***Article 48, UCMJ.*** ***"A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceeding by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both."***

NOTE 2: ***Procedure prior to instituting contempt proceedings.*** ***When a person's conduct borders upon contempt, that person should ordinarily be advised that his or her conduct is improper and that persisting in such conduct may cause the court to hold him or her in contempt. Such warning should be made a part of the record of trial in order to show a proper foundation for contempt proceedings. (In courts-martial with members, any warning to an accused or defense counsel should occur outside the presence of the members.) Contempt proceedings may often be avoided by causing the offender to be removed from the courtroom. Before an accused is removed from the court-martial, the military judge must comply with the requirements of RCM 804 and determine that the accused's continued presence will materially interfere with the conduct of the proceedings. Ordinarily, alternatives exist to removal of a disruptive accused. (See RCM 804 discussion.)***

NOTE 3: ***Types and timing of contempt proceedings.*** ***Two types of contempt proceedings exist: (1) summary disposition, and (2) disposition upon notice and hearing. Each type of contempt proceeding is explained in the following two NOTEs. However, in both proceedings, contempt power resides solely in the military judge, who has discretion as to when the proceedings will occur during the court-martial to avoid unnecessarily disrupting the court-martial or prejudicing an accused. If the accused has elected court-martial by members, the contempt proceeding will occur outside of the presence of the members. A contempt proceeding is part of the court-martial in which it occurs; therefore, it must occur before adjournment of the court-martial. Also, because the contempt proceeding occurs during the court-martial, the accused at the court-martial, even when not an actual participant in the contempt proceeding, should be present unless the accused waives the right to be present under RCM 804(b).***

NOTE 4: ***Summary disposition.*** ***Summary disposition of contempt may be used only when the military judge directly witnesses the allegedly contemptuous conduct in the actual presence of the court-martial. Under such circumstances, the military judge must recite the facts for the record, and indicate that the judge directly witnessed them in the actual presence of the court-martial. See RCM 809(c). The following is a suggested guide for a summary disposition of contempt:***

MJ: (To Respondent) I am considering whether you should be held in contempt for (here describe the conduct witnessed by the military judge in the actual presence of the court-martial). If I hold you in contempt, I will also adjudge a sentence. I now give you an opportunity to tell me anything about whether you should be held in contempt or what sentence I should adjudge if you are held in

contempt. If you wish to say nothing, that fact will not be held against you and I will draw no adverse inference from your silence. Is there anything you wish to say?

RESPONDENT: [Makes a statement or declines.]

[The military judge may close to deliberate, or immediately enter findings:]

MJ: (State the name of the Respondent), I find beyond a reasonable doubt, based upon my directly witnessing your conduct in the actual presence of the court-martial, that you (state the specific conduct which was observed). I conclude beyond a reasonable doubt that your act(s) constituted (menacing (words) (signs) (and) (gestures) in the presence of this court) (a disturbance of the proceedings of this court by (riotous) (disorderly) conduct).

MJ: (_____, I find that you were not in contempt of this court.) (Based upon this conduct, I hold you in contempt of court and I sentence you: To pay the United States a fine of $_____; (and to be confined for ___ days).)

> ***NOTE 5: Disposition upon Notice and Hearing. If the military judge did not witness the allegedly contemptuous conduct, the notice and hearing procedures must be used. In such cases, the alleged offender is brought before the military judge presiding at the court-martial and informed orally or in writing of the alleged contempt, and given a reasonable opportunity to present evidence. The alleged offender has the right to be represented by counsel, and shall be so advised. A suggested guide to accomplish the notice and hearing follows:***

MJ: (State the name of the Respondent), I have (heard) (received (a) report(s)) that you (state the conduct allegedly committed by the offender). If true, you (may have used menacing (words) (signs) (and) (gestures) in the presence of this court) (may have disturbed the proceedings of this court by (riotous) (disorderly) conduct). Article 48, Uniform Code of Military Justice, provides that any person who uses any menacing (word) (sign) (or) (gesture) in the presence of a court-martial, or who disturbs its proceedings by a (riot) (disorder) may be punished for contempt. The maximum punishment is a fine of $100 and confinement for 30 days. I will conduct a hearing in which I will determine if you should be held in contempt of court. At that hearing, you have the right to present evidence, to call witnesses, and to present argument. You are entitled to be represented by counsel at the contempt hearing.

(For military offender) You may be represented by military counsel appointed to represent you at no expense to you, or you may be represented by civilian counsel of your choosing at no expense to the government. Do you understand these rights?

(For civilian offender) That counsel must be someone you arrange for at no expense to the government. Do you understand these rights? Do you desire to be represented by counsel?

RESPONDENT: (Responds.)

MJ: You will be present at (state time/place for contempt hearing) with your counsel for the contempt proceeding. Do you have any questions?

[At the subsequent contempt proceeding, proceed as follows:]

MJ: This contempt proceeding is called to order.

TC: The accused at this court-martial, the respondent for this contempt proceedings, and the following persons detailed to this proceeding are present: _____, Military Judge; _____, Trial Counsel for the court-martial (and this contempt proceeding); (Trial Counsel for this contempt proceeding); _____, Defense Counsel for the accused; and _____, Defense Counsel for the respondent. (_____ has been detailed reporter forth is proceeding and (has been previously sworn) (will now be sworn.) [or] (_____ continues as court reporter for this proceeding.)

TC: (I) (All members of the prosecution for this proceeding) have the same detailing and qualifications as announced at the court-martial of United States v. (insert the name of the case in which the allegedly contemptuous conduct occurred). [or] (I) (All members of the prosecution for this proceeding) have been detailed to this proceeding 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 which might tend to disqualify (me) (us) in this proceeding.

MILITARY DC: (I) (All members of the defense for the respondent) have the same detailing and qualifications as announced at the court-martial of United States v. (insert the name of the case in which the allegedly contemptuous conduct occurred). [or] (I) (All members of the defense for the respondent) have been detailed to this proceeding by _____. (I am) (All 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 for the respondent has) acted in any manner which might tend to disqualify (me) (us) in this proceedings.

CIVILIAN DC: I will represent the respondent in this contempt proceeding. 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 capacity which might tend to disqualify me in this contempt proceeding.

[If necessary, the MJ should administer the oath to the civilian counsel, for oath see page 10.]

MJ: (State the name of the defense counsel), during this court-martial of United States v. _____, I indicated to your client that I had (heard) (received (a) report(s)) that he/she (may have used menacing (words) (signs) (and) (gestures) in the presence of this court) (may have disturbed the proceedings of this court by (riotous) (disorderly) conduct). This proceeding is being held to determine if your client should be held in contempt, and if so, what your client's punishment should be.

MJ: Trial Counsel, do you wish to make an opening statement?

TC: (Responds with opening statement, if desired.)

MJ: Defense Counsel, do you desire to make an opening now or wish to reserve?

DC: (Responds with opening statement, waives, or reserves.)

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

[The hearing proceeds with evidence being presented by the trial counsel, and cross-examination by the defense counsel, if desired. After the trial counsel rests, the defense counsel may present an opening statement (if originally reserved) or proceed to present witnesses/evidence on behalf of the respondent to show why he/she should not be held in contempt. To hold the offender in contempt, the evidence must establish the contempt beyond a reasonable doubt.]

MJ: (<u>To Respondent</u>) After counsel have argued, I will decide whether you should be held in contempt. If I hold you in contempt, I will also adjudge a sentence. I now give you an opportunity to tell me anything about whether you should be held in contempt or what sentence I should adjudge if you are held in contempt. If you wish to say nothing, that fact will not be held against you and I will draw no adverse inference from your silence. Is there anything you wish to say?

RESPONDENT: (Makes a statement or declines.)

MJ: Trial Counsel, you may present argument.

TC: (Argument or waiver.)

MJ: Defense Counsel, you may present argument.

DC: (Argument or waiver.)

[The military judge may close to deliberate, or immediately enter findings:]

MJ: The contempt proceeding is called to order. All parties present when the contempt proceeding closed are again present.

MJ: (_____, I find that you were not in contempt of this court.)

(_____, I find beyond a reasonable doubt that your act(s) constituted (menacing (words) (signs) (and) (gestures) in the presence of this court) (a disturbance of the proceedings of this court by (riotous) (disorderly) conduct). I hold you in contempt of court and I sentence you: To pay the United States a fine of $_____; (and to be confined for _____ days).)

NOTE 6: <u>Approval by convening authority of sentence</u>. Because RCM 809 indicates that the convening authority shall designate the place of confinement for any person sentenced to confinement for contempt and further states that confinement begins when adjudged unless the convening authority defers, suspends, or disapproves the confinement, the convening authority should be notified immediately of any contempt sentence that includes

confinement. This immediate notification will ensure that the offender is properly confined if the convening authority approves the sentence. A fine does not become effective until ordered executed by the convening authority; therefore, if the sentence only includes a fine, there is not the same urgency in notifying the convening authority.

NOTE 7: Record of contempt proceeding. A record of the contempt proceeding will be made and will be included in the regular record of trial. If the person is held in contempt, a separate record of the contempt proceeding will be prepared and forwarded to the convening authority for review. (As stated in NOTE 6 above, when the sentence includes confinement, the convening authority should be immediately notified; however, the notification need not consist of a complete record of the proceedings.)

NOTE 8: Barring person held in contempt from the courtroom. When a person has been held in contempt, pending the convening authority's review of the record of the contempt proceeding, that person may be removed from the courtroom and his/her return during the subsequent proceedings may be prohibited. The immediate commander of a person held in contempt should be advised of the court's action. In the case of a civilian, the convening authority should be immediately advised. In either case, a sentence to confinement begins to run when it is adjudged unless suspended, deferred, or disapproved by the convening authority. If the offender is a witness, he/she may be permitted to complete testimony before contempt proceedings are initiated. Ordinarily, the trial and defense counsel should be allowed to continue to perform their duties before the court even though held in contempt, unless it appears that they cannot be expected to conduct themselves properly during subsequent proceedings. The military judge may also delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings. See NOTE 2 above, about removing an accused from the court-martial proceedings.

REFERENCES: Article 48, UCMJ; RCM 801, 804, 809, and RCM 809 analysis at Appendix A, MCM; United States v. Burnett, 27 MJ 99 (CMA 1988).

Appendix F
General and Special Findings

F-1. General.

NOTE 1: Essential findings of fact. Under RCM 905(d), "essential findings of fact" must be stated by the military judge on the record when "factual issues are involved" in ruling on motions. Also under the MRE, when ruling upon certain motions, the military judge must state essential findings of fact on the record. See MRE 304(d)(4), 311(d)(4), and 321(f). This is a sua sponte responsibility.

NOTE 2: Requested special findings. Under RCM 918(b), the military judge MUST, upon request, find the facts specially in the event of a general finding of guilty. Counsel may make requests for special findings more than once during the trial of a case, but the judge is required to make only one set of special findings and then only if there is a conviction. The request must be made before findings and the judge may ask counsel to submit the request for special findings and actual proposed findings in writing. Proposed special findings submitted by counsel should be marked as appellate exhibits and appended to the record. However, a failure of counsel to submit proposed special findings in writing does not absolve the judge from the requirement to make special findings.

NOTE 3: Discretionary special findings. The military judge may make such special findings as deemed appropriate even if none are requested. In this regard, special findings may be made, if there is a conviction, whenever the judge concludes that the record does not adequately reflect all significant matters considered when "the trial court saw and heard the witnesses" (See Article 66(c), UCMJ).

NOTE 4: Effect of acquittal or conviction of lesser included offense. If an accused is acquitted, the judge is not obliged to make special findings nor need any be made regarding the greater offense when an accused is convicted of a lesser offense.

F-2. Preparing special findings.

NOTE 1: Findings of law. Special findings must reflect application of correct legal principles to the facts of the case. Conceptually, therefore, the judge cannot properly find the critical and relevant facts unless the evidence is fully considered in the light of rules of law governing the theories of the prosecution and defense.

A review of those instructions contained in this Benchbook concerning elements of offenses and the special and the other defenses in issue should be considered a prerequisite to drafting special findings. The judge should, as a general rule, make findings on all matters upon which members would be instructed. In this connection, it is suggested that the judge use the instructions checklist contained in Appendix I, as an aid in guarding against inadvertent omissions of crucial matters.

NOTE 2: Findings of fact. Appropriate special findings are not only findings on elements of offenses, but also on all factual questions placed reasonably in issue prior to findings, as well as controverted issues of fact which are deemed relevant to the sentencing decision. Jurisdictional facts must be found when they are controverted, and conclusions concerning issues of jurisdiction should be set forth. However, superfluous findings are not required nor are findings on each particular minor matter concerning which there may be conflicting evidence.

In preparing findings of fact, the judge should exercise care to find the facts simply, clearly, and with economy of expression. The judge, when stating special findings in the record, should first prepare a draft or detailed outline of the contemplated special findings. Findings should include facts which are admitted as well as those in dispute. Extended recital of testimony or discussion of evidence is not a substitute for simple findings by the judge as to the facts.

Additionally, special findings should include findings of all facts necessary to the disposition of evidentiary motions and motions to dismiss.

NOTE 3: Form of special findings. Special findings of fact may, in the discretion of the judge, be expressed orally in open court, in writing as an appellate exhibit, or in a written opinion or memorandum of decision filed within a reasonable time after trial but prior to authentication, or by a combination of these methods. However, when the need for special findings may be mooted by the findings, such as when the accused is acquitted, a nonverbatim record may result, a danger of inadvertent omission exists, or the judge wishes to analyze conflicting evidence to demonstrate the basis for any of his determinations, the judge should defer the special findings until after the trial and use an opinion or memorandum form. Citation of legal authority for factual conclusions and undisputed principles of law should not be used. However, if a memorandum or opinion is filed, citations of authority supporting conclusions of law are appropriate, particularly with regard to principles of law that are not universally accepted.

NOTE 4: Modification of special findings. When a military judge expresses the special findings at the time of trial, but later, prior to authentication, concludes that the special findings should be modified in any material respect, the judge should file an opinion or memorandum of decision to accomplish any necessary modification. Such opinion or memorandum should explain any discrepancy between the announced special findings and the later opinion or memorandum. For example, if a special finding of an element was in fact made by the judge, but omitted through inadvertence when stating the special findings at the trial, the judge may state such omitted special finding in a subsequent opinion or memorandum and include the explanation for its original absence from the record. Revision proceedings may also be used for this purpose (see Appendix D). A certificate of correction may be made when the finding was made, but left out of the record inadvertently.

NOTE 5: Special findings in nonverbatim case. In a trial by general or special court-martial in which no verbatim record of the proceedings is to be made, the judge should prepare the special findings completely and append the written document to the record as an appellate exhibit.

NOTE 6: Sample special findings. The following examples of special findings are suggested for use by the military judge when the judge feels it advisable in a given case to announce special findings from the bench after making general findings and after having prepared a draft or outline covering the elements, defenses, and other matters in issue.

EXAMPLE A:

MJ: In view of the request (need) for special findings in this case, I shall now announce them. The court finds beyond a reasonable doubt as follows:

a. That, on 3 September 2000, at Fort Blank, Missouri, the accused absented himself from his unit, namely: Company B, 20th Signal Battalion, 20th Infantry Division, Fort Blank, Missouri;

b. That such absence was without proper authority from anyone competent to give him leave; and

c. That he remained so absent until 25 September 2000.

EXAMPLE B:

MJ: In view of the request (need) for special findings in this case, I shall now announce them.

a. The court finds beyond a reasonable doubt as follows:

(1) That, on 2 September 2000, at the Service Club, Fort Blank, Missouri, the accused did bodily harm to PFC John Smith by striking him on the head;

(2) That the accused did so with a certain means, namely: a beer bottle;

(3) That the bodily harm was done with unlawful force and violence;

(4) That such means was used in a manner likely to produce grievous bodily harm.

b. With respect to the accused's claim of self-defense, the court finds that, under the circumstances, there were no reasonable grounds for the accused to apprehend that PFC Smith was about to inflict death or grievous bodily harm upon the accused. The evidence clearly demonstrates that the accused, without provocation, used profane and abusive language toward PFC Smith and struck him as Smith attempted to leave the premises in order to avoid an altercation with the accused. While the court finds that before he was struck by the accused, PFC Smith did shove the accused's arm away from him when the accused attempted to block Smith's departure, such an act, under all the circumstances, could not have caused a reasonable, careful person to apprehend death or grievous bodily harm.

Consequently, the court finds beyond a reasonable doubt, that the accused did not act in self-defense and that the force used by the accused was without justification or excuse.

NOTE 7: <u>Written special findings</u>. A suggested format for use by the military judge when the judge decides to include special findings in an opinion or memorandum of decision is set out below.

Table F–1
Sample Letter—Special Findings

United States	)	
	)	
v.	)	
	)	SPECIAL FINDINGS
SSG Richard Simmons	)	
123-45-6789	)	5 April 2000
Company B, 1st Battalion	)	
329th Infantry	)	
52d Infantry Division		

1. I considered all legal and competent evidence, and the reasonable inferences to be drawn therefrom. I resolved all issues of credibility. I found the accused guilty beyond a reasonable doubt of each and every element of the Charge at its specification, and I make the further findings as reflected *infra*.

2. I find that near Fort Blank, Missouri, in September 1999, the accused placed his hand on Jones' leg while traveling in the accused's automobile (R. 40). I find that approximately a week later, still in September, the accused kissed Jones on the mouth in the restroom of a theater in the town of Blank near Fort Blank (R. 50,

53). The accused put his hand on Jones' leg in the same theater on the same date (R. 54). He continued this conduct although Jones moved his leg (R. 55). Approximately one week later, in October 1999, Jones again accompanied the accused to town (R. 56), where accused kissed Jones on the lips in a pizza parlor bathroom (R. 57). Later the same day the accused kissed Jones on the lips in a theater latrine (R. 1). The accused put his hand on Jones' leg on the way home in accused's car (R. 73). The accused visited Jones at Jones' home in December 1999 (R. 75), and while there, grabbed Jones' penis through Jones's clothing (R. 76). The accused visited Jones at Jones' home in early January 1996 (R. 73-74) where he kissed Jones on the mouth in the basement (R. 79).

3. I find that Thomas Jones was a male person, and was under the age of 16 years (R. 36, 38).

4. I find that the acts of the accused, as portrayed upon the entire record were in fact indecent. In so finding I have consulted my common sense and my knowledge of the ways of the world. I find that these acts were depraved, grossly vulgar, obscene and repugnant to common propriety and that they tended to excite lust and deprave morals with respect to sexual relations.

5. I find upon a reading of the entire record as it pertains to these acts, that the intent of the accused was totally unambiguous. I find his intent clearly was to appeal to and gratify the lust, passions, and sexual desires of both the accused and his victim, Thomas Jones.

6. I find that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the service and was of a nature to bring discredit upon the armed forces.

JAMES HASH
COL, JA
Military Judge

NOTE 8: <u>Essential Findings</u>. A suggested format for use when the military judge decides or needs to include findings in an opinion or memorandum of decision is contained below. This format can also be used for oral essential findings.

Table F–2
Sample Letter—Essential Findings of Fact

United States	)	
	)	
v.	)	
	)	ESSENTIAL FINDINGS OF FACT
SSG Richard Simmons	)	
123-45-6789	)	5 April 2000
Company B, 1st Battalion	)	
329th Infantry	)	
52d Infantry Division		

Having had all of the evidence and having resolved issues of credibility, I find as follows:

1. The investigation into the accused's alleged misconduct began in Saudi Arabia on or about 24 January 1999.

2. The accused made various statements concerning his actions while he was in Saudi Arabia.

3. In Saudi Arabia he saw a lawyer, CPT White, on at least two occasions.

4. Apparently, no action was taken to end the matter prior to the accused's departure from Saudi Arabia.

5. On 10 December 1999, he was issued an administrative reprimand (AE XXXI).

6. At that point he believed the investigation was completed and no further adverse action would befall him.

7. Subsequently, the accused was informed through the news media that the matter was not closed and that further action might occur.

8. Eventually, the CID was directed to investigate the matter.

9. In the course of this investigation CID Agent Brown met with the accused at Kirtland AFB, New Mexico, on 24 March 2000.

10. During the course of that meeting the accused agreed to undergo a polygraph examination.

11. Subsequently, the examination was scheduled for 14 April 2000 at a motel in Albuquerque, New Mexico. CID Agent Orange was to be the examiner.

12. Prior to 0850 on 14 April 2000, the accused arrived at the motel with MAJ Blue.

13. Mr. Brown informed MAJ Blue that he could not attend the examination in the motel room but he was welcome to wait in the lobby.

14. The accused and Mr. Brown then went to the hotel suite and MAJ Blue returned to his duties.

15. In the suite, the accused was introduced to Special Agent Orange and the polygraph examination routine began.

16. The pre-test phase began at 0905 and continued until 1055. After a five minute break, the pre-test phase continued until 1155. The parties reconvened at 1215. At 1240 the instrument phase began and lasted until 1320.

17. Agent Orange then informed the accused that he had shown deception.

18. The post-test phase continued for several hours. During this phase, Orange threatened to leave.

19. Eventually, the accused made an oral inculpatory statement.

20. Agent Orange then departed, and Agent Brown continued the interrogation.

21. During the Brown interrogation, the accused made statements which were not as inculpatory as those made to Orange.

22. Eventually Brown typed a statement; the accused signed it at 1633 and departed at 1645 (AE VIII).

23. During early 2000, the accused was informed by a radio broadcast that the investigation was to be reopened.

24. During this period, there were a number of newspaper articles concerning his case, a Congressman became involved (not on his side), and a rape crisis counselor was also involved.

25. The accused was not on active duty and not training with his regular reserve unit.

26. The accused made many efforts to obtain a lawyer.

27. He approached civilian lawyers, civilian lawyers who were members of the Reserves, and the Army Trial Defense Service.

28. In the United States, prior to 14 April 2000, he never retained nor was furnished a lawyer who could help him with the criminal investigation.

29. On 24 March 2000 and 14 April 2000, he was advised by the CID agents that if he desired a lawyer, one would be furnished to him. He declined to request a lawyer.

30. Prior to 24 March 2000, the accused felt himself to be alone against the United States Government which was pursuing a criminal case against him.

31. As a last resort he asked MAJ Blue to accompany him to the CID interrogations.

32. MAJ Blue attended the 24 March interrogation but as noted was denied entry to the 14 April polygraph examination and interrogation.

33. During the entire polygraph examination/interrogation, the accused had two breaks; one of five minutes and one for 20 minutes. He had access to food but only had a coke.

34. He was accompanied by no one.

35. Proper rights warnings were given and waived by the accused.

36. The test I used to determine if the accused's statement of 14 April was voluntary is—Was the confession the product of an essential free and unconstrained choice by its maker?

37. In applying that test, I considered two other rules of law. First, the government had the burden of convincing me by a preponderance of the evidence that the statement was voluntary. If they could not so convince me, the statement would not be admitted. Second, in determining the issue, the totality of the circumstances were to be considered.

38. In making my determination, I considered that the accused believed himself to be alone against the government. Essentially all of his efforts to obtain legal counsel in the United States were fruitless. He was denied the accompaniment of MAJ Blue. It appeared to him that the media had chosen sides and was against him. The CID told him he had lied and gave him another scenario which it offered as the truth. He was not a member of an active duty unit which he could rely on for support and his reserve unit told him to train elsewhere.

39. With all these matters weighing on him and affecting him, he cracked and gave up.

40. Although he could physically leave the motel suite, psychologically he could not.

41. Under these conditions, he told the CID what it wanted to hear.

42. Under these conditions, his statement was not the product of an essentially free and unconstrained choice.

43. Under these conditions, the government did not convince me by a preponderance of the evidence that the statement was voluntary.

JAMES HASH
COL, JA
Military Judge

REFERENCES: RCM 918, MCM; United States v. Gerard, 11 MJ 446 (CMA 1982); United States v. Orben, 28 MJ 172 (CMA 1989); United States v. Martinez, 38 MJ 82 (CMA 1993).

Appendix G
Rules of Practice Before Army Courts-Martial

The Chief Trial Judge is authorized to promulgate general Rules of Court, and local Rules of Court may be prescribed by Chief Circuit Judges for courts-martial within their circuits. RCM 108; AR 27-10, paragraph 8-8. Such rules must be consistent with the Constitution, the UCMJ, the Manual for Courts-Martial, Army Regulations, and other applicable legal authority. *See* United States v. Williams, 23 MJ 382 (CMA 1987). Local rules must be forwarded to the Chief Trial Judge.

Appendix H
Form for Certificate of Correction of Record of Trial

NOTE: Once a record of trial has been authenticated and forwarded to the convening authority, it may be changed only through issuance of a certificate of correction. A certificate of correction may be used only to make the record correspond to that which actually occurred at the trial. A certificate of correction may not be used to correct a defect or error in the trial proceedings. Prior to authentication of the correction, all parties will be given notice of the proposed correction and an opportunity to respond. The certificate will be authenticated in the same manner as the record of trial and the accused will be furnished, and receipt for, a copy of the certificate. RCM 1104(d) and Appendix 14f, MCM.

Table H–1
Sample Letter—Certificate of Correction

United States **v.** CORPORAL HAROLD D. WHEELER 000-000-0000 United States Army	))))))))	Certificate of Correction

The record of trial in the above case, which was tried by the general court-martial convened by Court-Martial Convening Order Number 10, Headquarters, Fort Bragg, dated 4 October 1999, as amended by Court-Martial Convening Order Number 6, Headquarters, Fort Bragg, dated 31 May 2000, at Fort Bragg, North Carolina 28307, on 3-7 and 10 June 2000, is corrected by insertion of photographs as suitable descriptions of Defense Exhibit K, a pair of regular combat boots; Defense Exhibit L, a pair of jungle combat boots; and Defense Exhibit M, a pair of tennis shoes, at their appropriate place in the record. Substitution of photographs was authorized by the military judge on page 365 of the record of trial.

This correction is made because the original exhibits, photographs, or suitable descriptions of these exhibits as required by RCM 1103 are missing from the record of trial.

Substitute authentication by the trial counsel is authorized pursuant to RCM 1104(a)(2)(B) because the military judge has been retired from active duty and is not available.

All parties were given notice of this correction and permitted to examine and respond prior to the authentication of this Certificate of Correction pursuant to RCM 1104(d)(2).

A copy of this Certificate of Correction is being served on the accused by certified mail, return receipt requested, and will be sent for attachment to the record of trial when received.

JOHN Q. SMITH
CPT, JA
Trial Counsel

Appendix I
Instructions Checklists

Instructions checklists for contested cases (mental responsibility not in issue and mental responsibility (sanity) in issue) are located at I-1 and I-2.

Appendix I-1
Instructions Checklist-Mental Responsibility Not In Issue

I. PRIOR TO FINDINGS

(___) Preliminary Instructions (2-5)
(___) Joint Offenders (7-2)
(___) Elements of Offenses (Chap 3)
(___) Vicarious Liability (7-1)
(___) Absent Accused (2-7-23)
(___) _____
(___) _____

II. DURING TRIAL (As Required)

(___) Stipulation of Fact (7-4-1 and 2-7-24)
(___) Stipulation of Expected Testimony (7-4-2 and 2-7-24)
(___) Expert Testimony (7-9-1)
(___) Prior Inconsistent Statement (7-11-1)
(___) Prior Consistent Statement (7-11-2)
(___) Accused's Failure to Testify (7-12)
(___) Uncharged Misconduct (7-13-1)
(___) Prior Conviction to Impeach (7-13-2)
(___) Have You Heard Questions to Impeach Opinion (7-18)
(___) Comment on Rights to Silence or Counsel (2-7-20)
(___) _____
(___) _____

III. FINDINGS (Mental Responsibility NOT an Issue)

A. (___) Prefatory Instructions (2-5-9 or 8-3-8)

(B. Argument of Counsel. Can be done following Closing Substantive Instructions, at MJ's discretion.)

C. (___) Elements of Offenses (Chap 3)
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____

D. (___) Terms having special legal significance.
(___) _____ (___) _____ (___) _____

E. (___) Vicarious Liability (7-1)

F. (___) Joint Offenders (7-2)

G. Special and Other Defenses
(___) Self-Defense (5-2)
- (___) Homicide/Aggravated Assault (5-2-1)
- (___) Non-Aggravated Assault (5-2-2)
- (___) Assault as LIO (5-2-3)
- (___) Homicide/Unintended Death (5-2-4)
- (___) Use of Force to Deter (5-2-5)
- (___) Other Instructions-Self-Defense (5-2-6)
  - (___) _____
  - (___) _____
  - (___) _____
  - (___)

(___) Defense of Another (5-3)
- (___) Homicide/Aggravated Assault (5-3-1)
- (___) Assault/Battery (5-3-2)
- (___) Homicide/Agg Assault plus LIO (5-3-3)

(___) Accident (5-4)
(___) Duress (Compulsion or Coercion) (5-5)
(___) Entrapment (5-6)
(___) Defense of Property (5-7)
(___) Obedience to Orders (5-8)
- (___) Unlawful Order (5-8-1)
- (___) Lawful Orders (5-8-2)

(___) Physical Impossibility (5-9-1)
(___) Physical Inability (5-9-2)
(___) Financial and Other Inability (5-10)
(___) Ignorance or Mistake of Fact (5-11)
- (___) Specific Intent/Knowledge (5-11-1)
- (___) General Intent (5-11-2)
- (___) Article 134 Check Offenses (5-11-3)
- (___) Drug Offenses (5-11-4)

(___) Voluntary Intoxication (5-12)
(___) Alibi (5-13)
(___) Voluntary Abandonment (5-15)
(___) Parental Discipline (5-16)
(___) Evidence Negating *Mens Rea* (5-17)
(___) Claim of Right (5-18)
(___) Causation-Lack of (5-19)
(___) Other _____
(___) Other _____
(___) Other _____

H. Pretrial Statements

(___) Pretrial Statements (Chap 4)

APPENDIX I

I. Vicarious Liability (7-1) (if not given in Part III E)

(___) Aider and Abettor (7-1-1)
(___) Counseling, Commanding, Procuring (7-1-2)
(___) Causing an Act to be Done (7-1-3)
(___) Liability of Co-conspirators (7-1-4)

J. Joint Offenders (7-2) (if not given in Part III F)

K. Evidentiary and other instructions

(___) Circumstantial Evidence (7-3)
(___) Proof of Intent
(___) Proof of Knowledge
(___) Stipulation of Fact (7-4-1)
(___) Stipulation of Expected Testimony (7-4-2)
(___) Depositions (7-5)
(___) Judicial Notice (7-6)
(___) Credibility of Witness (7-7-1)
(___) Eyewitness Identification (7-7-2)
(___) Character Evidence-Accused (7-8-1)
(___) Character Evidence-Victim (7-8-2)
(___) Character for Untruthfulness (7-8-3)
(___) Expert Testimony (7-9-1)
(___) Polygraph Expert (7-9-2)
(___) Accomplice Testimony (7-10)
(___) Prior Inconsistent Statement (7-11-1)
(___) Prior Consistent Statement (7-11-2)
(___) Accused's Failure to Testify (7-12)
(___) Uncharged Misconduct-Accused (7-13-1)
(___) Prior Conviction to Impeach (7-13-2)
(___) Past Sexual Behavior of Nonconsensual Sex Victim (7-14)
(___) Variance-Findings by Exceptions and Substitutions (7-15)
(___) Variance-Value, Damage, or Amount (7-16)
(___) Spillover (7-17)
(___) Have you Heard Questions to Impeachment Opinion (7-18)
(___) Witness under Grant of Immunity (7-19)
(___) Chain of Custody (7-20)
(___) Privilege (7-21)
(___) False Exculpatory Statements (7-22)
(___) Closed Trial Sessions (7-23)
(___) Brain Death (7-24)
(___) Divers Occasions (7-25)
(___) _____
(___) _____
(___) _____

L. (___) Closing Substantive Instructions on Findings (2-5-12 or 8-3-11)

(M. Argument by Counsel. If not done in Part III B above.)

N. (___) Procedural Instructions on Findings (2-5-14 or 8-3-13)

O. (___) Presentencing Session (2-5-15)

P. (___) NO SENTENCING PROCEEDINGS (If no sentencing proceedings are required, give Excusal Instruction at end of 2-5-16.)

IV. SENTENCING

A. (___) Argument or Request for Punitive Discharge Inquiry (2-7-27)

(B. (___) Argument by Counsel)

C. Sentence Instructions (2-5-21 through 2-5-23)
(___) Offenses considered one for sentencing
(___) Article 58a
(___) Pretrial confinement credit
(___) Article 58b deferment
(___) 58b clemency powers by CA
(___) Fine
(___) Punitive discharge — Vested benefits
(___) Summary of evidence in extenuation/mitigation
(___) Accused's failure to testify
(___) Accused's not testifying under oath
(___) Scope of accused's unsworn statement
(___) Effect of guilty plea
(___) Mendacity
(___) Argument for specific sentence
((___) Clemency (2-7-16 and 2-7-17 or 8-3-34))
((___) Relative severity of sentence (2-7-15))
((___) Credit for Article 15 punishment (2-7-21))
(___) _____
(___) _____
(___) _____
(___) Concluding instructions (2-5-24)

V. EXCUSING MEMBERS. Give Excusal Instruction at 2-5-25

Appendix I-2
Instructions Checklist-Mental Responsibility IS In Issue

I. PRIOR TO FINDINGS

(___) Preliminary Instructions (2-5)
(___) Joint Offenders (7-2)
(___) Elements of Offenses (Chap 3)
(___) Vicarious Liability (7-1)
(___) Preliminary Instruction on Insanity (6-3)
(___) _____
(___) _____

II. DURING TRIAL (As Required)
(___) Stipulation of Fact (7-4-1 and 2-7-24)
(___) Stipulation of Expected Testimony (7-4-2 and 2-7-24)
(___) Expert Testimony (7-9-1)
(___) Prior Inconsistent Statement (7-11-1)
(___) Prior Consistent Statement (7-11-2)
(___) Accused's Failure to Testify (7-12)
(___) Uncharged Misconduct (7-13-1)
(___) Prior Conviction to Impeach (7-13-2)
(___) Have You Heard Questions to Impeach Opinion (7-18)
(___) Comment on Rights to Silence or Counsel (2-7-20)
(___) Preliminary instruction on insanity (6-3)
(___) _____
(___) _____

III. FINDINGS (Mental Responsibility IS an Issue)

A. (___) Prefatory Instructions (2-5-9 or 8-3-8)

(B. Argument of Counsel. Can be done following Closing Substantive Instructions, at MJ's discretion.)

C. (___) Elements of Offenses (Chap 3)
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____
(___) CH/SP _____ LIO _____

D. (___) Terms having special legal significance.
(___) _____ (___) _____ (___) _____

E. (___) Vicarious Liability (7-1)

F. Joint Offenders (7-2)

G. Special and Other Defenses
(___) Self-Defense (5-2)
(___) Homicide/Aggravated Assault (5-2-1)

(___) Non-Aggravated Assault (5-2-2)
(___) Assault as LIO (5-2-3)
(___) Homicide/Unintended Death (5-2-4)
(___) Use of Force to Deter (5-2-5)
(___) Other Instructions-Self-Defense (5-2-6)
(___) _____
(___) _____
(___) _____
(___) _____
(___) Defense of Another (5-3)
(___) Homicide/Aggravated Assault (5-3-1)
(___) Assault/Battery (5-3-2)
(___) Homicide/Agg Assault plus LIO (5-3-3)
(___) Accident (5-4)
(___) Duress (Compulsion or Coercion) (5-5)
(___) Entrapment (5-6)
(___) Defense of Property (5-7)
(___) Obedience to Orders (5-8)
(___) Unlawful Order (5-8-1)
(___) Lawful Orders (5-8-2)
(___) Physical Impossibility (5-9-1)
(___) Physical Inability (5-9-2)
(___) Financial and Other Inability (5-10)
(___) Ignorance or Mistake of Fact (5-11)
(___) Specific Intent/Knowledge (5-11-1)
(___) General Intent (5-11-2)
(___) Article 134 Check Offenses (5-11-3)
(___) Drug Offenses (5-11-4)
(___) Voluntary Intoxication (5-12)
(___) Alibi (5-13)
(___) Voluntary Abandonment (5-15)
(___) Parental Discipline (5-16)
(___) NO!! Evidence Negating *Mens Rea* (5-17)
(___) Claim of Right (5-18)
(___) Causation-Lack of (5-19)
(___) Other _____
(___) Other _____
(___) Other _____

H. Pretrial Statements (Chap 4)

I. Vicarious Liability (7-1) (if not given in Part III E)
(___) Aider and Abettor (7-1-1)
(___) Counseling, Commanding, Procuring (7-1-2)
(___) Causing an Act to be Done (7-1-3)
(___) Liability of Co-conspirators (7-1-4)

J. Joint Offenders (7-2) (if not given in Part III F)

K. Defense of Lack of Mental Responsibility

(___) Mental Responsibility at Time of Offense (6-4)
(___) Partial Mental Responsibility (6-5)
(___) Expert Testimony (7-9-1)
(___) Evaluation of Testimony (6-6)

L. Evidentiary and Other Instructions
(___) Circumstantial Evidence (7-3)
    (___) Proof of Intent
    (___) Proof of Knowledge
(___) Stipulation of Fact (7-4-1)
(___) Stipulation of Expected Testimony (7-4-2)
(___) Depositions (7-5)
(___) Judicial Notice (7-6)
(___) Credibility of Witness (7-7-1)
(___) Eyewitness Identification (7-7-2)
(___) Character Evidence-Accused (7-8-1)
(___) Character Evidence-Victim (7-8-2)
(___) Character for Untruthfulness (7-8-3)
(___) Expert Testimony (7-9-1)
(___) Polygraph Expert (7-9-2)
(___) Accomplice Testimony (7-10)
(___) Prior Inconsistent Statement (7-11-1)
(___) Prior Consistent Statement (7-11-2)
(___) Accused's Failure to Testify (7-12)
(___) Uncharged Misconduct-Accused (7-13-1)
(___) Prior Conviction to Impeach (7-13-2)
(___) Past Sexual Behavior of Nonconsensual Sex Victim (7-14)
(___) Variance-Findings by Exceptions and Substitutions (7-15)
(___) Variance-Value, Damage, or Amount (7-16)
(___) Spillover (7-17)
(___) Have you Heard Questions to Impeachment Opinion (7-18)
(___) Witness Under Grant of Immunity (7-19)
(___) Chain of Custody (7-20)
(___) Privilege (7-21)
(___) False Exculpatory Statements (7-22)
(___) Closed Trial Sessions (7-23)
(___) Brain Death (7-24)
(___) Divers Occasions (7-25)
(___) _____
(___) _____
(___) _____

M. (___) Closing Substantive Instructions on Findings (2-5-12 or 8-3-11)

(N. Argument by Counsel. If not done in Part III B above.)

O. (___) Procedural Instructions on Findings (Mental Responsibility at Issue) (6-7)

P. (___) Presentencing Session (2-5-15)

Q. (___) NO SENTENCING PROCEEDINGS (If no sentencing proceedings are required, give Excusal Instruction at 2-5-16)

IV. SENTENCING

A. (___) Argument or Request for Punitive Discharge Inquiry (2-7-27)

(B. (___) Argument by Counsel)

C. Sentence Instructions (2-5-21 through 2-5-23)
(___) Offenses considered one for sentencing
(___) Article 58a
(___) Pretrial confinement credit
(___) Article 58b deferment
(___) 58b clemency powers by CA
(___) Fine
(___) Punitive discharge - Vested benefits
(___) Summary of evidence in extenuation/mitigation
(___) Mental responsibility sentencing factors (6-9)
(___) Accused's failure to testify
(___) Accused's not testifying under oath
(___) Scope of accused's unsworn statement
(___) Effect of guilty plea
(___) Mendacity
(___) Argument for specific sentence
((___) Clemency (2-7-16 and 2-7-17 or 8-3-34))
((___) Relative severity of sentence (2-7-15))
((___) Credit for Article 15 punishment (2-7-21))
(___) _____
(___) _____
(___) _____
(___) Concluding instructions (2-5-24)

V. EXCUSING MEMBERS. Give Excusal Instruction at 2-5-25

Appendix J
DuBay Hearing Procedure

NOTE: Scope of this appendix. When a record of trial is deficient on a particular issue, appellate courts sometimes order limited evidentiary hearings to assist them in performing their appellate duties. These hearings generally require the MJ to make specific findings of fact and conclusions of law on a particular issue, thus eliminating "the unsatisfactory alternative of settling [an] issue on the basis of ex parte affidavits, amidst a barrage of claims and counterclaims." United States v. DuBay, 37 CMR 411, 413 (CMA 1967).

MJ: Please be seated. This limited hearing is called to order.

TC: This limited hearing was ordered by _____ in accordance with United States v. DuBay. Appellate Exhibit I (__) is the order from _____ returning the record of trial to The Judge Advocate General, for remand to a convening authority to order a limited hearing pursuant to United States v. DuBay. Appellate Exhibit II (__) is the memorandum from The Judge Advocate General to the Commander, _____, designating him/her as the convening authority authorized to order this limited hearing. Appellate Exhibit III (__) is the advice from the Staff Judge Advocate to the convening authority and the convening authority's order to conduct this limited hearing. (Appellate Exhibit IV (__) is the docketing order for this hearing, with the written input from both sides attached.) A copy of these appellate exhibits, along with the record of trial in this case, have been furnished to the military judge, counsel, and the appellant.

NOTE: The MJ should also require any additional documents relating to the hearing be made Appellate Exhibits at this point. The record of trial of the prior trial ordinarily should not be marked as an Appellate Exhibit.

TC: The government is ready to proceed in this limited hearing.

MJ: Defense Counsel, do you have any challenges to the jurisdiction of this limited hearing?

DC: (Responds.)

TC: (I) (All members of the prosecution) have been detailed to this limited hearing by (name of detailing authority). (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 hearing.

TC: The appellant and the following persons detailed to this hearing are present: _____, Military Judge; _____, Trial Counsel; and _____, Defense Counsel. No voting members of the court are present or required. The following persons detailed to this court are absent: _____.

NOTE: Oaths for counsel. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the MJ: "Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?"

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

NOTE: When detailed, the reporter is responsible for recording the proceedings, for accounting for the parties to the trial, and for keeping a record of the hour and date of each opening and closing of each session whether a recess, adjournment, or otherwise, for insertion in the record.

MJ: _____, you have the right to be represented by _____, your detailed military defense counsel. He/She is provided to you at no expense to you.

You also have the right to request a different military lawyer to represent you. If the person you request were reasonably available, he or she would be appointed to represent you free of charge. If your request for this other military lawyer were granted, however, you would not have the right to keep the services of your detailed defense counsel because you are entitled only to one military lawyer. You may ask his/her superiors to let you keep your detailed counsel, but your request would not have to be granted.

In addition, you have the right to be represented by a civilian lawyer. A civilian lawyer would have to be provided by you at no expense to the government.

If a civilian lawyer represents you, you can also keep your military lawyer on the case to assist your civilian lawyer, or you could excuse your military lawyer and be represented only by your civilian lawyer. Do you understand that?

APP: (Responds.)

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

APP: (Responds.)

MJ: By whom do you wish to be represented?

APP: (Responds.)

MJ: And by him/her/them alone?

APP: (Responds.)

NOTE: If the accused elects pro se representation, see applicable inquiry at 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 applicable inquiry at paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.

NOTE: If the original defense counsel from trial is not present, the MJ should inquire or explain as applicable why the attorney-client relationship has ceased (Example: Former defense counsel left active duty or appellant is claiming ineffective assistance of counsel against former defense counsel). In any situation where it appears the appellant may have a legal right to the assistance of a former defense counsel, the MJ should obtain from the appellant an affirmative waiver of that former defense counsel's presence.

MJ: _____ is no longer on active duty and cannot be detailed by military authority to represent you at this hearing. However, you could attempt to retain _____ as civilian counsel. Accordingly, _____ has been detailed to represent you at this hearing. Do you wish to proceed with this hearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this hearing?

MJ: Because you have made allegations after trial that _____ was ineffective in his/her former representation of you, he/she has not been detailed to represent you at this hearing. Accordingly, _____ has been detailed to represent you at this hearing. Do you wish to proceed with this hearing without _____ and with only _____ as your counsel? Do you expressly consent to not having _____ represent you at this hearing?

MJ: Defense Counsel will announce by whom he/she/they (was) (were) detailed and his/her/their qualifications.

DC: (I) (All detailed members of the defense) have been detailed to this hearing 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 proceeding.

(OATH FOR CIVILIAN COUNSEL:) MJ: 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 hearing. Counsel for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn.

TC: Your Honor, are you aware of any matter that might be a ground for challenge against you?

MJ: (I am not. I was the trial judge for the _____ portion of this case.) (I am not. I was not the trial judge for any prior proceedings in this case, whether pretrial, trial or post-trial.) (_____.) Does either side desire to question or to challenge me?

TC/DC: (Respond.)

MJ: Counsel, based on Appellate Exhibit(s) __, the purpose of this limited hearing is _____. Do both counsel agree?

TC/DC: (Respond.)

MJ: _____ has your defense counsel explained the nature of this hearing to you?

APP: (Responds.)

MJ: Defense Counsel, does the accused have in front of (him) (her) a copy of Appellate Exhibit I (__), the appellate court's order directing this hearing?

DC: (Responds.)

MJ: _____, look at page (__) of Appellate Exhibit I (__). The appellate court told me to determine _____. Do you see that portion of Appellate Exhibit I (__)? Do you understand that my sole purpose at this hearing is to listen to the matters presented by the parties and then make findings of fact and conclusions of law with respect to the issue(s) that the appellate court specified?

APP: (Responds.)

MJ: I have no authority to change anything that happened at your original trial. I cannot alter any prior ruling, finding, or sentence. When I provide my findings and conclusions, the appellate court will decide what happens in your case. Do you understand that?

APP: (Responds.)

MJ: Because the defense raised the matter at issue in this hearing, I will allow the defense to go first with opening statement, presentation of the evidence and argument. Does the defense have an opening statement?

DC: (Responds.)

MJ: Does the government have an opening statement?

TC: (Responds.)

MJ: Defense Counsel, you may present evidence.

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 the 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).

DC: The defense has nothing further.

MJ: Trial Counsel, you may present evidence.

TC: The government has nothing further.

MJ: Defense Counsel, do you wish to present any rebuttal evidence?

DC: (Responds.)

MJ: Defense Counsel, you may present closing argument.

DC: (Responds.)

MJ: Trial Counsel, you may present closing argument.

TC: (Responds.)

MJ: I will prepare findings of fact and conclusions of law, which will be provided to counsel and attached to this record as Appellate Exhibit __ prior to my authentication of the record.

MJ: Is there anything further from either party?

TC/DC: (Respond.)

MJ: This hearing is adjourned.

Glossary

Section I
Abbreviations

ABR
Army Board of Review

ACCA
Army Court of Criminal Appeals

ACC
Accused

ACMR
Army Court of Military Review

AFBR
Air Force Board of Review

AFCCA
Air Force Court of Criminal Appeals

AFCMR
Air Force Court of Military Review

ADC
Assistant/Associate Defense Counsel

ATC
Assistant Trial Counsel

BCD
Bad-Conduct Discharge

CDC
Civilian Defense Counsel

CGCCA
Coast Guard Court of Criminal Appeals

CGCMR
Coast Guard Court of Military Review

CMA
United States Court of Military Appeals

CAAF
Court of Appeals for the Armed Forces

DC
Defense Counsel

DD
Dishonorable Discharge

GCM
General Court-Martial

IMC
Individual Military Defense Counsel

MCM
Manual for Courts-Martial

MJ
Military Judge

MJ
Military Justice Reporter

MRE
Military Rules of Evidence

NMCMR
Navy-Marine Corps Court of Military Review

NMCCA
Navy-Marine Corps Court of Criminal Appeals

RCM
Rules for Courts-Martial

SCM
Summary Court-Martial

SPCM
Special Court-Martial

TC
Trial Counsel

UCMJ
Uniform Code of Military Justice

Section II
Terms

This section contains no entries.

Section III
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This section contains no entries.

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