Department of the Army
Pamphlet 27–9

Legal Services

Military Judges' Benchbook

Headquarters
Department of the Army
Washington, DC
29 February 2020

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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 2019 Edition; decisions of military and higher courts; and comments and opinions of individual legal specialists on criminal law. Highlighted below are some of the major changes to the 2020 edition of this Benchbook:

- Substantially revises the Trial Scripts in Chapter 2 to ensure compliance with the sweeping changes to the military justice system that went into effect on 1 January 2019 pursuant to the Military Justice Act of 2016.

- Adds Chapter 3A to include instructions on all punitive articles for offenses committed on or after 1 January 2019. Chapter 3 is now only to be used for offenses committed before 1 January 2019.

- Substantially revises the Trial Scripts in Chapter 6 to ensure compliance with the sweeping changes to the military justice system that went into effect on 1 January 2019 pursuant to the Military Justice Act of 2016.

- Substantially revises the Trial Scripts in Chapter 8 to ensure compliance with the sweeping changes to the military justice system that went into effect on 1 January 2019 pursuant to the Military Justice Act of 2016.

- Substantially revises and updates the Appendices. This revision includes the deletion of two former appendices (former Appendix G and former Appendix I). This update also includes the re-ordering of the remaining Appendices in an order in which they are likely to be used during trial.

- Corrects minor typographical and usage 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, 2019 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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Legal Services
Military Judges' Benchbook

By Order of the Secretary of the Army:

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General, United States Army
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History. This publication is a major revision.

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 practice and administration of military justice.

Applicability. This pamphlet applies to the Regular Army, the Army National Guard/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. 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 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 (JALS-TJ), 9725 Gunston Road, Fort Belvoir, VA 22060-5546.

Distribution. This publication is available in electronic media only and is intended for command levels of the Regular Army, the Army National Guard/Army National Guard of the United States, and the United States Army Reserve.

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*This pamphlet supersedes DA Pamphlet 27-9, 10 September 2014.

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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, the National Judicial College, 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) A military judge 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 herein, 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 (Offenses Committed before 1 January 2019) bears the same number as the corresponding paragraph in Chapter 4 of the 2016 edition of the Manual for Courts-Martial (MCM). Likewise, each pattern instruction contained in Chapter 3A (Offenses Committed on or after 1 January 2019) bears the same number as the corresponding paragraph in Chapter 4 of the 2019 MCM.

For example, regarding larceny, paragraph 46, 2016 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 model specification, which may be slightly different from the MCM sample 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 and Chapter 3A 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.

b. NOTEs are used extensively throughout the instructions in Chapter 3 and Chapter 3A. 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 and Chapter 3A are intended to explain the applicability of the instruction generally, or to alert the 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 any applicable lesser included offenses, any special or other defenses 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 Chapters 3 and 3A, 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 Chapters 3 and 3A conform to the paragraph numbers in the 2016 and 2019 MCM, respectively. Therefore, no MCM citations are listed at paragraph e, “Reference.” Absent other helpful citations, paragraph e is omitted.

CHAPTER 2: TRIAL PROCEDURE AND INSTRUCTIONS

The procedural guides and instructions in this chapter are intended for use in any non-capital 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 procedural and instructional guides appear generally correspond with the point in the trial when the particular wording or instruction is needed or is otherwise appropriate. The *NOTEs* must be carefully reviewed to help determine the applicability of the surrounding procedural guides and instructions.

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.

NOTE: Courts-martial referred to a Special Court-Martial consisting of a Military Judge Alone pursuant to Article 16(c)(2)(A) should be announced as follows:

TC: This court-martial was convened by order of (name of commander/convening authority), (commander's/convening authority's unit), on _____, pursuant to Article 16(c)(2)(A), UCMJ.

NOTE: All other courts-martial should be announced as follows:

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

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

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

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

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

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

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

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

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

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

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

2–1–1. RIGHTS TO COUNSEL

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

You also have the right to be represented by a military counsel of your own selection, provided that the counsel you request is reasonably available. If you were represented by military counsel of your own selection, then your detailed defense counsel would normally be excused. However, you could request that your detailed counsel continue to represent you, but your request would not have to be granted. Do you understand that?

ACC: (Responds.)

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

excuse your military counsel and be represented only by your civilian counsel. Do you understand that?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: By whom do you wish to be represented?

ACC: (Responds.)

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

ACC: (Responds.)

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

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

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

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

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

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

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

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

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

TC/DC/ACC: (Respond.))

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

TC/DC: (Respond.)

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

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

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

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

2–1–2. FORUM RIGHTS (SPECIAL COURT-MARTIAL CONSISTING OF A MILITARY JUDGE ALONE)

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

NOTE: If the charges contain any offenses alleged to have been committed prior to 1 January 2019, the judge must conduct the below colloquy with the accused to determine if he elects to be sentenced under the sentencing rules that became effective on 1 January 2019. To proceed with a special court-martial consisting of a military judge alone, the accused must agree to be sentenced under the sentencing rules that became effective on 1 January 2019. See Executive Order 13825, Section 10, and RCM 902A. If all charges allege offenses committed on or after 1 January 2019, skip to the next NOTE.

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

ACC: (Responds.)

MJ: Have you discussed this with your defense counsel?

ACC: (Responds)

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

ACC: (Responds)

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

ACC: (Responds.)

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

ACC: (Responds)

NOTE: In all cases, continue below.

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

ACC: (Responds.)

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

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

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC/DC/TC: (Respond.)

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

ACC: (Responds.)**)**

NOTE: If the accused objects to the trial of any specification by special court-martial consisting of a military judge alone, recess the proceedings and allow trial counsel to refer the matter to the convening authority. If the accused does not object, announce that the court is assembled, as stated below, and then proceed to paragraph 2-1-6, ARRAIGNMENT. However,

before announcing assembly of the court, the military judge should consider the impact of doing so on the ability to later change the military judge pursuant to RCM 505(e).

MJ: The court is assembled.

2–1–3. FORUM RIGHTS (GENERAL AND SPECIAL COURTS-MARTIAL REFERRED ON OR AFTER 1 JANUARY 2019)

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

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

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

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

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

ACC: (Responds.)

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

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

(OPTION 1. TO BE USED IF <u>ALL</u> SPECIFICATIONS ALLEGE OFFENSES COMMITTED <u>PRIOR TO 1 JANUARY 2019</u>:)
MJ: If you are found guilty in a trial with members, you will also be sentenced by the members. Three-fourths of the members must agree in voting on a sentence.

(OPTION 2. TO BE USED IF <u>ALL</u> SPECIFICATIONS ALLEGE OFFENSES COMMITTED <u>ON OR AFTER 1 JANUARY 2019</u>:)
MJ: If you are found guilty in a trial with members, you will have the option of electing sentencing by the military judge alone or sentencing by court members.

If you elect to be sentenced by court members, three-fourths of the members must agree in voting on a sentence. If you do not elect to be sentenced by the members, then the military judge will decide an appropriate sentence for you.

(OPTION 3. TO BE USED IF THE SPECIFICATIONS ALLEGE SOME OFFENSES COMMITTED PRIOR TO 1 JANUARY 2019 AND SOME OFFENSES COMMITTED ON OR AFTER 1 JANUARY 2019:)
MJ: If you are found guilty in a trial with members, you will also be sentenced by the members. Three-fourths of the members must agree in voting on a sentence. However, if you elect to be sentenced under the sentencing rules that became effective on 1 January 2019, you will also have the option of electing sentencing by the military judge. If you elect to be sentenced under these new sentencing rules, and then elect to be sentenced by the military judge following conviction of any offense, the military judge will decide an appropriate sentence for you.

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

(IN NONCAPITAL CASE:) **MJ: Alternatively, you may request to be tried by military judge alone. If your request is approved, there will be no court members. The military judge will decide whether you are guilty or not guilty, and if found guilty, the military judge will determine your sentence.**

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

ACC: (Responds.)

MJ: Do you understand the choices that you have?

ACC: (Responds.)

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

ACC: (Responds.)

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

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

DC: There is (not).

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

DC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

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

MJ: The court is assembled.

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

2–1–4. FORUM RIGHTS (GENERAL AND SPECIAL COURTS-MARTIAL REFERRED PRIOR TO 1 JANUARY 2019)

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

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

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

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

ACC: (Responds.)

MJ: If you are tried by court members, the members will vote by secret, written ballot and two-thirds of the members must agree before you could be found guilty of any offense. If you were found guilty, then two-thirds must also agree in voting on a sentence (and if that sentence included confinement for more than 10 years, then three-fourths would have to agree).

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

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

ACC: (Responds.)

MJ: Do you understand the choices that you have?

ACC: (Responds.)

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

ACC: (Responds.)

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

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

DC: There is (not).

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

DC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

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

MJ: The court is assembled.

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

2–1–5. SENTENCING RIGHTS

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

MJ: Because you are charged with offenses allegedly occurring both before 1 January 2019 and on or after 1 January 2019, the applicable sentencing rules for this court-martial are the sentencing rules in effect prior to 1 January 2019. If you are convicted of any offense, no matter when the offense was committed, this court-martial will apply the sentencing rules in effect prior to 1 January 2019. However, you may elect to be sentenced under the sentencing rules in effect as of 1 January 2019. If you make this election, and are later convicted of any offense, no matter when the offense occurred, you will be sentenced under the sentencing rules in effect on 1 January 2019. You must make this election prior to arraignment. Your election regarding the applicable sentencing rules is irrevocable, unless I find good cause for a later request to withdraw the election.

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

ACC: (Responds)

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

ACC: (Responds)

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

ACC: (Responds.)

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

ACC: (Responds)

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

2–1–6. ARRAIGNMENT

MJ: The accused will now be arraigned.

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

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

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

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

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

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

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

DC: The accused, _____, pleads as follows:

> ***NOTE: The MJ must ensure that pleas are entered after all motions are litigated. IF GUILTY PLEA, go to paragraph 2-2-1, GUILTY PLEA INTRODUCTION.***
>
> ***NOTE: IF NOT GUILTY (JUDGE ALONE), go to Section III.***
>
> ***NOTE: IF NOT GUILTY (MEMBERS), mark the flyer as an Appellate Exhibit; ensure each court member packet contains copies of the flyer, convening orders, note paper, and witness question forms; then go to Section V.***
>
> ***NOTE: The following admonition is suggested after arraignment. See RCM 804(c)(1).***

MJ: _____, what has just happened is called an arraignment. An arraignment has certain legal consequences, one of which I'd like to explain to you now. Under ordinary circumstances, you have the right to be present at every session and stage of your trial. However, if you are voluntarily absent at any point in this

trial going forward, you may forfeit the right to be present. Future sessions and the trial could go forward even if you were not present, up to and including sentencing, if necessary. Do you understand this?

ACC: (Responds.)

MJ: It is important that you keep your defense counsel and your chain of command apprised of your whereabouts at all times between now and all future sessions of this court-martial. Do you have any questions about what I've told you?

ACC: (Responds.)

SECTION II: GUILTY PLEA INQUIRY

2–2–1. GUILTY PLEA INTRODUCTION

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

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

ACC: (Responds.)

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

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

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

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

Do you have any questions about these rights?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.))

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

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

ACC: (Responds.)

MJ: Is there a stipulation of fact?

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

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

2–2–2. STIPULATION OF FACT INQUIRY

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

DC: (Responds.)

MJ: _____, I have Prosecution Exhibit __ for Identification, a stipulation of fact. Did you sign this stipulation?

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Responds.)

MJ: _____, a stipulation of fact is an agreement among the trial counsel, your defense counsel, and you that the contents of the stipulation are true and if

entered into evidence are uncontradicted facts in this case. No one can be forced to enter into a stipulation, so you should enter into it only if you truly want to do so. Do you understand this?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: If I admit this stipulation into evidence it will be used in two ways. First, I will use it to determine if you are guilty of the offense(s) to which you pled guilty.

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

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

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

ACC: (Responds.)

MJ: Do both counsel also agree to these uses?

TC/DC: (Responds.)

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

ACC: (Responds.)

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

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

MJ: Have you finished reading it?

ACC: (Responds.)

MJ: Is everything in the stipulation true?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

DC: (Responds.)

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

2–2–3. GUILTY PLEA FACTUAL BASIS

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

ACC: (Responds.)

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

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

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

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

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

MJ: Do you admit that you (left your unit on _____) (_____)?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: And that (you did not return until _____) (_____)?

ACC: (Responds.)

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

MJ: Do counsel believe any further inquiry is required?

TC/DC: (Respond.)

2–2–4. MAXIMUM / MINIMUM PUNISHMENT INQUIRY

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

TC: (Responds.)

MJ: Defense Counsel, do you agree?

DC: (Responds.)

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

ACC: (Responds.)

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

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

ACC: (Responds.)

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

TC: (Responds.)

> ***NOTE: "Pretrial agreement" refers to agreements executed under the sentencing rules in effect prior to 1 January 2019. Agreements executed under the sentencing rules which became effective on 1 January 2019 are referred to as "plea agreements." See Article 53a, UCMJ. MJs must be aware of the differences between a "pretrial agreement" and "plea agreement."***
>
> ***NOTE: If no pretrial agreement or plea agreement exists, continue to paragraph 2-2-5 below. If a pretrial agreement exists and trial is by military judge alone, go to paragraph 2-2-6, PRETRIAL AGREEMENT (JUDGE ALONE). If a pretrial agreement exists and trial is with court members, go to paragraph 2-2-7, PRETRIAL AGREEMENT (MEMBERS). If a plea agreement exists, go to paragraph 2-2-8, PLEA AGREEMENT.***

2–2–5. IF NO PLEA AGREEMENT OR PRETRIAL AGREEMENT EXISTS

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

TC/DC: (Respond.)

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

ACC: (Responds.)

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

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

MJ: _____, we will now discuss your pretrial agreement.

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

DC: (Responds)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Responds.)

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

ACC: (Responds.)

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

> ***NOTE: Pretrial Agreement Terms. The military judge must discuss each provision in a pretrial agreement with the accused and obtain the accused's understanding of the agreement. Special attention must be given to terms that purport to waive motions. RCM 705(c) prohibits any term in a pretrial agreement to which the accused did not freely and voluntarily agree or any term which deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in pretrial agreements, they have voided pretrial agreement terms which require the accused to waive all motions or to waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues during the accusatory phase of the court-martial. The pretrial agreement cannot make a trial an empty ritual. See Section VII for scripts for the following clauses that may appear in pretrial agreements:***
>
> ***Dismissal of charge: paragraph 2-7-4***
> ***Testify in another case: paragraph 2-7-5***
> ***Operation of Article 58a on suspended sentence: paragraph 2-7-6***
> ***Suspension without deferment: paragraph 2-7-7***
> ***Waiver of Article 32 Preliminary Hearing: paragraph 2-7-8***
> ***Waiver of members: paragraph 2-7-9***
> ***Waiver of certain motions: paragraphs 2-7-10 and 2-7-11***

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

ACC: (Responds.)

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

TC/DC: (Responds.)

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

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

ACC: (Responds.)

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

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

ACC: (Responds))

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Respond.)

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

2–2–7. PRETRIAL AGREEMENT (MEMBERS)

MJ: _____, we will now discuss your pretrial agreement.

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

DC: (Responds)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Responds.)

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

ACC: (Responds.)

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

> ***NOTE: Pretrial Agreement Terms. The military judge must discuss each provision in a pretrial agreement with the accused and obtain the accused's understanding of the agreement. Special attention must be given to terms that purport to waive motions. RCM 705(c) prohibits any term in a pretrial agreement to which the accused did not freely and voluntarily agree or any term which deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in pretrial agreements, they have voided pretrial agreement terms which require the accused to waive all motions or to waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues during the accusatory phase of the court-martial. The pretrial agreement cannot make a trial an empty ritual. See Section VII for scripts for the following clauses that may appear in pretrial agreements:***
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> > ***Dismissal of charge: paragraph 2-7-4***
> > ***Testify in another case: paragraph 2-7-5***
> > ***Operation of Article 58a on suspended sentence: paragraph 2-7-6***
> > ***Suspension without deferment: paragraph 2-7-7***

Waiver of Article 32 preliminary hearing: paragraph 2-7-8
Waiver of certain motions: paragraphs 2-7-10 and 2-7-11

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

ACC: (Responds.)

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

ACC: (Responds.)

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

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

ACC: (Responds.))

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Respond.)

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

2–2–8. PLEA AGREEMENT

MJ: _____, we will now discuss your plea agreement.

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

DC: (Responds)

MJ: _____, I have Appellate Exhibit __, your plea agreement. Did you sign this document?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Respond.)

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

> ***NOTE: Plea Agreement Terms. The military judge must discuss each provision in a plea agreement with the accused and ensure that (1) the accused understands the agreement, and (2) that the parties agree to the terms of the agreement. See RCM 910(f)(4). If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall: (1) conform, with the consent of the government, the agreement to the accused's understanding, or (2) permit the accused to withdraw the plea.***
>
> ***Special attention must be paid to sentence limitations contained in the agreement, especially when segmented sentencing is required in a military judge alone trial.***
>
> ***Special attention must also be given to terms that purport to waive motions. RCM 705(c) prohibits any term in a plea agreement to which the accused did not freely and voluntarily agree or any term which deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete presentencing proceedings, or the right to complete and effective exercise of post-trial and appellate rights. While military appellate courts have generally upheld waiver of evidentiary objections in plea agreements, they have voided plea agreement terms which require the accused to waive all motions or to waive unlawful command influence issues unless the waiver originated with the defense and concerned only unlawful command influence issues during the accusatory phase of the court-martial. The plea agreement cannot make a trial an empty ritual. See Section VII for scripts for the following clauses that may appear in plea agreements:***
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> > ***Waiver of Article 32 preliminary hearing: paragraph 2-7-8***
> > ***Waiver of members: paragraph 2-7-9***
> > ***Waiver of certain motions: paragraphs 2-7-10 and 2-7-11***

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

ACC: (Responds.)

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

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

ACC: (Responds.))

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Respond.)

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

> ***NOTE: The military judge shall reject a plea agreement that (1) contains a provision that has not been accepted by both parties, (2) contains a provision that is not understood by the accused, (3) contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense, unless such a provision is permissible, (4) is prohibited by law, or (5) is contrary to, or is inconsistent with, a regulation prescribed by the President with respect to terms, conditions, or other aspects of plea agreements. See Article 53a(b). If the military judge does not accept the plea agreement, the military judge shall: (1) issue a statement explaining the basis for the rejection, (2) allow the accused to withdraw any plea, and (3) inform the accused that if the plea is not withdrawn the court-martial may impose any lawful punishment. See RCM 910(f)(7).***
>
> ***NOTE: Go to paragraph 2-2-9, ACCEPTANCE OF GUILTY PLEA.***

2–2–9. ACCEPTANCE OF GUILTY PLEA

MJ: Defense Counsel, have you had enough time and opportunity to discuss this case with _____?

DC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

MJ: And are you satisfied with your defense counsel?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

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

DC: (Responds.)

MJ: Are you a citizen of the United States?

ACC: (Responds.)

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

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

ACC: (Responds.)

MJ: Have you discussed this with your defense counsel?

ACC: (Responds.)

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

ACC: (Responds.)

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

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

DC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

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

> ***NOTE: If the accused pled guilty to only some of the charges and specifications or pled guilty to lesser included offenses, ask the trial counsel if the government is going forward on the offenses to which the accused has pled not guilty. If the government is going forward on any offense(s), do not enter findings except to those offenses to which the accused pled guilty as charged in a members' trial (i.e., if the plea was to a LIO or by exceptions and substitutions and the government is going forward as charged, do not enter findings).***
>
> ***NOTE: If issues of guilt remain in a judge alone (contest), go to Section III and in a court members (contest) go to Section V. The MJ should not inform the court members of plea and findings of guilty prior to presentation of the evidence on another specification to which the accused pled not guilty unless the accused requests it or the guilty plea was to a***

LIO and the prosecution intends to prove the greater offense. Unless one of these two exceptions exists, the flyer should not have any specifications/charges which reflect provident guilty pleas if other offenses are being contested.

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

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

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

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

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

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

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

If the death penalty may be adjudged, return to the appropriate section of Chapter 8.

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

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

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.))

NOTE: For judge alone (sentencing), go to Section IV and for court members (sentencing only), after marking the flyer, go to Section VI. If the death penalty remains a possible punishment that may be adjudged in a capitally-referred case, go to the appropriate section of Chapter 8.

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

TC: The government rests.

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

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

MJ: Defense Counsel, you may proceed.

DC: (Responds.)

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

DC: The defense rests.

2–3–3. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Trial Counsel, any rebuttal?

TC: (Responds / presents rebuttal.)

MJ: Defense Counsel, any surrebuttal?

DC: (Responds / presents surrebuttal.)

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

MJ: _____, you did not testify. Was it your personal decision not to testify?

ACC: (Responds.)

MJ: Trial Counsel, you may present argument.

TC: (Argument.)

MJ: Defense, you may present argument.

DC: (Argument.)

MJ: Trial Counsel, rebuttal argument?

TC: (Responds.)

MJ: The court is closed.

2–3–4. ANNOUNCEMENT OF FINDINGS

MJ: _____, this court finds you: _____.

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

SECTION IV: JUDGE ALONE (SENTENCING)

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

ACC: (Responds.)

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

TC/DC: (Respond.)

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

DC: (Responds.)

MJ: _____, is that correct?

ACC: (Responds.)

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

TC/DC: (Respond.)

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

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

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

TC: The government rests.

> ***NOTE: If a crime victim exercises the right to be reasonably heard, the MJ must ensure that the crime victim is afforded the opportunity to present a***

sworn or unsworn statement, following the government case on sentencing and prior to the defense case on sentencing. See RCM 1001(a)(1)(B), RCM 1001(a)(3)(A), and RCM 1001(c); US v. Barker, 77 MJ 377 (CAAF 2018).

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

VIC: (Responds.)

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

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

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

DC: The defense rests.

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

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

ACC: (Responds.)

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

TC: (Responds.)

MJ: Defense counsel, any surrebuttal?

DC: (Responds.)

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

MJ: Trial Counsel, you may present argument.

TC: (Argument.)

MJ: Defense Counsel, you may present argument.

DC: (Argument.)

NOTE: If the DC concedes that a punitive discharge is appropriate or argues for a discharge, the MJ should conduct an inquiry with the accused to ascertain if the accused knowingly and intelligently agrees with DC's actions. See paragraph 2-7-26, ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE.

2–4–1. POST-TRIAL AND APPELLATE RIGHTS ADVICE

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

DC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

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

DC: (Responds.)

MJ: The court is closed.

2–4–2. ANNOUNCEMENT OF SENTENCE

MJ: The court is called to order.

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

MJ: Accused and Defense Counsel please rise. _____, this court sentences you to: _____.

(MJ: The accused will be credited with __ days of confinement credit against the accused's term of confinement.)

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

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

ACC: (Responds.)

MJ: Counsel, do you agree?

TC/DC: (Respond.)

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

TC/DC: (Responds.)

MJ: _____, is that also your understanding?

ACC: (Responds.)

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

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

TC/DC: (Respond.)

MJ: This court is adjourned.

SECTION V: COURT MEMBERS (CONTESTED)

2–5. PRELIMINARY INSTRUCTIONS

MJ: Bailiff, call the court members.

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

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

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

_____, Military Judge;

_____, Trial Counsel;

_____, Defense Counsel; and

_____, _____, _____, and _____, Court Members.

The following person(s) (is) (are) absent: _____, _____, _____.

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

TC: The prosecution is ready to proceed with trial in the case of the *United States versus (Private) (___)* _____.

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

TC: Do you swear or affirm that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so in the due course of law, so help you God?

MBRS: (Respond.)

MJ: Please be seated. The court is assembled.

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

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

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

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

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

(AIR FORCE) **A "reasonable doubt" is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged, you must find (him) (her) guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.**

(NAVY / USMC) **By "reasonable doubt" is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by**

insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt.

NOTE: In all cases, continue below.

The fact that (a) charge(s) (has) (have) been preferred against this accused and referred to this court for trial does not permit any inference of guilt. You must determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court and upon the instructions I will give you. Because you cannot properly make that determination until you have heard all the evidence and received the instructions, it is of vital importance that you keep an open mind until all the evidence has been presented and the instructions have been given. I will instruct you fully before you begin your deliberations. In so doing, I may repeat some of the instructions which I will give now or possibly during the trial. Bear in mind that all of these instructions are designed to help you perform your duties as court members.

The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you. You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness's intelligence and ability to observe and accurately remember, in addition to the witness's sincerity and conduct in court, friendships, prejudices, and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence, the relationship each witness may have with either side, and how each witness might be affected by the verdict. In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth. The believability of each witness's testimony should be your guide in evaluating testimony, rather than the number of witnesses called.

Counsel soon will be given an opportunity to ask you questions and exercise challenges. With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so. Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement.

Any matter that might affect your impartiality is a ground for challenge. Some of the grounds for challenge would be if you were the accuser in the case, if you have been an investigating or preliminary hearing officer as to any offense charged, or if you have formed or expressed an opinion as to the guilt or

innocence of the accused. To determine if any grounds for challenge exist, counsel for both sides are given an opportunity to question you. These questions are not intended to embarrass you. They are not an attack upon your integrity. They are asked merely to determine whether a basis for challenge exists.

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

It is no adverse reflection upon a court member to be excused from a particular case. You may be questioned either individually or collectively, but in either event, you should indicate an individual response to the question asked. Unless I indicate otherwise, you are required to answer all questions.

You must keep an open mind throughout the trial. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed-session deliberations may you properly make a determination as to whether the accused is guilty or not guilty or as to an appropriate sentence if the accused is found guilty of (any) (this) offense. With regard to sentencing, should that become necessary, you may not have a preconceived idea or formula as to either the type or the amount of punishment that should be imposed if the accused were to be convicted.

Counsel are given an opportunity to question all witnesses. When counsel have finished, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so (at the close of evidence or prior to any witness being permanently excused). There are forms provided for your use if you desire to question any witness. You are required to write your question on the form and sign legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked because your questions, like questions of counsel, are subject to objection. I will conduct any needed examination. There are a couple of things you need to keep in mind concerning questioning.

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

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

Rules of evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial, when I sustain

an objection, disregard the question and answer. If I overrule an objection, you may consider both the question and answer.

Until you close to deliberate, you may not discuss this court-martial with anyone, even amongst yourselves. You must wait until you are all together in your closed session deliberations so that all panel members have the benefit of your discussion. During the course of the trial, including all periods of recess and adjournment, you must not communicate with anyone about the case, either in person or by email, blog, text message, twitter or any form of social media. Posting information about the case on a Facebook page, for example, is considered a form of communicating about the case. You must also not listen to or read any accounts of the case or visit the scene of any incident alleged in the specification(s) or mentioned during the trial. Do not consult any source of law or information, written or otherwise, as to any matters involved in this case and do not conduct your own investigation or research. For example, you cannot consult the Manual for Courts-Martial, dictionaries or reference materials, search the internet, 'Google' the witnesses to learn more about them, review a Wikipedia entry or consult a map or satellite picture to learn more about the alleged crime scene.

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

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

While you are in your closed-session deliberations, only the members will be present. You must remain together and you may not allow any unauthorized intrusion into your deliberations.

Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. However, in addition to the duties of the other members, the senior member will act as your presiding officer during your closed-session deliberations and will speak for the court in announcing the results.

This general order of events can be expected at this court-martial: Questioning of court members, challenges and excusals, opening statements by counsel, presentation of evidence, substantive instructions on the law to you, closing argument by counsel, procedural instructions on voting, your deliberations, and

announcement of the findings. If the accused is convicted of any offense, there will also be sentencing proceedings.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If it becomes too hot or cold in the courtroom, or if you need a break because of drowsiness or for comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

Each of you may take notes if you desire and use them to refresh your memory during deliberations, but they may not be read or shown to other members. At the time of any recess or adjournment, you may (take your notes with you for safekeeping until the next session) (leave your notes in the (courtroom) (deliberation room)).

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

Are there any questions?

MBRS: (Respond.)

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

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

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

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

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.

MEMBER(S): (Respond.) or

TC: (Negative response from the court members.)

2–5–1. VOIR DIRE

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

1. Does anyone know the accused? (Negative response.) (Positive response from _____.)

2. (If appropriate) **Does anyone know any person named in (any of the) (The) Specification(s)?**

3. (The trial counsel is) (I am) going to read a list of the potential witnesses in this case. Afterwards, (the trial counsel) (I) will ask you if anyone knows any of the potential witnesses in this case. [Read list of witnesses] Does anyone know any of the potential witnesses in this case?

4. Having seen the accused and having read the charge(s) and specification(s), does anyone believe that you cannot give the accused a fair trial for any reason?

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

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

7. (If appropriate) **Has anyone, or any member of your family, or anyone close to you personally ever been the victim of an offense similar to any of those charged in this case?**

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

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

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

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

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

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

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

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

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

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

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

18. Has anyone had any specialized law enforcement training or experience, to include duties as a military police officer, off-duty security guard, civilian police officer, or comparable duties other than the general law enforcement duties common to military personnel of your rank and position?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2–5–2. INDIVIDUAL VOIR DIRE

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

MBRS: (Comply.)

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

TC: (Responds.)

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

DC: (Responds.)

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

2–5–3. CHALLENGES

NOTE: Challenges are to be made outside the presence of the court members in an Article 39(a) session. RCM 912 encompasses challenges based upon both actual bias and implied bias. US 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. US 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. US v. Napolitano, 53 MJ 162 (CAAF 2000). In determining whether implied bias is present, military judges look to the totality of the circumstances. US 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. US v. Armstrong, 54 MJ 51, 54 (CAAF 2000). In close cases, military judges are enjoined to liberally grant defense challenges for cause. US v. Clay, 64 MJ 274 (CAAF 2007). This "liberal grant mandate" does not apply to government challenges for cause. US 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. US v. Townsend, 65 MJ 460, 464 (CAAF 2008). The following is a suggested procedure for an Article 39(a) session.

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

TC: (Responds.)

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

DC: (Responds.)

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

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

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

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

DC: (Responds.)

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

TC: (Responds.)

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

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

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

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

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

TC/DC: (Respond.)

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

(Recess.)

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

TC/DC: (Respond.)

NOTE: Continue below with the exercise of peremptory challenges, if any.**MJ: Trial Counsel, do you have a peremptory challenge?**

TC: (Responds.)

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

DC: (Responds.)

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

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

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

MJ: The members are impaneled. Call the members.

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

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

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

2–5–4. ANNOUNCEMENT OF PLEA

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

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

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

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

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

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

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

2–5–5. TRIAL ON MERITS

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

TC: (Responds.)

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

DC: (Responds.)

MJ: Trial Counsel, you may proceed.

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

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

TC: The government rests.

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

2–5–6. TRIAL RESUMES WITH DEFENSE CASE, IF ANY

MJ: Defense Counsel, you may proceed.

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

DC: The defense rests.

2–5–7. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Trial Counsel, any rebuttal?

TC: (Responds / presents case.)

MJ: Defense Counsel, any surrebuttal?

DC: (Responds / presents case.)

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

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

MBRS: (Respond.)

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

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

MBRS: (Comply.)

2–5–8. DISCUSSION OF FINDINGS INSTRUCTIONS

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

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

MJ: _____, you did not testify. Was it your personal decision not to testify?

ACC: (Responds.)]

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

TC/DC: (Respond.)

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

TC/DC: (Respond.)

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

DC: (Responds.)

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

TC/DC: (Respond.)

MJ: What other instructions do the parties request?

TC/DC: (Respond.)

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

TC: (Complies.)

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

DC: (Responds.)

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

TC/DC: (Respond.)

MJ: Call the court members.

2–5–9. PREFATORY INSTRUCTIONS ON FINDINGS

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

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

MJ: Members of the Court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions that I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine whether the accused is guilty or not guilty. The law presumes the accused to be innocent of the charge(s) against (him) (her).

MJ: 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.

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

MJ: 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 and/or Chapter 3a of the Benchbook.

_____ _____ _____ _____.

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

2–5–10. LESSER INCLUDED OFFENSE(S)

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

2-5-10a. LIO Introduction

MJ: The offense(s) of _____ (is) (are) (a) lesser included offense(s) of the offense set forth in (The) Specification (__) (of) (The) (Additional) Charge (__).

When you vote, if you find the accused not guilty of the offense charged, that is, _____, then you should next consider the lesser included offense of _____, in violation of Article __. To find the accused guilty of this lesser offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

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

2-5-10b. LIO Differences
MJ: The offense charged,_____, and the lesser included offense of _____ differ (in that the offense charged requires as (an) element(s) that you be convinced beyond a reasonable doubt that (<u>state the element(s) applicable only to the greater offense</u>), whereas the lesser offense of _____ does not include such (an) element(s).

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

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

2-5-10c. Other LIO's Within the Same Specification
MJ: This lesser included offense differs from the lesser included offense I just discussed with you previously in that the previous lesser included offense of _____ requires as (an) essential element(s) that you be convinced beyond a reasonable doubt that (<u>state the element(s) applicable only to the previous lesser offense</u>) whereas this lesser offense of _____ does not include such (an) element(s).

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

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

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

2–5–11. OTHER APPROPRIATE INSTRUCTIONS

NOTE: For other instructions which may be appropriate in a particular case, see Chapter 4, Confessions Instructions; Chapter 5, Special and Other Defenses; Chapter 6, Mental Responsibility; Chapter 7, Evidentiary Instructions. Generally, instructions on credibility of witnesses (see Instruction 7-7-1) and circumstantial evidence (see Instruction 7-3) are typical in most cases and should be given prior to proceeding to the following instructions.

2–5–12. CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS

MJ: You are further advised:

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

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

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

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

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

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

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

(AIR FORCE) **A "reasonable doubt" is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged, you must find (him) (her) guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.**

(NAVY / USMC) **By reasonable doubt is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you shall give him/her the benefit of the doubt and find him/her not guilty. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution that does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element of an offense, then you should find the accused guilty of that offense.**

NOTE: In all cases, continue below.

MJ: 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.

MJ: 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.

MJ: Trial Counsel, you may proceed.

TC: (Argument.)

MJ: Defense Counsel, you may present findings argument.

DC: (Argument.)

MJ: Trial Counsel, rebuttal argument?

TC: (Responds.)

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

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

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

2–5–14. PROCEDURAL INSTRUCTIONS ON FINDINGS

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

(The order in which the (several) charges and specifications are to be voted on will 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 (the) (a) charge, then the finding as to (the) (that) charge must also be guilty. The junior member will collect and count the votes. The count will then be checked by the president, who will immediately announce the result of the ballot to the members.

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

Table 2-1
Votes Needed for a Finding of Guilty

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

Table 2-2
Votes Needed for a Finding of Guilty

No. of Members	Three-Fourths
4	3
6	5
7	6
8	6

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 the findings worksheet, the first portion will be used if the accused is completely acquitted or completely convicted of (the) (all) charge(s) and specification(s). (The second part 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 has been modified to reflect the words that would be deleted, (as well as the words that would be substituted therefor) if you found the accused guilty of the lesser included offense(s). (These) (This) modification(s) of the worksheet in no way indicate(s) (an) opinion(s) by me or counsel concerning any degree of guilt of this accused. (They are) (This is) merely included to aid you in understanding what findings might be made in the case and for no other purpose. The worksheet is provided as an aid in finalizing and announcing your decision.

MJ: Are there any questions about the Findings Worksheet?

MBRS: (Respond.)

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

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

TC/DC: (Respond.)

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

MBR: (Respond.)

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

PRES: (Responds.)

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

TC/BAILIFF: (Complies.)

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

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

MJ: The court is closed.

2–5–15. PRESENTENCING SESSION

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

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

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

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

ACC: (Responds.)

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

TC/DC: (Respond.)

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

DC: (Responds.)

MJ: _____, is that correct?

ACC: (Responds.)

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

TC/DC: (Respond.)

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

TC/DC: (Comply.)

MJ: Is there anything else by either side?

TC/DC: (Respond.)

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

2–5–16. FINDINGS

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

PRES: (Responds.)

MJ: Are the findings reflected on the Findings Worksheet?

PRES: (Responds.)

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

BAILIFF: (Complies.)

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

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

If the words "divers occasions" or another specified number of occasions have been excepted IAW US 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 reviewed the Findings Worksheet and (the findings appear to be in proper form) (_____). Bailiff, please return the findings worksheet to the President.

BAILIFF: (Complies.)

MJ: Accused and Defense Counsel, please rise.

ACC/DC: (Comply.)

MJ: (COL) (___) _____, please announce the findings of the court.

PRES: (Complies.)

MJ: Please be seated. Bailiff, please retrieve all exhibits from the president and hand them to the court reporter.

BAILIFF: (Complies.)

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

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

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

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

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

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

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

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

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.))

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

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

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

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

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

2–5–17. SENTENCING PROCEEDINGS

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

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

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: **_____**.

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.

(If appropriate:) **(MJ: Any crime victim who is present at this presentencing proceeding has the right to be reasonably heard, including the right to make a**

sworn statement, unsworn statement, or both. A crime victim may exercise this right following the government's opportunity to present evidence.)

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

TC: (Responds and presents case on sentencing.)

TC: The government rests.

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

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

VIC: (Responds.)

MJ: Defense Counsel, you may proceed.

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

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

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

MJ: Trial Counsel, any rebuttal?

TC: (Responds / presents case.)

MJ: Defense Counsel, any surrebuttal?

DC: (Responds / presents case.)

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

(The members withdraw from the courtroom.)

2–5–19. DISCUSSION OF SENTENCING INSTRUCTIONS

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

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

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

ACC: (Responds.)

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

TC/DC: (Respond.)

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

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

TC/DC: (Respond.)

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

TC: (Complies.)

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

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

DC: (Responds.)

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

TC/DC: (Respond.)

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

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

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

MJ: Call the members.

2–5–20. SENTENCING ARGUMENTS

MJ: The court is called to order.

TC: All parties to include the members are present.

MJ: Trial Counsel, you may present argument.

TC: (Argument.)

MJ: Defense Counsel, you may present argument.

DC: (Argument.)

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

2–5–21. SENTENCING INSTRUCTIONS

MJ: Members, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment(, if any,) is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as to those in aggravation,) you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he) (she) has been found guilty.

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

MJ: You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. (A single sentence shall be adjudged for all offenses of which the accused has been found guilty.) (A separate sentence must be adjudged for each accused.)

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

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

Reduction to the grade of _____;

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

Confinement for _____; (and)

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

MJ: The minimum punishment that must be adjudged in this case is: (_____).

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

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

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

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

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

1. The nature and circumstances of the offense(s) and the history and characteristics of the accused;

2. The impact of the offense(s) on the financial, social, psychological, or medical well-being of any victim of the offense(s); and the mission, discipline, or efficiency of the command of the accused and any victim of the offense(s);

3. The need for the sentence to reflect the seriousness of the offense(s); promote respect for the law; provide just punishment for the offense(s); promote adequate deterrence of misconduct; protect others from further crimes by the accused; rehabilitate the accused; and provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and

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

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

2–5–22. TYPES OF PUNISHMENT

MJ: In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe ((IF NO MANDATORY MINIMUM SENTENCE, OR NO MINIMUM

SENTENCE LIMITATION IN A PLEA AGREEMENT:) **or you may adjudge no punishment).**

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

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

(REDUCTION:) **MJ: This court may adjudge reduction to the lowest (or any intermediate) enlisted grade. A reduction carries both the loss of military status and the incidents thereof and results in a corresponding reduction of military pay. You should designate only the pay grade to which the accused is to be reduced, for example, E-__. (An accused may not be reduced laterally, that is, from corporal to specialist.)**

> ***NOTE: In Army and Navy/USMC courts-martial, the appropriate instruction (from the two below) on automatic reduction in enlisted grade should be given. However, automatic reductions do not apply in the Air Force and Coast Guard, or in any service in which all offenses were committed on or after 1 January 2019 unless and until an Executive Order is signed authorizing the Service Secretary to implement Article 58a (as of the date of the publication of this DA Pam, no such EO had been signed yet).***

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

(EFFECT OF ARTICLE 58a—NAVY / USMC:) **MJ: I also advise you that any sentence of an enlisted service member in a pay grade above E-1 that includes either of the following two punishments will automatically reduce that service member to the lowest enlisted pay grade E-1 by operation of law. The two punishments are: One, a punitive discharge, meaning in this case (a bad-conduct discharge) (or) (a dishonorable discharge); or two, confinement in excess of three**

months, if the sentence is adjudged in months, or 90 days, if the sentence is adjudged in days. (Accordingly, if your sentence includes either a punitive discharge or confinement in excess of three months or 90 days, the accused will automatically be reduced to E-1.) (Because (a dishonorable discharge) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically be reduced to E-1.) However, notwithstanding these automatic provisions if you wish to sentence the accused to a reduction, you should explicitly state the reduction as a separate element of the sentence.

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

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

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

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

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

MJ: A sentence to confinement for life may be either with eligibility for parole or without eligibility for parole. You are advised that a sentence to "confinement for life without eligibility for parole" means that the accused will not be eligible for parole by any official, but it does not preclude clemency action which might convert the sentence to one which allows parole. A sentence to "confinement for life" or any lesser confinement term, by comparison, means that the accused will have the possibility of earning parole from confinement under such circumstances as are or may be provided by law or regulations. "Parole" is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled on specific conditions and under the possibility of return to incarceration to complete (his) (her) sentence to confinement if the

conditions of parole are violated. In determining whether to adjudge "confinement for life without eligibility for parole" or "confinement for life," if either, you should bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating, clemency, or parole action by the convening authority or any other authority.

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

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

MJ: A sentence to "confinement for life without eligibility for parole" means that the accused will be confined for the remainder of (his) (her) life and will not be eligible for parole by any official, but it does not preclude clemency action that might convert the sentence to one that allows parole. A sentence to "confinement for life," by comparison, means the accused will be confined for the rest of (his) (her) life, but (he) (she) will have the possibility of earning parole from such confinement, under such circumstances as are or may be provided by law or regulations. "Parole" is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility of return to incarceration to complete (his) (her) sentence of confinement if the conditions of parole are violated. In determining whether to adjudge "confinement for life without eligibility for parole" or "confinement for life" bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating or clemency action by the convening authority or any higher authority, nor in the case of "confinement for life" in reliance upon future decisions on parole that might be made by appropriate officials.

(PRETRIAL CONFINEMENT CREDIT, IF APPLICABLE:) **MJ: In determining an appropriate sentence in this case, you should consider that the accused has spent __days in pretrial confinement. If you adjudge confinement as part of your sentence, the days the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve (his) (her) confinement, and will be given on a day for day basis.**

(FORFEITURES—ALL PAY AND ALLOWANCES:) **MJ: This court may sentence the accused to forfeit all pay and allowances. A forfeiture is a financial penalty which deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the**

accused (and (his) (her) family) of such a loss of income. Unless a total forfeiture is adjudged, a sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue. The accused is in pay grade E-__ with over __ years of service, the total basic pay being $_____ per month.

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

MJ: If reduced to the grade of E-__, the accused's total basic pay would be $_____.
If reduced to the grade of E-__, the accused's total basic pay would be $_____.
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: In the case of an accused who is not confined, forfeitures of pay may not exceed two-thirds of pay per month.

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

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

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

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

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

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

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

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

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

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

(FORFEITURES—2/3DS ONLY:) **MJ: This court may sentence the accused to forfeit up to two-thirds pay per month for a period of (12) (__) months. A forfeiture is a financial penalty which deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the accused (and (his) (her) family) of such a loss of income. A sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue.**

MJ: 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.**

(MJ: 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.**

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

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

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

> ***NOTE: Effect of punitive discharge on retirement benefits. The following instruction must be given if requested and the evidence shows any of the***

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

(MJ: 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. US v. Boyd, 55 MJ 217 (CAAF 2001).

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

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

establishment. A dishonorable discharge should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad-conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature).

(ONLY BAD-CONDUCT DISCHARGE ALLOWED:) **MJ: This court may adjudge a bad-conduct discharge. Such a discharge may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. A bad-conduct discharge is a severe punishment and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature.)**

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

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

2–5–23. OTHER INSTRUCTIONS

MJ: In selecting a sentence, you should consider all matters in extenuation, mitigation, and aggravation (, whether introduced before or after findings).

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

(The accused's age)
(The accused's good military character)
(The accused's (record) (reputation) in the service for (good conduct) (efficiency) (bravery) (_____))
(The prior honorable discharge(s) of the accused)
(The combat record of the accused)
(The (family) (domestic) difficulties experienced by the accused)

(The financial difficulties experienced by the accused)
(The accused's (mental condition) (mental impairment) (behavior disorder) (personality disorder) (character disorder) (nervous disorder) (_____))
(The accused's (physical disorder) (physical impairment) (addiction))
(The duration of the accused's pretrial confinement or restriction)
(The accused's GT score of _____)
(The accused's education, which includes: _____)
(That the accused is a graduate of the following service schools:_____)
(That the accused's (evaluation reports) (_____) indicate: _____)
(That the accused is entitled to (wear the following medals and awards: _____) (wear the medals and awards as reflected on (his) (her) record brief)
(Lack of previous convictions or Article 15 punishment)
(Past performance and conduct in the Army as reflected by _____)
(Character evidence—testimony of _____)
(Accused's testimony _____)
(The accused's expression of his desire to remain in the service)
(That the accused has indicated that (he/she) does not desire a (BCD) (DD) (Dismissal)
(Testimony of _____, _____, _____)
(Pretrial punishment experienced by the accused)
(_____)

(MJ: Further, you should consider:

(Previous convictions)
(Prior Article 15s)
(Prosecution exhibits, stipulations, etc.)
(Rebuttal testimony of _____)
(Nature of the weapon used in the commission of the offense)
(Nature and extent of injuries suffered by the victim)
(Period of hospitalization and convalescence required for victim))
(_____)

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

(ACCUSED AND/OR VICTIM NOT TESTIFYING UNDER OATH:) **MJ: (The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court, and must be given appropriate consideration.)**

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

A person making an unsworn statement cannot be cross-examined by the prosecution or defense, or interrogated by court members or me. However,

evidence may be offered to rebut statements of fact contained in unsworn statements. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

> ***NOTE: SCOPE OF ACCUSED'S UNSWORN STATEMENT. The scope of an accused's unsworn statement is broad. US v. Grill, 48 MJ 131 (CAAF 1998); US v. Jeffrey, 48 MJ 229 (CAAF 1998); US v. Britt, 48 MJ 233 (CAAF 1998). If the accused addresses collateral consequences (the treatment or sentence of others, command options, sex offender registration, or other matters) that would be inadmissible but for their being presented in an unsworn statement, the military judge can use the instruction below to "put the information in proper context by effectively advising the members to ignore it." US v. Talkington, 73 MJ 212 (CAAF 2014) (sex offender registration), citing US v. Barrier, 61 MJ 482 (CAAF 2005). In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused's unsworn statement.***

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

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

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

not take) (in this case) (or) (in other cases)) (or) (possible requirements of sex offender registration, and the consequences thereof, at certain locations in the future).

(PLEA OF GUILTY:) **MJ: A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.**

(MENDACITY:) **MJ: The evidence presented (and the sentencing argument of trial counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints.**

First, this factor should play no role in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court.

Second, such lies must have been, in your view, willful and material, meaning important, before they can be considered in your deliberations.

Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

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

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

(IF DEFENSE RETENTION EVIDENCE IS PRESENTED:) **MJ: You have (also) heard testimony from (name witness(es)) indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____). The testimony of a witness indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____) is a matter in mitigation that you should consider in determining an appropriate sentence in this case.**

(IF THERE IS REBUTTAL TO DEFENSE RETENTION EVIDENCE:) **MJ: In response to this evidence offered by the defense, you have heard testimony from (name witness(es)) indicating that the witness does not (desire to continue to serve with the accused) (desire to deploy with the accused) (_____). This evidence can only be considered for its tendency, if any, to rebut the defense evidence on this issue.**

(CONCLUDING INSTRUCTIONS FOR ALL REHABILITATIVE POTENTIAL/ RETENTION EVIDENCE:) **MJ: You may not consider testimony about (an accused's rehabilitative potential) (and) (whether a witness does (or does not) (desire to continue to serve with the accused) (desire to deploy with the accused) (_____)) as a recommendation regarding the appropriateness of a punitive discharge or any other specific sentence in this case, because no witness may suggest a specific punishment or sentence. (This rule does not apply to (statements) (testimony) by the accused regarding personal requests he/she may make in relation to specific punishments.). Whether the accused should receive a punitive discharge or any other authorized legal punishment is a matter for you alone to decide in the exercise of your independent discretion based on your consideration of all the evidence.**

> ***NOTE: Pretrial punishment evidence introduced for purposes of mitigation. An accused may introduce evidence of pretrial punishment in mitigation, even though the judge has already awarded specific credit for the Article 13 violation as a matter of law. See US v. Carter, 74 MJ 204 (CAAF 2015). If so, the following instruction is appropriate.***

(PRETRIAL PUNISHMENT EVIDENCE OFFERED IN MITIGATION:) **MJ: In determining an appropriate sentence, you should consider evidence presented that the accused was illegally punished for (this) (these) offense(s) prior to trial in violation of Article 13, UCMJ. You should also consider that I have awarded the accused ___ days of credit for this illegal punishment (in addition to the ____ days of credit for pretrial confinement previously referred to), which will be applied against any sentence to confinement you may adjudge. You should consider evidence of this pretrial punishment, as well as the credit I have awarded for it, in deciding an appropriate sentence in this case.**

(ARGUMENT FOR A SPECIFIC SENTENCE:) **MJ: During argument, trial counsel recommended that you consider a specific sentence in this case. You are advised that the arguments of the trial counsel and (her) (his) recommendations are only (her) (his) individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel. In contrast, you are advised that the defense counsel is speaking on behalf of the accused.**

2–5–24. CONCLUDING SENTENCING INSTRUCTIONS

MJ: When you close to deliberate and vote, only the members will be present. (Alternate members will not, at this time, participate in deliberation or voting.) I

remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your deliberations should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment.

When you have completed your discussion, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. (IF MANDATORY MINIMUM SENTENCE, OR A MINIMUM SENTENCE LIMITATION IN A PLEA AGREEMENT: **Once again, I advise you that any proposed sentence must include at least (a Dishonorable Discharge) (a Dismissal) (confinement for life) (_____).)**

The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain.

(If charges were referred prior to 1 January 2019:) **Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is two-thirds or ___ members. (A sentence which includes (confinement for life without eligibility for parole, or confinement for life, or) confinement in excess of ten years requires the concurrence of three-fourths or __ members.)**

(If charges were referred on or after 1 January 2019:) **Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is three-fourths or ___ members.**

Table 2-3
Votes Needed for Sentencing

No. of Members	Two-Thirds	Three-Fourths
3	2	*
4	3	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 Bailiff may now hand to the president.

BAILIFF: (Complies.)

MJ: Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial or any other publication or writing not properly admitted or received during this trial.

These instructions must not be interpreted as indicating an opinion as to the sentence that should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. The only permissible punishments are those listed on the Sentence Worksheet. When the court returns, I will examine the Sentence Worksheet.

MJ: Do counsel object to the instructions as given or request other instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions?

MBR: (Responds.)

MJ: (COL) (___) _____, if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?

PRES: (Responds.)

MJ: Bailiff, please give the president (Prosecution Exhibit(s) ___) (Defense Exhibit(s) ___) (and) (the Sentencing Instructions).

BAILIFF: (Complies.)

MJ: (COL) (___) _____, please do not mark on any of the exhibits, except the Sentence Worksheet and please bring all the exhibits with you when you return to announce the sentence.

TC: (Complies.)

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

MJ: The court is closed.

2–5–25. POST-TRIAL AND APPELLATE RIGHTS ADVICE

MJ: This Article 39(a) session is called to order. All parties are present, except the court members. MJ: Defense Counsel, have you advised the accused orally and in writing of (his) (her) post-trial and appellate rights including the rights contained in Rule for Court-Martial 1010?

DC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

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

DC: (Responds.)

MJ: While we wait for the members' sentence, this Article 39(a) session is terminated.

2–5–26. ANNOUNCEMENT OF SENTENCE

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

MJ:_____, have you reached a sentence?

PRES: (Responds.)

NOTE: If the president indicates that the members are unable to agree on a sentence, the MJ should give paragraph 2-7-18, the "Hung Jury" instruction.

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

PRES: (Responds.)

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

TC/BAILIFF: (Complies.)

NOTE: If charges were referred <u>prior to 1 January 2019</u>, proceed as stated below. The president will announce the sentence. If charges were referred on or after 1 January 2019, skip to the next NOTE.

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

BAILIFF: (Complies.)

MJ: Accused and Defense Counsel, please rise.

ACC/DC: (Complies)

MJ: (_____), please announce the sentence.

PRES: (Complies.)

MJ: Please be seated. (Trial Counsel) (Bailiff), please retrieve the exhibit(s) from the president.

TC/BAILIFF: (Complies.)

NOTE: If charges were referred <u>on or after 1 January 2019</u>, proceed as stated below. The MJ will announce the sentence adjudged by the members.

MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (_____).

MJ: Accused and Defense Counsel, please rise.

ACC/DC: (Complies)

MJ: _____, this court sentences you to: _____.

MJ: Please be seated. Bailiff, please retrieve the exhibit(s) from the president and return them to the court reporter.

BAILIFF: (Complies.)

NOTE: In all cases, continue below.

MJ: Members of the Court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may 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 withdrew from the courtroom. All other parties are present.

(PRETRIAL CONFINEMENT CREDIT:) **MJ: The accused will be credited with ___ days of pretrial confinement against the accused's term of confinement.**

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

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

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

ACC: (Respond.)

MJ: Do counsel also agree with that interpretation?

TC/DC: (Respond.)

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

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

TC/DC: (Respond.)

MJ: This court is adjourned.

SECTION VI: COURT MEMBERS (SENTENCING ONLY)

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

ACC: (Responds.)

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

TC/DC: (Respond.)

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

DC: (Responds.)

MJ: _____, is that correct?

ACC: (Responds.)

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

TC/DC: (Respond.)

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

TC/DC: (Respond.)

MJ: Is there anything else by either side before we call the members?

TC/DC: (Respond.)

MJ: Bailiff, call the court members.

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

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

TC: The court is convened by Court-Martial Convening Order No. ___, Headquarters _____ dated _____ (as amended by _____), (a copy) (copies) of which (has) (have) been furnished to each member of the court. The accused and the following persons detailed to this court-martial are present: _____, Military Judge; _____, Trial Counsel; _____, Defense Counsel; and _____, _____, _____, 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 (Private) (___)* _____.

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

TC: Do you swear or affirm that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the sentence unless required to do so in the due course of law, so help you God?

MBRS: (Comply.)

MJ: Please be seated. The court is assembled.

2–6–1. PRELIMINARY INSTRUCTIONS

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

At a session held earlier, the accused pled guilty to the charge(s) and specification(s) which you have before you. I accepted that plea and entered findings of guilty. Therefore, you will not have to determine whether the accused is guilty or not guilty as that has been established by (his) (her) plea. Your duty is to determine an appropriate sentence. That duty is a grave responsibility requiring the exercise of wise discretion. Your determination must be based upon all the evidence presented and the instructions I will give you as to the applicable law. Since you cannot properly reach your determination until all the evidence has been presented and you have been instructed, it is of vital importance that you keep an open mind until all the evidence and instructions have been presented to you.

Counsel soon will be given an opportunity to ask you questions and exercise challenges. With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so. Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement.

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

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

It is no adverse reflection upon a court member to be excused from a particular case. You may be questioned either individually or collectively, but in either event, you should indicate an individual response to the question asked. Unless I indicate otherwise, you are required to answer all questions. You must keep an open mind throughout the trial. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to an appropriate sentence, after considering all the alternative punishments of which I will later advise you. You may not have a preconceived idea or formula as to either the type or the amount of punishment which should be imposed, if any.

Counsel are given an opportunity to question all witnesses. When counsel have finished, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so. There are forms provided for your use if you desire to question any witness. You are required to write your question on the form and sign legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked since your questions, like questions of counsel, are subject to objection. I will conduct any needed examination. There are a couple of things you need to keep in mind with regard to questioning.

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

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

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

Until you close to deliberate, you may not discuss this court-martial with anyone, even amongst yourselves. You must wait until you are all together in your closed session deliberations so that all panel members have the benefit of your discussion. During the course of the trial, including all periods of recess and adjournment, you must not communicate with anyone about the case, either in person or by email, blog, text message, twitter or other form of social media. Posting information about the case on a Facebook page, for example, is considered a form of communicating about the case. You must also not listen to or read any accounts of the case or visit the scene of any incident alleged in the specification(s) or mentioned during the trial. Do not consult any source of law or information, written or otherwise, as to any matters involved in this case and do not conduct your own investigation or research. For example, you cannot consult the Manual for Courts-Martial, dictionaries or reference materials, search the internet, 'Google' the witnesses to learn more about them, review a Wikipedia entry or consult a map or satellite picture to learn more about any alleged crime scene.

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

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

While you are in your closed session deliberations, only the members will be present. You must remain together and you may not allow any unauthorized intrusion into your deliberations.

Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. However, in addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations.

This general order of events can be expected at this court-martial: Questioning of court members, challenges and excusals, presentation of evidence, closing argument by counsel, instructions on the law, your deliberations, and announcement of the sentence.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If it becomes too hot or cold in the courtroom, or if you need a break because of drowsiness or for comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

Each of you may take notes if you desire and use them to refresh your memory during deliberations, but they may not be read or shown to other members. At the time of any recess or adjournment, you should (take your notes with you for safekeeping until the next session) (leave your notes in the courtroom).

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

MJ: Are there any questions?

MBRS: (Respond.)

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

MBRS: (Comply.)

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

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

TC: The records of this case disclose (no grounds for challenge) (grounds for challenge of _____ for the following reasons).

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

MBRS: (Respond.) or

TC: (Negative response from the court members.)

2–6–2. VOIR DIRE

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

1. Does anyone know the accused? (Negative response.) (Positive response from _____.)

2. Does anyone know any person named in any of the specifications?

3. (The trial counsel is) (I am) going to read a list of the potential witnesses in this case. Afterwards, I will ask you if anyone knows any of the potential witnesses in this case. [Read list of witnesses] **Does anyone know any of the potential witnesses in this case?**

4. Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?

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

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

7. Has anyone, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to any of those charged in this case?

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

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

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

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

11. Has anyone had any specialized law enforcement training or experience, to include duties as a military police officer, off-duty security guard, civilian police officer or comparable duties other than the general law enforcement duties common to military personnel of your rank and position?

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

> ***NOTE: If question 12 is answered in the affirmative, the military judge may want to ask questions 13 and 14 out of the hearing of the other members.***

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

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

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

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

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

18. You will be instructed in detail before you begin your deliberations. I will instruct you on the full range of punishments (from no punishment) up to the maximum punishment. You should consider all forms of punishment within that range. Consider doesn't necessarily mean that you would vote for that particular punishment. Consider means that you think about and make a choice in your mind, one way or the other, as to whether that's an appropriate punishment. Each member must keep an open mind and not make a choice, nor foreclose from

consideration any possible sentence, until the closed session for deliberations and voting on the sentence. Can each of you follow this instruction?

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

20. Can each of you reach a decision on a sentence on an individual basis in this particular case and not solely upon the nature of the offense (or offenses) of which the accused has been convicted?

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

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

NOTE: Trial Counsel and Defense Counsel will conduct voir dire if desired, and individual voir dire will be conducted, if required.

2–6–3. INDIVIDUAL VOIR DIRE

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

MBRS: (Comply.)

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

TC: (Responds.)

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

DC: (Responds.)

NOTE: Individual members are recalled for questioning until all individual questioning is complete. Advise any member who is questioned individually not to discuss what he/she just said in the courtroom with any other member when he/she returns to the deliberation room, in order to avoid inadvertently biasing or disqualifying any other member.

2–6–4. CHALLENGES

NOTE: Challenges are to be made outside the presence of the court members in an Article 39(a) session. RCM 912 encompasses challenges based upon both actual bias and implied bias. US 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. US 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. US v. Napolitano, 53 MJ 162 (CAAF 2000). In determining whether implied bias is present, military judges look to the totality of the circumstances. US 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. US v. Armstrong, 54 MJ 51, 54 (CAAF 2000). In close cases, military judges are enjoined to liberally grant defense challenges for cause. US v. Clay, 64 MJ 274 (CAAF 2007). This "liberal grant mandate" does not apply to government challenges for cause. US 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. US v. Townsend, 65 MJ 460, 464 (CAAF 2008). The following is a suggested procedure for an Article 39(a) session.

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

TC: (Responds.)

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

DC: (Responds.)

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

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

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

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

DC: (Responds.)

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

TC: (Responds.)

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

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

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

MJ: At this time, we will take a recess to allow the court reporter to randomly assign numbers to the remaining members. (She) (He) will do so using the panel member random number generator on the Army JAG Corps' site. Each party may be present and observe the court reporter perform this task, if desired.

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

TC/DC: (Respond.)

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

(Recess.)

MJ: Appellate exhibit __ reflects the result of the random assignment of numbers to the remaining members. Does any party have an objection to appellate exhibit __?

TC/DC: (Respond.)

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

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

TC: (Responds.)

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

DC: (Responds.)

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

If charges were referred prior to 1 January 2019, proceed to paragraph 2-6-5, SENTENCING PROCEEDINGS.

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

MJ: The members are impaneled. Bailiff, call the members.

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

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

2–6–5. SENTENCING PROCEEDINGS

MJ: Court Members, at this time we will begin the sentencing phase of this court-martial. Trial Counsel, you may read the personal data concerning the accused as shown on the charge sheet.

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

MJ: Members of the Court, I have previously admitted into evidence (Prosecution Exhibit(s) ___, which (is) (are) _____) (and) (Defense Exhibit(s) ___, which (is) (are) _____). You will have (this) (these) exhibit(s) available to you during your deliberations. (Trial Counsel, you may read the stipulation of fact into evidence.)

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

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

TC: (Responds and presents case on sentencing.)

NOTE: The TC administers the oath/affirmation for all witnesses.

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

MBRS: (Respond.)

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

MJ: _____, you are excused. You may step down and (return to your duties) (go about your business).

TC: The government rests.

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

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

VIC: (Responds.)

MJ: Defense Counsel, you may proceed.

NOTE: <u>MRE 412 evidence offered in sentencing.</u> MRE 412 applies in sentencing. US v. Fox, 24 MJ 110 (CMA 1987); US v. Whitaker, 34 MJ 822 (AFCCA 1992).

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

2–6–6. REBUTTAL AND SURREBUTTAL, IF ANY

MJ: Trial Counsel, any rebuttal?

TC: (Responds / presents case.)

MJ: Defense Counsel, any surrebuttal?

DC: (Responds / presents case.)

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

MBRS: (Comply.)

2–6–7. DISCUSSION OF SENTENCING INSTRUCTIONS

MJ: All parties are present as before, except the court members who are absent.

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

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

ACC: (Responds.)

MJ: Counsel, what do you calculate to be the maximum sentence authorized (and the minimum punishment required)?

TC/DC: (Respond.)

NOTE: <u>Plea Agreement</u>. If a plea agreement exists, the members must be instructed on the permissible sentence in accordance with the sentence limitations agreed to by the parties. See RCM 705(d) and RCM 1006(d)(6). The existence of a plea agreement, however, will not be disclosed to the members, except upon request of the accused or when the MJ finds that

disclosure of the existence of the plea agreement is manifestly necessary in the interest of justice because of circumstances arising during the proceeding. See RCM 705(f).

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

TC/DC: (Respond.)

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

TC: (Complies.)

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

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

DC: (Responds.)

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

TC/DC: (Respond.)

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

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

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

MJ: Call the members.

2–6–8. SENTENCING ARGUMENTS

MJ: The court is called to order.

TC: All parties, to include the members, are present.

MJ: Trial Counsel, you may present argument.

TC: (Argument.)

MJ: Defense Counsel, you may present argument.

DC: (Argument.)

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

2–6–9. SENTENCING INSTRUCTIONS

MJ: Members of the Court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, (as well as to those in aggravation), you must bear in mind that the accused is to be sentenced only for the offense(s) of which (he) (she) has been found guilty.

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

MJ: You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. (A single sentence shall be adjudged for all offenses of which the accused has been found guilty.) (A separate sentence must be adjudged for each accused.)

NOTE: Maximum and Minimum Punishment. The MJ must instruct the members on the maximum authorized punishment that may be adjudged and the mandatory minimum punishment, if any. See RCM 1005(e)(1). If there is a plea agreement, the MJ must ensure that this instruction is in accordance with the sentence limitation contained in the plea agreement. See RCM 705(d) and RCM 1006(d)(6). The existence of a plea agreement, however, will not be disclosed to the members, except upon request of the

accused or when the MJ finds that disclosure of the existence of the plea agreement is manifestly necessary in the interest of justice because of circumstances arising during the proceeding. See RCM 705(f).

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

Reduction to the grade of _____;

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

Confinement for _____; (and)

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

MJ: The minimum punishment that must be adjudged in this case is: (_____).

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

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

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

NOTE: The instruction on sentencing considerations following this NOTE should be given only if: (1) all referred specifications allege offenses committed on or after 1 January 2019, or (2) the referred specifications allege some offenses committed before 1 January 2019 and some offenses committed on or after 1 January 2019 AND the accused elected to be sentenced under the "new" sentencing rules which became effective on 1

January 2019. Otherwise, the instruction in the preceding NOTE should be given.

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

1. The nature and circumstances of the offense(s) and the history and characteristics of the accused;

2. The impact of the offense(s) on the financial, social, psychological, or medical well-being of any victim of the offense(s); and the mission, discipline, or efficiency of the command of the accused and any victim of the offense(s);

3. The need for the sentence to reflect the seriousness of the offense(s); promote respect for the law; provide just punishment for the offense(s); promote adequate deterrence of misconduct; protect others from further crimes by the accused; rehabilitate the accused; and provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and

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

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

2–6–10. TYPES OF PUNISHMENT

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

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

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

(REDUCTION:) **MJ: This court may adjudge reduction to the lowest (or any intermediate) enlisted grade, either alone or in connection with any other kind of punishment within the maximum limitation. A reduction carries both the loss of military status and the incidents thereof and results in a corresponding reduction of military pay. You should designate only the pay grade to which the accused is to be reduced, for example, E-___. (An accused may not be reduced laterally, that is, from corporal to specialist).**

NOTE: In Army and Navy/USMC courts-martial, the appropriate instruction (from the two below) on automatic reduction in enlisted grade should be given. However, automatic reductions do not apply in the Air Force and Coast Guard, or in <u>any</u> service in which all offenses were committed on or after 1 January 2019 unless and until an Executive Order is signed authorizing the Service Secretary to implement Article 58a (as of the date of the publication of this DA Pam, no such EO had been signed yet).

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

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

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

(HARD LABOR WITHOUT CONFINEMENT:) **MJ: This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. Such hard labor would be performed in addition to other military duties which would normally be assigned. In the usual course of business, the**

immediate commanding officer assigns the amount and character of the hard labor to be performed.

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

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

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

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

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

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

MJ: A sentence to "confinement for life without eligibility for parole" means that the accused will be confined for the remainder of (his) (her) life, and will not be eligible for parole by any official, but it does not preclude clemency action that might convert the sentence to one that allows parole. A sentence to "confinement for life," by comparison, means the accused will be confined for the rest of (his) (her) life, but (he) (she) will have the possibility of earning parole from such confinement, under such circumstances as are or may be provided by law or regulations. "Parole" is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility of return to incarceration to complete (his) (her) sentence of confinement if the conditions of parole are violated. In determining whether to adjudge "confinement for life without eligibility for parole" or "confinement for life," bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating or clemency action by the convening authority or any higher authority nor, in the case of "confinement for life," in reliance upon future decisions on parole that might be made by appropriate officials.

(PRETRIAL CONFINEMENT CREDIT, IF APPLICABLE:) **MJ: In determining an appropriate sentence in this case, you should consider that the accused has spent ___ days in pretrial confinement. If you adjudge confinement as part of your sentence, the days the accused spent in pretrial confinement will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve (his) (her) confinement, and will be given on a day for day basis.**

(FORFEITURES ALL PAY AND ALLOWANCES:) **MJ: This court may sentence the accused to forfeit all pay and allowances. A forfeiture is a financial penalty which deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the accused (and (his) (her) family) of such a loss of income. Unless a total forfeiture is adjudged, a sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue. The accused is in pay grade E-___ with over ___ years of service, the total basic pay being $ _____ per month.**

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

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

If reduced to the grade of E-___, the accused's total basic pay would be $ _____.
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: In the case of an accused who is not confined, forfeitures of pay may not exceed two-thirds of pay per month.

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

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

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

> ***NOTE: Automatic forfeitures under Article 58b are not authorized for special courts-martial consisting of a military judge alone referred pursuant to Article 16(c)(2)(A).***
>
> ***NOTE: The following instruction may be given in the discretion of the trial judge:***

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

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

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

(FOR SPCM—BCD NOT AUTHORIZED:) **confinement for more than six months, then the accused will forfeit all pay due (him) (her) during any period of confinement. However, when the accused has dependents, the convening authority may direct that any or all of the forfeiture of pay which the accused otherwise by law would be required to forfeit be paid to the accused's dependents for a period not to exceed six months. This action by the convening authority is**

purely discretionary. You should not rely upon the convening authority taking this action when considering an appropriate sentence in this case.)

(FORFEITURES 2/3DS ONLY:) **MJ: This court may sentence the accused to forfeit up to two-thirds pay per month for a period of (12) (___) months. A forfeiture is a financial penalty which deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the accused (and (his) (her) family) of such a loss of income. A sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue.**

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

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

(FINE—GENERAL COURT-MARTIAL:) **MJ: This court may adjudge a fine either in lieu of, or in addition to, forfeitures. A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. (In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offense(s) in this case.)**

(FINE—SPECIAL COURT-MARTIAL:) **MJ: This court may adjudge a fine, either in lieu of, or in addition to, forfeitures. If you should adjudge a fine, the amount of the fine, along with any forfeitures that you adjudge, may not exceed the total amount of forfeitures which may be adjudged, that is, forfeiture of two-thirds pay per month for (six) (___) months(s). A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of the fine. (In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period**

being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed _____ (month(s)) (year).)

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

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

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

(MJ: 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. US v. Boyd, 55 MJ 217 (CAAF 2001).***

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

(DISHONORABLE DISCHARGE ALLOWED:) **MJ: (This court may adjudge either a dishonorable discharge or a bad-conduct discharge.) (The law imposes a mandatory minimum sentence of a dishonorable discharge for the offense(s) of _____.) Such a discharge may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. A dishonorable discharge should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad-conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature.)**

(ONLY BAD-CONDUCT DISCHARGE ALLOWED:) **MJ: This court may adjudge a bad-conduct discharge. Such a discharge may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. A bad-conduct discharge is a severe punishment and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature.)**

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

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

2–6–11. OTHER INSTRUCTIONS

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

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

(The accused's age)
The accused's good military character)
(The accused's (record) (reputation) in the service for (good conduct) (efficiency) (bravery))
(The prior honorable discharge(s) of the accused)
(The combat record of the accused)
(The (family) (domestic) difficulties experienced by the accused)
(The financial difficulties experienced by the accused)
(The accused's (mental condition) (mental impairment) (behavior disorder) (personality disorder))
(The accused's (physical disorder) (physical impairment) (addiction))
(The duration of the accused's pretrial confinement or restriction)
(The accused's GT score of _____)
(The accused's education which includes: _____)
(That the accused is a graduate of the following service schools: _____)
(That the accused's (OER's) (NCOER's) (_____) indicate: _____)
(That the accused is entitled to wear the following medals and awards: _____)
(Lack of previous convictions or Article 15 punishment)
(Past performance and conduct in the Army as reflected by _____)
(Character evidence—testimony of _____)
(Accused's testimony _____)
(The accused's expression of his desire to remain in the service)
(That the accused has indicated that (he/she) does not desire a (BCD) (DD) (Dismissal))
(Testimony of _____, _____, _____)
(Pretrial punishment experienced by the accused)
(_____)

MJ: Further you should consider:

(Previous convictions)
(Prior Article 15s)
(Prosecution exhibits, stipulations, etc.)

(Rebuttal testimony of _____)
(Nature of the weapon used in the commission of the offense)
(Nature and extent of injuries suffered by the victim)
(Period of hospitalization and convalescence required for victim)
(_____)

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

(ACCUSED AND/OR VICTIM NOT TESTIFYING UNDER OATH:) **MJ: (The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court, and must be given appropriate consideration.)**

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

MJ: A person making an unsworn statement cannot be cross-examined by the prosecution or defense, or interrogated by court members or me. However, evidence may be offered to rebut statements of fact contained in unsworn statements. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

> ***NOTE: SCOPE OF ACCUSED'S UNSWORN STATEMENT. The scope of an accused's unsworn statement is broad. US v. Grill, 48 MJ 131 (CAAF 1998); US v. Jeffrey, 48 MJ 229 (CAAF 1998); US v. Britt, 48 MJ 233 (CAAF 1998). If the accused addresses collateral consequences (the treatment or sentence of others, command options, sex offender registration, or other matters) that would be inadmissible but for their being presented in an unsworn statement, the military judge can use the instruction below to "put the information in proper context by effectively advising the members to ignore it." US v. Talkington, 73 MJ 212 (CAAF 2014) (sex offender registration), citing US v. Barrier, 61 MJ 482 (CAAF 2005). In giving the instruction, the military judge must be careful not to suggest that the members should disregard the accused's unsworn statement.***

MJ: The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (_____). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the

accused stands convicted. (Under DOD Instructions, when convicted of certain offenses, including the offense(s) here, the accused must register as a sex offender with the appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration is required in all 50 states; though requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable.)

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

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

(PLEA OF GUILTY:) **MJ: A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.**

(MENDACITY:) MJ: The evidence presented (and the sentencing argument of trial counsel) raise**d 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.**

MJ: First, this factor should play no role in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court. Second, such lies must have been, in your view, willful and material, meaning important, before they can be considered in your deliberations. Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

> ***NOTE: When evidence of rehabilitative potential, defense retention evidence, or government rebuttal to defense retention evidence is introduced, the military judge should consider the following instructions,***

tailored to the specific evidence. US v. Eslinger, 70 MJ 193 (CAAF 2011); US v. Griggs, 61 MJ 402 (CAAF 2005).

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

(IF DEFENSE RETENTION EVIDENCE IS PRESENTED:) **MJ: You have (also) heard testimony from (name witness(es)) indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____). The testimony of a witness indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____) is a matter in mitigation that you should consider in determining an appropriate sentence in this case.**

(IF THERE IS REBUTTAL TO DEFENSE RETENTION EVIDENCE:) **MJ: In response to this evidence offered by the defense, you have heard testimony from (name witness(es)) indicating that the witness does not (desire to continue to serve with the accused) (desire to deploy with the accused) (_____). This evidence can only be considered for its tendency, if any, to rebut the defense evidence on this issue.**

(CONCLUDING INSTRUCTIONS FOR ALL REHABILITATIVE POTENTIAL/ RETENTION EVIDENCE:) **MJ: You may not consider testimony about (an accused's rehabilitative potential) (and) (whether a witness does (or does not) (desire to continue to serve with the accused) (desire to deploy with the accused) (_____)) as a recommendation regarding the appropriateness of a punitive discharge or any other specific sentence in this case, because no witness may suggest a specific punishment or sentence. (This rule does not apply to (statements) (testimony) by the accused regarding personal requests he/she may make in relation to specific punishments.). Whether the accused should receive a punitive discharge or any other authorized legal punishment is a matter for you alone to decide in the exercise of your independent discretion based on your consideration of all the evidence.**

NOTE: Pretrial punishment evidence introduced for purposes of mitigation. An accused may introduce evidence of pretrial punishment in mitigation, even though the judge has already awarded specific credit for the Article 13 violation as a matter of law. US v. Carter, 74 MJ 204 (CAAF 2015). If so, the following instruction is appropriate.

(PRETRIAL PUNISHMENT EVIDENCE OFFERED IN MITIGATION:) **MJ: In determining an appropriate sentence, you should consider evidence presented that the accused was illegally punished for (this) (these) offense(s) prior to trial in**

violation of Article 13, UCMJ. You should also consider that I have awarded the accused ___ days of credit for this illegal punishment (in addition to the ____ days of credit for pretrial confinement previously referred to), which will be applied against any sentence to confinement you may adjudge. You should consider evidence of this pretrial punishment, as well as the credit I have awarded for it, in deciding an appropriate sentence in this case.

(ARGUMENT FOR A SPECIFIC SENTENCE:) **MJ: During argument, trial counsel recommended that you consider a specific sentence in this case. You are advised that the arguments of the trial counsel and (her) (his) recommendations are only (her) (his) individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel. In contrast, you are advised that the defense counsel is speaking on behalf of the accused.**

2–6–12. CONCLUDING SENTENCING INSTRUCTIONS

MJ: When you close to deliberate and vote, only the members will be present. (Alternate members will not participate in deliberation or voting.) I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your deliberations should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment.

MJ: When you have completed your discussion, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. (IF MANDATORY MINIMUM SENTENCE, OR A MINIMUM SENTENCE LIMITATION IN A PLEA AGREEMENT: **Once again, I advise you that any proposed sentence must include at least (a Dishonorable Discharge) (a Dismissal) (confinement for life) (_____).)**

MJ: The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

MJ: You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain.

(If charges were referred prior to 1 January 2019:) **MJ: Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is two-thirds or ___ members. (A sentence which includes (confinement for life without eligibility for parole, or confinement for life,**

or) confinement in excess of ten years requires the concurrence of three-fourths or __ members.)

(If charges were referred on or after 1 January 2019:) **MJ: Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is three-fourths or ___ members.**

Table 2-4
Votes Needed for Sentencing

No. of Members	Two-Thirds	Three-Fourths
3	2	*
4	3	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

MJ: 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.

MJ: 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. The only permissible punishments are those listed on the Sentence Worksheet. When the court returns, I will examine the Sentence Worksheet.

MJ: Do counsel object to the instructions as given or request other instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions?

MBRS: (Respond.)

MJ: (COL) (___) _____, if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?

PRES: (Responds.)

MJ: (Trial Counsel) (Bailiff), please give the president Prosecution Exhibit(s) ___ (and Defense Exhibit(s) ___).

TC/BAILIFF: (Complies.)

MJ: (COL) (___) _____, please do not mark on any of the exhibits, except the Sentence Worksheet, and please bring all the exhibits with you when you return to announce the sentence.

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

MJ: The court is closed.

2–6–13. POST-TRIAL AND APPELLATE RIGHTS ADVICE

MJ: This Article 39(a) session is called to order.

TC: All parties are present except the court members.

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

DC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

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

DC: (Responds.)

MJ: This court is in recess.

2–6–14. ANNOUNCEMENT OF SENTENCE

MJ: The court is called to order.

TC: All parties to include the court members are present as before.

MJ:_____, have you reached a sentence?

PRES: (Responds.)

NOTE: If the president indicates that the members are unable to agree on a sentence, the MJ should give paragraph 2-7-18, the "Hung Jury" instruction.

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

PRES: (Responds.)

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

TC/BAILIFF: (Complies.)

NOTE: If charges were referred prior to 1 January 2019, proceed as stated below. The president will announce the sentence. If charges were referred on or after 1 January 2019, skip to the next NOTE.

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

BAILIFF: (Complies.)

MJ: Accused and Defense Counsel, please rise.

ACC/DC: (Complies.)

MJ: (_____), please announce the sentence.

PRES: (Complies.)

MJ: Please be seated. (Trial Counsel) (Bailiff), please retrieve the exhibit(s) from the president.

TC/BAILIFF: (Complies.)

NOTE: If charges were referred on or after 1 January 2019, proceed as stated below. The MJ will announce the sentence adjudged by the members.

MJ: I have reviewed the Sentence Worksheet and it appears (to be in proper form) (_____).

MJ: Accused and Defense Counsel, please rise. _____, this court sentences you to: _____.

MJ: Please be seated. (Trial Counsel) (Bailiff), please retrieve the exhibit(s) from the president.

TC/BAILIFF: (Complies.)

NOTE: In all cases, continue below.

MJ: Members of the Court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may discuss your personal observations in the courtroom and the process of how a court-martial functions, but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused. Counsel and the accused will remain.

MJ: The members have withdrawn from the courtroom. All other parties are present.

(PRETRIAL CONFINEMENT CREDIT:) **MJ: The accused will be credited with ___ days of pretrial confinement against the accused's term of confinement.**

NOTE: If a <u>pretrial agreement</u> exists continue below. The military judge must ensure that all parties have the same understanding concerning the operation of the quantum portion on the sentence of the court. Otherwise, the plea may be improvident. If no pretrial agreement exists, see next NOTE below.

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

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

ACC: (Respond.)

MJ: Do counsel also agree with that interpretation?

TC/DC: (Respond.)

NOTE: In all cases, continue below.

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

TC/DC: (Respond.)

MJ: This court is adjourned.

SECTION VII: MISCELLANEOUS PROCEDURAL GUIDES

2–7–1. WAIVER OF STATUTORY WAITING PERIOD

MJ: _____, you have a right to a delay of (three) (five) days between the day charge(s) (was) (were) 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.)

2–7–3. WAIVER OF CONFLICT-FREE COUNSEL (DC REPRESENTING MULTIPLE ACCUSED)

MJ: _____, do you understand that you have a constitutional right to be represented by counsel who has undivided loyalty to you and your case?

ACC: (Responds.)

MJ: Do you understand that a lawyer ordinarily should not represent more than one client when the representation involves a matter arising out of the same incident?

ACC: (Responds.)

MJ: For a lawyer to represent more than one client concerning a matter arising out of the same incident, you must consent to that representation. Do you understand that?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: After discussing this matter with (her) (him), did you voluntarily decide for yourself that you would like to have (her) (him) still represent you?

ACC: (Responds.)

MJ: Do you understand that when a defense counsel represents two or more clients regarding a matter arising out of the same incident, then the lawyer may have divided loyalties, that is, for example, the defense counsel may be put in a position of arguing that one client is more at fault than another client?

ACC: (Responds.)

MJ: Understanding that even if an actual conflict of interest does not presently exist between your defense counsel representing you and (her) (his) other client(s), but that one could possibly develop, do you still desire to be represented by _____ ?

ACC: (Responds.)

MJ: Do you understand that you are entitled to be represented by another lawyer where no potential conflict of interest would ever arise?

ACC: (Responds.)

MJ: Knowing this, please tell me why you want to give up your right to conflict-free counsel and be represented by _____?

ACC: (Responds.)

MJ: Do you have any questions about your right to conflict-free counsel?

ACC: (Responds.)

MJ: I find that the accused has knowingly and voluntarily waived (his/her) right to conflict-free counsel and may be represented by _____ at this court-martial.

REFERENCES: US v. Smith, 36 MJ 455 (CMA 1993); US v. Hurtt, 22 MJ 134 (CMA 1986); US v. Breese, 11 MJ 17 (CMA 1981).

2–7–4. PRETRIAL / PLEA AGREEMENT: DISMISSAL OF CHARGE CLAUSE

MJ: Your (pretrial) (plea) agreement indicates that the convening authority has directed the trial counsel to move to dismiss (charge(s) ___ and (its) (their) specification(s) after I accept your plea of guilty. In other words, if I accept your plea of guilty, the government will not prosecute the remaining charge(s) provided your plea of guilty remains in effect until the announcement of sentence, at which time I would grant the motion. Do you understand that?

ACC: (Responds.)

MJ: However, if for some reason your plea of guilty at any time becomes unacceptable, the trial counsel would be free to proceed on (all) (The) (Additional) Charge(s) and (its) (their) specification(s). Do you understand that?

ACC: (Responds.)

2–7–5. PRETRIAL / PLEA AGREEMENT: TESTIFY IN ANOTHER CASE

MJ: In your (pretrial) (plea) agreement, you have offered to testify truthfully as to the facts and circumstances of this case, as you know them, in the trial of *United States v.*_____. If you are called as a witness in that case and either refuse to testify or testify untruthfully, the convening authority will no longer be bound by the sentence limitations contained in Appellate Exhibit ___. Do you understand that?

ACC: (Responds.)

2–7–6. PRETRIAL / PLEA AGREEMENT: OPERATION OF ARTICLE 58A ON A SUSPENDED SENTENCE

NOTE: In Army and Navy/USMC courts-martial, the appropriate instruction (from the two below) on automatic reduction in enlisted grade should be given. However, automatic reductions do not apply in the Air Force and Coast Guard, or in <u>any</u> service in which all offenses were committed on or after 1 January 2019 unless and until an Executive Order is signed authorizing the Service Secretary to implement Article 58a (as of the date of the publication of this DA Pam, no such EO had been signed yet).

MJ: Did you realize at the time you made the agreement, and do you understand now that, under the provisions of Article 58a, UCMJ, if a (dishonorable discharge) (bad-conduct discharge) (confinement for 6 months or 180 days) is adjudged, but suspended by the convening authority as provided in your agreement, you will automatically be reduced to the lowest enlisted pay grade, E-1?

ACC: (Responds.)

2–7–7. PRETRIAL / PLEA AGREEMENT: SUSPENSION WITHOUT DEFERMENT

MJ: Your (pretrial) (plea) agreement provides that the convening authority will suspend for ___ (years) (months) any sentence to confinement which is adjudged. However, the agreement makes no reference to deferment. Did you realize at the time you made the agreement, and do you understand now that the effect of this provision is that you will begin serving any sentence to confinement when adjudged and the convening authority will suspend the (unexecuted) (unserved) portion of any confinement when (she) (he) takes action in your case and you will then be released from confinement?

ACC: (Responds.)

2–7–8. PRETRIAL / PLEA AGREEMENT: ARTICLE 32 WAIVER

NOTE: Use this version for Article 32 preliminary hearings waived on or after 26 December 2014.

MJ: _____, your (pretrial) (plea) agreement states that you agreed to waive the Article 32 preliminary hearing. Have you discussed what an Article 32 preliminary hearing is with your defense counsel?

ACC: (Responds.)

MJ: Do you understand that no charge against you may be tried at a general court-martial without first having an Article 32 preliminary hearing concerning that charge unless you agree otherwise?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: Do you understand that you could cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing, for the preliminary hearing officer to consider in arriving at his or her recommendations?

ACC: (Responds.)

MJ: Do you understand that you could have provided sworn or unsworn testimony at the Article 32 preliminary hearing?

ACC: (Responds.)

(IF THE WAIVER OCCURRED <u>BEFORE</u> 1 JANUARY 2019:) **MJ: Do you understand that the purpose of the Article 32 preliminary hearing is to consider the form of the charges, to determine whether there is probable cause to believe you committed an offense, to determine whether the convening authority has court-martial jurisdiction over the offense and you, and to recommend the disposition that should be made of the case?**

(IF THE WAIVER OCCURRED <u>ON OR AFTER</u> 1 JANUARY 2019:) **MJ: Do you understand that the purpose of the Article 32 preliminary hearing is to determine whether each specification alleges an offense, whether there is probable cause to believe you committed an offense, whether the convening authority has court-martial jurisdiction over the offense and you, and to recommend the disposition that should be made of the case?**

ACC: (Responds.)

MJ: Do you understand that, if legally permissible, one possible strategy for you and your counsel at the preliminary hearing could have been an attempt to have the Article 32 preliminary hearing officer recommend disposition of the charge(s) other than trial by general court-martial?

ACC: (Responds.)

MJ: Did you know about all these rights that you would have at the Article 32 preliminary hearing at the time you elected to give up the right to have the Article 32 preliminary hearing?

ACC: (Responds.)

MJ: Do you freely and willingly agree to proceed to trial by general court-martial without an Article 32 preliminary hearing occurring in your case?

ACC: (Responds.)

MJ: Defense Counsel, if the accused's plea of guilty is determined to be improvident will the accused be afforded an Article 32 preliminary hearing or is it permanently waived?

DC: (Responds.)

MJ: Trial Counsel, do you agree?

TC: (Responds.)

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

MJ: Your (pretrial) (plea) agreement states that you agree to waive, that is give up, trial by members and to select trial by military judge alone.

ACC: (Responds.)

MJ: Do you understand the difference between trial before members and trial before military judge alone, as I explained to you earlier?

ACC: (Responds.)

MJ: Did you understand the difference between the various types of trials when you signed your (pretrial) (plea) agreement?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

NOTE: Waiver of motions in a pretrial agreement or plea agreement. RCM 705 prohibits any term in a pretrial agreement or plea agreement that is not voluntary or deprives the accused of the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights. Thus, a term to "waive all motions" is overbroad and cannot be enforced. However, if the agreement includes a term to waive a particular motion not precluded by RCM 705 or a term to "waive all waiveable motions" or words to that effect, proceed along the lines of the instruction below. See paragraph 2-7-11, WAIVER OF MOTION FOR ILLEGAL PRETRIAL PUNISHMENT (ARTICLE 13) SENTENCING CREDIT.

MJ: Defense Counsel, what motions are you not making pursuant to this provision of the (pretrial) (plea) agreement?

DC: (Responds.)

MJ: _____, your (pretrial) (plea) agreement states that you waive, or give up, the right to make a motion regarding (<u>state the specific motion(s) waived by the agreement</u>). I advise you that certain motions are waived, or given up, if your defense counsel does not make the motion prior to entering your plea. Some motions, however, such as motions to dismiss for a lack of jurisdiction, for example, can never be given up. Do you understand that this term of your (pretrial) (plea) agreement means that you give up the right to make (this) (any) motion which by law is given up when you plead guilty?

ACC: (Responds.)

MJ: In particular, do you understand that this term of your agreement may preclude this court or any appellate court from having the opportunity to determine if you are entitled to any relief based upon (this) (these) motion(s)?

ACC: (Responds.)

MJ: When you elected to give up the right to litigate (this) (these) motion(s), did your defense counsel explain this term of your agreement and the consequences to you?

ACC: (Responds.)

MJ: Did anyone force you to enter into this term of your agreement?

ACC: (Responds.)

MJ: Defense Counsel, which side originated the waiver of motion(s) provision?

DC: (Responds.)

NOTE: Unlawful Command Influence. The government may not require waiver of an unlawful command influence motion to obtain a pretrial agreement or plea agreement. The accused, however, may offer to waive an unlawful command influence motion if the unlawful command influence involves issues occurring only during the accusatory phase of the court-martial (i.e., during preferral, forwarding, and referral of charges), as opposed to the adjudicative process (i.e., which includes interference with witnesses, judges, members, and counsel). See US 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: _____, (although the government originated this term of your (pretrial) (plea) agreement,) did you freely and voluntarily agree to this term of your agreement in order to receive what you believed to be a beneficial agreement?

ACC: (Responds.)

MJ: Defense Counsel, what do you believe to be the factual basis of any motions covered by this term of the (pretrial) (plea) agreement?

DC: (Responds.)

MJ: _____, 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: Knowing what your defense counsel and I have told you, do you want to give up making (this) (these) motion(s) in order to get the benefit of your (pretrial) (plea) agreement?

ACC: (Responds.)

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

ACC: (Responds.)

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

MJ: Your (pretrial) (plea) agreement indicates that you agree to waive, or give up, your right to make a motion about whether you have suffered from illegal pretrial punishment. Article 13 of the Uniform Code of Military Justice essentially prohibits anyone from imposing pretrial punishment upon you except for the minimum amount of restraint necessary to ensure your presence for trial. In addition, your chain of command may not publicly humiliate or degrade you as a form of punishment. Do you understand what I have said?

ACC: (Responds.)

MJ: What was the nature of the pretrial restraint, if any, that you have undergone pending this trial?

ACC: (Responds.)

MJ: (IF ACCUSED HAD BEEN IN PRETRIAL RESTRAINT) What is it about this pretrial restraint that you believe may have been illegal?

ACC: (Responds.)

MJ: Tell me about other illegal pretrial punishment, if any, you may have suffered.

ACC: (Responds.)

MJ: (IF ACCUSED HAD BEEN IN PRETRIAL CONFINEMENT) Do you understand that the law requires that I award you day for day credit against the sentence for any lawfully imposed pretrial confinement imposed in this case?

ACC: (Responds.)

MJ: Do you also understand that if you convinced me that more likely than not you suffered from illegal pretrial punishment, then you would be entitled to (additional) credit against any sentence which you may receive in this case?

ACC: (Responds.)

MJ: Do you understand that, by this term of your (pretrial) (plea) agreement, you are giving up the right for this court, or any court considering an appeal of your case, to determine if you actually suffered from illegal pretrial punishment to include a claim for (additional) credit against your sentence for illegal pretrial punishment?

ACC: (Responds.)

MJ: Defense Counsel, have you considered the amount of credit you would have asked for if this issue were to be litigated?

DC: (Responds.)

MJ: _____, do you understand that the amount of credit for illegal pretrial punishment, if any, would be subject to my discretion depending on the seriousness of the illegal pretrial punishment? (If you succeeded on this issue, do you understand that you may have received the credit sought by your defense counsel, or possibly more or less than that amount?)

ACC: (Responds.)

MJ: Do you understand that by not litigating this issue, you will never know what credit for illegal pretrial punishment, if any, that you would be entitled to, and that you will receive no credit against your sentence for illegal pretrial punishment?

ACC: (Responds.)

MJ: When you elected to give up the right to litigate the illegal pretrial punishment issue, did your defense counsel explain this issue and the consequences to you?

ACC: (Responds.)

MJ: Did anyone force you to enter into this term of your agreement?

ACC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

MJ: Knowing what I have now told you, do you still desire to give up the right to litigate the issue of illegal pretrial punishment as long as your (pretrial) (plea) agreement continues to exist?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: As I have stated, if I accept your waiver of the Article 13 issue, I will not order any credit to be applied against your sentence for illegal pretrial punishment. You may, however, bring to the court's attention (the conditions of your pretrial restraint) (and) (your perceived pretrial punishment) in the sentencing phase of the trial so that the court can consider such matters in deciding upon an appropriate sentence for you. Do you understand that?

ACC: (Responds.)

REFERENCES: US v. McFadyen, 51 MJ 289 (CAAF 1999).

2–7–12. STATUTE OF LIMITATIONS

NOTE: Unless it affirmatively appears in the record that the accused is aware of his/her right to plead the statute of limitations when it is obviously applicable, the MJ has a duty to advise the accused of the right to assert the statute in bar of trial. This advice should be given before the accused is allowed to enter a plea except in the unusual case where the applicability of the statute first becomes known after evidence is presented or after findings. The advice may be substantially as follows:

MJ: _____, one of the offenses for which you are about to be tried is (specify the offense). This offense is alleged to have been committed more than (five) (___) years before the date upon which the sworn charges in this case were received by a summary court-martial convening authority. It therefore appears that the statute of limitations may properly be asserted by you in bar of trial for this offense. In other words, this specification (and charge) must be dismissed upon your request. Take time to consult with your counsel and then advise me whether you wish to assert the statute of limitations in bar of trial for the offense of (specify the offense).

NOTE: An election by the accused to assert the statute should be treated as a motion to dismiss. Where the motion to dismiss because of the statute of limitations raises a question of fact, the MJ should defer ruling until all evidence has been presented. When determination of such issue is essential to the question of guilt or innocence of an alleged offense, the issue of fact must be decided by the court pursuant to appropriate instructions. RCM 905 and 907.

2–7–13. MOTION FOR FINDING OF NOT GUILTY

NOTE: The DC may make any motion for a finding of not guilty when the government rests or after the defense has rested, or both. Such a motion should be made at an Article 39(a) session outside the presence of the members. Before the motion is ruled upon, the DC may properly be required to indicate specifically wherein the evidence is legally insufficient. Also, the ruling on the motion may be deferred to permit the TC to reopen the case for the prosecution and produce any available evidence. The MJ rules finally on the motion for findings of not guilty. If there is any evidence which, together with all inferences that can properly be drawn therefrom and all applicable presumptions, could reasonably tend to establish every essential element of an offense charged, the motion will not be granted. If, using the same test, there is insufficient evidence to support the offense charged, but there is sufficient evidence to support a lesser included offense, the military judge may grant the motion as to the greater part and, if appropriate, the corresponding charge. See RCM 917. Normally, the motion should not be made before the court members. If the motion is mistakenly made before the members and is denied, the MJ should instruct the members as follows:

MJ: You are advised that my ruling(s) on the defense motion for a finding of not guilty must not influence you in any way when you consider whether the accused is guilty or not guilty. The ruling(s) (was) (were) governed by a different standard than that which will guide you in determining whether the accused is guilty or not guilty. A finding of guilty may not be reached unless the government has met its burden of establishing the guilt of the accused beyond a reasonable doubt, and whether this standard of proof has been met is a question which must be determined by you without any references to my prior ruling(s) on the motion(s) for a finding of not guilty.

NOTE: If the motion is granted in part, so that the specification is reduced to a lesser offense, the MJ should instruct the members as follows:

MJ: You are advised that I have found the accused not guilty of the part of (The) Specification (___) of (The) (Additional) Charge _____ which alleges the offense of _____. However, the accused remains charged in this specification with the lesser offense of _____. My ruling must not influence you in any way when you consider whether the accused is guilty or not guilty of the lesser offense. The ruling was governed by a different standard than that which will guide you in determining whether the accused is guilty or not guilty of the lesser offense. A finding of guilty may not be reached unless the government has met its burden of establishing the guilt of the accused beyond a reasonable doubt, and whether this standard of proof has been met is a question which must be determined by you without reference to my prior ruling on the motion for a finding of not guilty.

NOTE: Depending upon the complexity of the changes resulting from a partial finding of not guilty, the MJ should direct the members to amend their copies of the flyer or direct preparation of a new flyer.

2–7–14. RECONSIDERATION INSTRUCTION (FINDINGS)

NOTE: If the charges were referred prior to 1 January 2019, an instruction substantially as follows must be given when any court member proposes reconsideration. If charges were referred on or after 1 January 2019, skip to the next NOTE.

MJ: Reconsideration is a process wherein you are allowed to re-vote on your finding(s) after you have reached a finding of either guilty or not guilty. The process for reconsideration is different depending on whether the proposal to reconsider relates to a finding of guilty or a finding of not guilty. After reaching your finding(s) by the required concurrence, any member may propose that (some or all of) the finding(s) be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the finding(s). In order for you to reconsider and re-vote on a finding, the following rules apply:

Table 2-5
Votes Needed to Reconsider Finding (referral before 1 January 2019)

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.

> ***NOTE: If the charges were referred on or after 1 January 2019, an instruction substantially as follows must be given when any court member proposes reconsideration. If charges were referred prior to 1 January 2019, see the preceding NOTE.***

MJ: Reconsideration is a process wherein you are allowed to re-vote on your finding(s) after you have reached a finding of either guilty or not guilty. The process for reconsideration is different depending on whether the proposal to reconsider relates to a finding of guilty or a finding of not guilty. After reaching your finding(s) by the required concurrence, any member may propose that (some or all of) the finding(s) be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the finding(s). In order for you to reconsider and re-vote on a finding, the following rules apply:

Table 2-6
Votes Needed to Reconsider Finding (referral on or after 1 January 2019)

No. of Members	Not Guilty	Guilty
4	3	2
6	4	2
7	4	2
8	5	3

MJ: If the proposal is to reconsider a not guilty finding, then a majority of the members must vote by secret, written ballot in favor of reconsideration. Since we have ___ members, that means ___ members must vote in favor of reconsidering any finding of not guilty. If the proposal is to reconsider a guilty finding, then more than one-fourth of the members must vote by secret, written ballot in favor of reconsideration. Since we have ___ members, that means ___ members must vote in favor of reconsidering any finding of guilty. If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the findings as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for determining whether the accused is guilty or not guilty, to include the procedural rules pertaining to your voting on the findings and (the required three-fourths concurrence for a finding of guilty) (the unanimous vote requirement for a finding of guilty for a capital offense). (COL) (_____), when the findings are announced, do not indicate whether they are the original findings or the result of reconsideration.

2–7–15. RELATIVE SEVERITY OF SENTENCE

NOTE: The following matters commonly arise pertaining to sentence or during the members' deliberation on sentence. They should be given when counsel or a member of the court raises a question or makes a request calling for such instructions or when the need for such instructions is otherwise apparent. Before answering any question concerning relative severity of sentences, the views of counsel for both sides and the accused should be ascertained. An Article 39(a) session may be required. The following instruction, as modified to meet the circumstances of the particular case, may be given:

MJ: The question as to whether a sentence of _____ is less severe than a sentence of _____ is a question which cannot be resolved with mathematical certainty. However, I remind you of my advice as to the effect of punitive discharges. Both types of punitive discharge and their consequences remain with the accused for the rest of (his) (her) life, whereas the (period of confinement once served) (or) (money once forfeited) does not have the same permanent stigma. In light of these instructions and the facts and circumstances of this case, you should determine which of the proposed sentences is the least severe and vote on it first. In determining the order of severity, any differences among you must be decided by majority vote. After deciding which of the proposed sentences should be voted on first, you should proceed to deliberate and vote on an appropriate sentence in this case.

2–7–16. CLEMENCY (RECOMMENDATION FOR SUSPENSION)

MJ: You have no authority to suspend either a part of or the entire sentence that you adjudge; however, you may recommend such suspension. Such a recommendation is not binding on the convening or higher authority. Thus, in arriving at a sentence, you must be satisfied that it is appropriate for the offense(s) of which the accused has been convicted, even if the convening or higher authority refuses to adopt your recommendation for suspension.

If fewer than all members wish to recommend suspension of a part of, or the entire sentence, then the names of those making such a recommendation, or not joining in such a recommendation, whichever is less, should be listed at the bottom of the Sentence Worksheet.

Where such a recommendation is made, then the president, after announcing the sentence, may announce the recommendation, and the number of members joining in that recommendation. Whether to make any recommendation for suspension of a part of or the entire sentence is solely in the discretion of the court.

Your responsibility is to adjudge a sentence that you regard as fair and just at the time it is imposed, and not a sentence that will become fair and just only if your recommendation is adopted by the convening or higher authority.

2–7–17. CLEMENCY (ADDITIONAL INSTRUCTIONS)

MJ: It is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. However, if any or all of you wish to recommend clemency, it is within your authority to do so after the sentence is announced. Your responsibility is to adjudge a sentence that you regard as fair and just at the time it is imposed and not a sentence that will become fair and just only if the mitigating action recommended in your clemency recommendation is adopted by the convening or higher authority who is in no way obligated to accept your recommendation.

A recommendation by the court for an administrative discharge or disapproval of a punitive discharge, if based upon the same matters as the sentence, is inconsistent with a sentence to a punitive discharge as a matter of law. You may make the court's recommendation expressly dependent upon such mitigating factors as (the (attitude) (conduct) of) (or) (the restitution by) the accused after the trial and before the convening authority's action.

2–7–18. "HUNG JURY" INSTRUCTION

NOTE: Whenever any question arises concerning whether the required concurrence of members on a sentence or other matter relating to sentence is mandatory, or the MJ, after discussion with counsel for both sides and the accused, determines the jury has been deliberating for an inordinate length of time, the court may be advised substantially as follows:

MJ: As the sentence in this case is discretionary with you members, you each have the right to conscientiously disagree. It is not mandatory that the required fraction of members agree on a sentence and therefore you must not sacrifice conscientious opinions for the sake of agreeing upon a sentence. Accordingly, opinions may properly be changed by full and free discussion during your deliberations. You should pay proper respect to each other's opinions, and with an open mind you should conscientiously compare your views with the views of others.

Discussion may follow as well as precede the voting. All members must have a full and fair opportunity to exchange their points of view and to persuade others to join them in their beliefs. It is generally desirable to have the theories for both the prosecution and the defense weighed and debated thoroughly before final judgment. You must not go into the deliberation room with a fixed determination that the sentence shall represent your opinion of the case at the moment, nor should you close your ears to the arguments of the other members who have heard the same evidence, with the same attention, with an equal desire for truth and justice, and under the sanction of the same oath. But you are not to yield your judgment simply because you may be outnumbered or outweighed.

If, after comparing views and repeated voting for a reasonable period in accordance with these instructions, your differences are found to be irreconcilable, you should open the court and the president may then announce, in lieu of a formal sentence, that the required fraction of members are unable to agree upon a sentence.

NOTE: In capital cases, only one vote on the death penalty may be taken.

NOTE: If the President subsequently announces that the court is unable to agree upon a sentence, a mistrial as to sentence should be declared. The court should then be adjourned.

2–7–19. RECONSIDERATION INSTRUCTION (SENTENCE)

NOTE: If the charges were referred <u>before 1 January 2019</u>, an instruction substantially as follows must be given when any court member proposes reconsideration. If charges were referred on or after 1 January 2019, skip to the next NOTE. For reconsideration in a capital sentencing case referred on or after 1 January 2019, skip to the final NOTE.

MJ: Reconsideration is a process wherein you are allowed to re-vote on a sentence after you have reached a sentence. The process for reconsideration is different depending on whether the proposal to reconsider relates to increasing or decreasing the sentence. After reaching a sentence by the required concurrence, any member may propose that the sentence be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the sentence. In order for you to reconsider and re-vote on the sentence, the following rules apply:

Table 2-7
Votes Needed to Reconsider Sentence (referral before 1 January 2019)

No. of Members	Increase Sentence	Decrease Sentence (10 yrs or less)	Decrease Sentence (Conf > 10 yrs)
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 increasing the sentence. If the proposal to reconsider is with a view to decreasing 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 decreasing 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 decreasing the sentence.) (If the sentence you have reached is death, then a proposal by any member for reconsideration

requires you to reconsider.) If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the sentence as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for proposing and determining an appropriate sentence to include the two-thirds (or three-fourths) (or unanimous) concurrence required for a sentence. (COL) (_____), when the sentence is announced, do not indicate whether it is the original sentence or the result of reconsideration.

> ***NOTE: If the charges were referred <u>on or after 1 January 2019</u>, an instruction substantially as follows must be given when any court member proposes reconsideration. If charges were referred prior to 1 January 2019, see the preceding NOTE, except in capital sentencing (then see the next NOTE).***

MJ: Reconsideration is a process wherein you are allowed to re-vote on a sentence after you have reached a sentence. The process for reconsideration is different depending on whether the proposal to reconsider relates to increasing or decreasing the sentence. After reaching a sentence by the required concurrence, any member may propose that the sentence be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote on the sentence. In order for you to reconsider and re-vote on the sentence, the following rules apply:

Table 2-8
Votes Needed to Reconsider Sentence (referral on or after 1 January 2019)

No. of Members	Increase Sentence	Decrease Sentence
4	3	2
6	4	2
7	4	2
8	5	3

If the proposal to reconsider is with a view to increasing the sentence, then a majority of the members must vote by secret, written ballot in favor of reconsideration. Since we have ___ members, that means at least ___ members must vote in favor of reconsideration with a view to increasing the sentence. If the proposal to reconsider is with a view to decreasing the sentence, then more than one-fourth of the members must vote by secret, written ballot in favor of reconsideration. Since we have ___ members, then ___ members must vote in favor of reconsideration with a view to decreasing the sentence. If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the sentence as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for proposing and determining an appropriate sentence to include the three-fourths (or unanimous) concurrence

required for a sentence. (COL) (_____), when the sentence is announced, do not indicate whether it is the original sentence or the result of reconsideration.

> ***NOTE: In a capital sentencing case where the charges were referred on or after 1 January 2019, an instruction substantially as follows must be given when any court member proposes reconsideration. If charges were referred prior to 1 January 2019, including in a capital sentencing case, see the first NOTE.***

MJ: Reconsideration is a process wherein you are allowed to re-vote on the establishment of the aggravating factor(s), on the balancing of extenuating and mitigating factors against the aggravating circumstances, or on the sentence. The process for reconsideration is different depending on which vote you are reconsidering, whether that vote was unanimous or non-unanimous, and, if reconsidering the sentence, whether the proposal to reconsider relates to increasing or decreasing the sentence. After concluding your votes on the establishment of the aggravating factor(s) or on the balancing of extenuating and mitigating factors against the aggravating circumstances, or after reaching a sentence by the required concurrence, any member may propose reconsideration of any of those concluded votes. When this is done, the first step is to vote on the issue of whether to reconsider and re-vote.

In order for you to reconsider and re-vote on the establishment of the aggravating factor(s) or on the balancing of extenuating and mitigating factors against the aggravating circumstances, the following rules apply:

If the proposal is to reconsider a unanimous vote that (the) (an) aggravating factor(s) was established beyond a reasonable doubt or a unanimous vote that the extenuating and mitigating circumstances were substantially outweighed by the aggravating circumstances, then only one member must vote by secret, written ballot in favor of reconsideration. If one member votes to reconsider a unanimous vote, you must reconsider and re-vote on that issue. You will follow the procedure for voting on that issue that I instructed you before.

If the proposal is to reconsider a non-unanimous vote that (the) (an) aggravating factor(s) was established beyond a reasonable doubt or a unanimous vote that the extenuating and mitigating circumstances were substantially outweighed by the aggravating circumstances, then a majority of the members must vote for reconsideration. In other words, if your original vote resulted in a finding that (the) (an) aggravating factor(s) was not established beyond a reasonable doubt or in a finding that the extenuating and mitigating circumstances were not substantially outweighed by the aggravating circumstances, either result would prevent you from considering the death penalty as part of the sentence. In order to reconsider either non-unanimous vote, at least 7 of the 12 members must vote by secret, written ballot for reconsideration. If at least 7 members vote to reconsider a non-unanimous vote, you must reconsider and re-vote on that issue following the procedure I instructed you before. I remind you must unanimously

find both that (the) (an) aggravating factor(s) was established beyond a reasonable doubt and that the extenuating and mitigating circumstances were substantially outweighed by the aggravating circumstances, in order for you to consider death in determining an appropriate sentence. If one of the two votes is non-unanimous, you may not consider death in determining an appropriate sentence.

In order for you to reconsider and re-vote on the sentence, the following rules apply:

If the proposal to reconsider is with a view to increasing the sentence, then a majority of the members, or 7 of the 12 members, must vote by secret, written ballot in favor of reconsideration. If the proposal to reconsider is with a view to decreasing the sentence, then more than one-fourth of the members, or 4 of the 12 members, must vote by secret, written ballot in favor of reconsideration. If the sentence you reached included death, then a proposal by any member for reconsideration requires you to reconsider the sentence. If you do not receive the required concurrence in favor of reconsideration, that ends the issue and you should open the court to announce the sentence as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for proposing and determining an appropriate sentence to include the three-fourths concurrence required for a sentence not including death and the unanimous concurrence required for a sentence including death.

(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 US v. Garrett, 24 MJ 413 (CMA 1987), and US 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: 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 US v. Gammons, 51 MJ 169 (CAAF 1999).

NOTE: 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. US 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., US v. Edwards, 42 MJ 381 (CAAF 1995)), the judge should give an instruction substantially as follows:

MJ: 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: 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.):

MJ: 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. 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.

Table 2-9
Table of Equivalent Punishments

Confinement at Hard labor	Hard Labor Without Confinement	Restriction to Limits	Forfeiture
1 day	1 ½ days	2 days	1 day's pay

Table 2-10
Table of Equivalent Nonjudicial Punishments

Kinds 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 ½ 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 ½ 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.

REFERENCES: US v. Gammons, 51 MJ 169 (CAAF 1999); US v. Pierce, 27 MJ 367 (CMA 1989).

2–7–22. VIEWS AND INSPECTIONS

NOTE: 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: 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: 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: 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: 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: 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: 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. Discussion to RCM 807(b)(2).

(3) Test for whether a view is warranted. US v. Marvin, 24 MJ 365 (CMA 1987); US v. Ayala, 22 MJ 777 (ACMR 1986), aff'd 26 MJ 190 (CAAF 1988); and US v. Huberty, 50 MJ 704 (AFCCA 1999).

(4) View not evidence. US v. Ayala, 22 MJ 777 (ACMR 1986), aff'd 26 MJ 190 (CMA 1988).

(5) Unauthorized view. US v. Wolfe, 24 CMR 57 (CMA 1955).

(6) Completeness of record of a view. US 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 US v. Minter, 8 MJ 867 (NMCMR 1980); See also US v. Denney, 28 MJ 521 (ACMR 1989) (indicating that accused's absence may be considered for rehabilitative potential); US v. Chapman, 20 MJ 717 (NMCMR 1985), aff'd, 23 MJ 226 (CMA 1986) (summary affirmance).

2–7–24. STIPULATIONS OF FACT AND EXPECTED TESTIMONY (NOT IAW A PRETRIAL / PLEA AGREEMENT)

NOTE: Whenever the prosecution or defense offers a stipulation into evidence, the MJ should conduct an inquiry with the accused outside the presence of the court members along the following lines:

MJ: _____, before signing the stipulation, did you read it thoroughly?

ACC: (Responds.)

MJ: Do you understand the contents of the stipulation?

ACC: (Responds.)

MJ: Do you agree with the contents of the stipulation?

ACC: (Responds.)

MJ: Before signing the stipulation, did your defense counsel explain the stipulation to you?

ACC: (Responds.)

MJ: Do you understand that you have an absolute right to refuse to stipulate to the contents of this document?

ACC: (Responds.)

MJ: You should enter into this stipulation only if you believe it is in your best interest to do so. Do you understand that?

ACC: (Responds.)

MJ: _____, I want to ensure that you understand how this stipulation is to be used.

(IF STIPULATION OF FACT:) **MJ: When counsel for both sides and you agree (to a fact) (the contents of a writing), the parties are bound by the stipulation and the stipulated matters are facts in evidence to be considered along with all the other evidence in the case. Do you understand that?**

ACC: (Responds.)

(IF STIPULATION OF EXPECTED TESTIMONY:) **MJ: When counsel for both sides and you agree to a stipulation of expected testimony, you are agreeing that if _____ were present in court and testifying under oath, (she) (he) would testify substantially as set forth in this stipulation. The stipulation does not admit**

the truth of the person's testimony. The stipulation can be contradicted, attacked, or explained in the same way as if the person was testifying in person. Do you understand that?

ACC: (Responds.)

MJ: _____, knowing now what I have told you and what your defense counsel earlier told you about this stipulation, do you still desire to enter into the stipulation?

ACC: (Responds.)

MJ: Do counsel concur in the contents of the stipulation?

TC/DC: (Respond.)

MJ: The stipulation is admitted into evidence as _____.

> ***NOTE: Stipulations of expected testimony are admitted into evidence, but only read to the court members. They are not to be given to them for use in deliberations.***

2–7–25. CONFESSIONAL STIPULATION OF FACT INQUIRY

NOTE: The following inquiry is required by US v. Bertelson, 3 MJ 314 (CMA 1977), whenever a stipulation "practically amounts to a confession" as set forth in the discussion following RCM 811(c).

MJ: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure the accused has a copy.

TC: (Complies.)

MJ: _____, I have before me Prosecution Exhibit ___ for Identification, a stipulation of fact. Did you sign this stipulation?

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Respond.)

MJ: _____, a stipulation of fact is an agreement among the trial counsel, the defense counsel, and you that the contents of the stipulation are true, and if entered into evidence are the uncontradicted facts in this case. No one can be forced to enter into a stipulation, and no stipulation can be accepted without your consent, so you should enter into it only if you truly want to do so. Do you understand this?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: _____, the government has the burden of proving beyond a reasonable doubt every element of the offense(s) with which you are charged. By stipulating to the material elements of the offense(s), as you are doing here, you alleviate that burden. That means that based upon the stipulation alone, and without receiving any other evidence, the court can find you guilty of the offense(s) to which the stipulation relates. Do you understand that?

ACC: (Responds.)

(IF JUDGE ALONE TRIAL:) **MJ: If I admit this stipulation into evidence it will be used in two ways. First, I will use it to determine if you are, in fact, guilty of the offense(s) to which the stipulation relates. And second, I will use it in determining an appropriate sentence for you.**

(IF MEMBERS TRIAL:) **MJ: If I admit this stipulation into evidence it will be used in two ways. First, members will use it to determine if you are, in fact, guilty of the offense(s) to which the stipulation relates. And second, the trial counsel may read it to the court members and they will have it with them when they decide upon your sentence.**

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

ACC: (Responds.)

MJ: Do both counsel also agree to these uses?

TC/DC: (Respond.)

MJ: _____, a stipulation of fact ordinarily cannot be contradicted. You should, therefore, let me know now if there is anything in the stipulation that you disagree with or feel is untrue. Do you understand that?

ACC: (Responds.)

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

> ***NOTE: The MJ should read the stipulation and be alert to resolve inconsistencies between what is stated in the stipulation and what the accused will say during the inquiry establishing the factual basis for the stipulation.***

MJ: Have you finished reading it?

ACC: (Responds.)

MJ: _____, is everything in the stipulation the truth?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: _____, have you consulted fully with your counsel about the stipulation?

ACC: (Responds.)

MJ: After having consulted with your counsel, do you consent to my accepting the stipulation?

ACC: (Responds.)

MJ: _____, at this time I want you to tell me what the factual basis is for this stipulation. Tell me what happened.

> ***NOTE: At this point the military judge must personally question the accused to develop information showing what the accused did or did not do and what he/she intended, where intent is pertinent. The aim is to make clear the factual basis for the recitations in the stipulation. The military judge must be alert to the existence of any inconsistencies between the stipulation and the explanations of the accused. If any arise they must be discussed thoroughly with the accused, and the military judge must resolve them or reject the stipulation.***

MJ: Does either counsel believe that any further inquiry is required into the factual basis for the stipulation?

TC/DC: (Respond.)

MJ: _____, has anybody made any promises or agreements with you in connection with this stipulation?

ACC: (Responds.)

MJ: Counsel, are there any written or unwritten agreements between the parties in connection with the stipulation?

> ***NOTE: Should this inquiry reveal the existence of an agreement not to raise defenses or motions, the stipulation will be rejected as inconsistent with Article 45(a).***

TC/DC: (Respond.)

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

DC: (Responds.)

MJ: Prosecution Exhibit ___ for Identification is admitted into evidence.

2–7–26. ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE

NOTE: 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. US v. Israel, 75 MJ 559 (ACCA 2015); US v. Dresen, 40 MJ 462 (CMA 1994); US 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. US v. McNally, 16 MJ 32 (CMA 1983). But See US v. Lyons, 36 MJ 425 (CMA 1993). The focus of the inquiry is to ensure that the accused consents to the argument and fully understands the ramifications of a punitive discharge or dismissal. Ordinarily, before argument or the accused's making a request for a discharge or dismissal, the defense counsel should inform the military judge outside the presence of the court members of the planned argument or request. This procedure will ensure that the inquiry is done before the members hear the argument or request. If the argument is made before the inquiry below is conducted, the inquiry should be made before the court closes to deliberate on the sentence. If the accused did not wish the argument to be made, the military judge should instruct the members to disregard that portion of the defense's argument. The following inquiry may be appropriate:

MJ: _____, do you understand that the only discharge(s) this court can adjudge (is) (are) a bad-conduct discharge (and a dishonorable discharge) (is a dismissal)?

ACC: (Responds.)

MJ: Do you understand that a (dishonorable discharge) (bad-conduct discharge) (dismissal) will forever adversely stigmatize the character of your military service and it will limit your future employment and schooling opportunities?

ACC: (Responds.)

MJ: Do you understand that a (dishonorable discharge) (bad-conduct discharge) (dismissal) may adversely affect your future with regard to legal rights, economic opportunities, and social acceptability?

ACC: (Responds.)

MJ: Do you understand that by (receiving a (dishonorable discharge) (bad-conduct discharge)) (being dismissed), you will lose substantially all benefits from the Department of Veterans Affairs and the military establishment, as well as other benefits normally given by other governmental agencies?

ACC: (Responds.)

(IF POSSIBILITY OF RETIREMENT) MJ: Do you understand that a (dishonorable discharge) (bad-conduct discharge) (dismissal) terminates your military status and will deprive you of any retirement benefits, to include retired pay?

ACC: (Responds.)

MJ: Have you thoroughly discussed your desires with your defense counsel?

ACC: (Responds.)

MJ: Do you believe you fully understand the ramifications of a (dishonorable discharge) (bad-conduct discharge) (dismissal)?

ACC: (Responds.)

MJ: Are you aware that if you do not receive a punitive discharge from this court-martial, then your chain of command may very well try to administratively separate you from the service?

ACC: (Responds.)

MJ: Are you also aware that an administrative separation is considered much less severe than a discharge from a court-martial and will not stigmatize you with the devastating and long term effects of a discharge from a court-martial?

ACC: (Responds.)

MJ: _____, knowing all that I and your defense counsel have explained to you, is it your express desire to be (discharged from the service with a (dishonorable discharge) (bad-conduct discharge)) (dismissed from the service) (if, as you indicate, it will preclude (confinement) (an extended period of confinement) (_____))?

ACC: (Responds.)

MJ: Do you consent to your defense counsel stating an argument that you desire to be (discharged with a (dishonorable discharge) (bad-conduct discharge)) (dismissed from the service) (if it will preclude (confinement) (an extended period of confinement) (_____))?

ACC: (Responds.)

> ***NOTE: Sentence Appropriateness. The sentencing authority should not adjudge a dishonorable discharge, bad-conduct discharge or a dismissal merely based upon a request for one. The discharge or dismissal must be an appropriate punishment for the accused and the offenses of which the accused stands convicted before it can be adjudged. US v. Strauss, 47 MJ 739 (NMCCA 1997).***

NOTE: 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 US v. Worrell, 3 MJ 817 (AFCMR 1977) (arguing for a dismissal is not ineffective assistance of counsel); US v. Nunes, 39 MJ 889 (AFCCA 1994) (argument held not to be a request for dismissal); US 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: Title 10, US Code, Section 1161(b) (2) authorizes the President to "drop from the rolls of any armed force any commissioned officer…who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court-martial." Section 1167 provides that "a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member's armed force at any time after the sentence to confinement has become final...and the member has served in confinement for a period of six months."

2–7–27. GUILTY PLEA–ADVICE TO ACCUSED WHEN RAISED: MENTAL RESPONSIBILITY, EVIDENCE NEGATING MENS REA, OR COMPETENCE

NOTE: If the accused has pled guilty and the issue of the accused's mental responsibility, lack of mens rea, or competence to stand trial is raised during trial, the military judge should conduct one or more of the following inquires, as appropriate. See Article 50a, UCMJ; Ellis v. Jacob, 26 MJ 90 (CMA 1988); US v. Berri, 33 MJ 337 (CMA 1991); Benchbook Instructions 6-1 through 6-5 (Sanity and Partial Mental Responsibility) and 5-17 (Evidence Negating Mens Rea). During a Care inquiry, to distinguish between the "mere possibility of a defense" (which does not require further inquiry by the military judge) and a "possible defense" (which does), See US v. Hayes, 70 MJ 454 (CAAF 2012).

NOTE: Lack of mental responsibility or lack of mens rea due to partial mental responsibility raised. If the issue of the accused's lack of mental responsibility or lack of mens rea due to partial mental responsibility at the time of the offenses charged has been raised during the providence inquiry, conduct the following inquiry. If necessary, the military judge may sua sponte order an inquiry under RCM 706 to occur during or after the trial.

MJ: Defense counsel, (during my inquiry into the providence of the accused's guilty plea) (during your sentencing case) (_____), the issue of the accused's (lack of mental responsibility) (partial mental responsibility) at the time of the offense(s) charged (in (the) specification(s) (___) of (the) (Additional) Charge (___)) was raised. Specifically, (the accused stated _____) ((Doctor)(_____) testified that _____) (_____). (Do you believe the accused has a defense based upon lack of mental responsibility) (Do you believe the accused, because of partial lack of mental responsibility, was unable to (entertain the premeditated design to kill) (form the specific intent to _____) (know that _____) (act willfully) (_____)) with respect to (the) (those) charged offense(s)?

DC: (Responds.)

MJ: Have you fully investigated potential mental responsibility defenses by reviewing the facts in this case and speaking with the accused? (Have you spoken with the accused's doctor(s)?) (Have you obtained assistance from mental health professionals in evaluating this issue?)

DC: (Responds.)

MJ: Has a mental responsibility inquiry been conducted under RCM 706? (If not, do you believe there is reason to believe the accused lacked mental responsibility for any offense charged?)

DC: (Responds.)

(MJ: Do you desire a continuance in order to further investigate this issue?

DC: (Responds.))

> ***NOTE: <u>Defense states no lack of mental responsibility defense</u>. If defense counsel states that no mental responsibility defenses exist, the MJ should conduct the following inquiry of the accused.***

MJ: _____, military law recognizes a defense of lack of mental responsibility. This lack of mental responsibility defense would be a complete defense to the offense(s) charged (in (the) specification(s) (___) of (the) (Additional) Charge (___)). The defense of lack of mental responsibility has two parts. First, at the time of (the) (those) charged offense(s), you must have been suffering from a severe mental disease or defect. Second, as a result of that severe mental disease or defect, you must have been unable to appreciate the nature and quality or wrongfulness of your conduct. Do you understand this?

ACC: (Responds.)

MJ: _____, has your defense counsel explained to you the defense of lack of mental responsibility?

ACC: (Responds.)

MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were suffering from a severe mental disease or defect?

ACC: (Responds.)

MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were unable to appreciate the nature and quality or wrongfulness of your actions?

ACC: (Responds.)

MJ: Did you understand what you were doing at the time of (the) (those) charged offense(s)? Why?

ACC: (Responds.)

MJ: Did you understand what you were doing at the time of (the) (those) charged offense(s) was wrong? Why?

ACC: (Responds.)

MJ: _____, based on what I have told you and what your defense counsel told you, do you believe the defense of lack of mental responsibility applies in your case?

ACC: (Responds.)

MJ: Defense counsel, are you affirmatively disclaiming the defense of lack of mental responsibility?

DC: (Responds.)

MJ: _____, do you agree?

ACC: (Responds.)

NOTE: Defense states no partial lack of mental responsibility for specific mens rea offense. If any offense includes a specific mens rea element, ask the following additional questions.

MJ: Defense counsel, based on your investigation, do you believe the accused suffered from a mental (disease) (defect) (impairment) (condition) (deficiency) (character or behavior disorder) (_____) that prevented him/her from (entertaining the premeditated design to kill) (forming the specific intent to _____) (knowing that _____) (acting willfully) (_____) at the time he/she committed (the) (those) charged offense(s)?

DC: (Responds.)

MJ: _____, has your defense counsel explained to you that partial lack of mental responsibility can negate certain mental states required for (the) (those) charged offense(s)?

ACC: (Responds.)

MJ: (The military judge should describe the offense(s) to which partial lack of mental responsibility might apply, and the affected elements, as follows:) I advised you earlier that one of the elements of the offense(s) charged (in (the) specification(s) (___) of (the) (Additional) Charge (___)) is that you (had a premeditated design to kill) (had the specific intent to _____) (knew that _____) (acted willful) (_____). You may have been sane at the time of the charged offense(s), yet, because of some underlying mental disease, defect, impairment, condition, deficiency, or character or behavior disorder, you may have been incapable of (entertaining the premeditated design to kill) (forming the specific intent to _____) (having knowledge that _____) (acting willfully) (_____). Do you understand this?

ACC: (Responds.)

MJ: What, if any, mental disease, defect, impairment, condition, deficiency, or character or behavior disorder, were you suffering from at the time you committed (the) (those) charged offense(s)? Were you seeing a doctor? What medications were you taking at that time? What effects, if any, did the mental

disease, defect, impairment, condition, deficiency, or character or behavior disorder and these medications have on you? At the time you committed (the) (those) charged offense(s), did you continue to perform military duties?

ACC: (Responds.)

MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were suffering from a mental disease, defect, impairment, condition, deficiency, or character or behavior disorder that would have prevented you from (entertaining the premeditated design to kill) (forming the specific intent to _____) (having knowledge that _____) (acting willfully) (_____)? Why?

ACC: (Responds.)

MJ: Defense counsel, are you affirmatively disclaiming the defense of partial mental responsibility with respect to (the) (those) charged offense(s)?

DC: (Responds.)

MJ: _____, do you agree?

ACC: (Responds.)

> ***NOTE: <u>Lack of competence to stand trial raised</u>. To the extent that the accused's competence to stand trial is raised, the military judge should conduct the following inquiry.***

MJ: Defense counsel, have you fully investigated the issue of whether the accused suffers from a mental disease or defect that prevents him/her from understanding the nature of these proceedings or from cooperating intelligently with you in the preparation of the defense?

DC: (Responds.)

MJ: Based on your investigation, do you believe the accused suffers from a mental disease or defect that prevents him/her from understanding the nature of these proceedings or prevented him/her from cooperating intelligently with you in the preparation of the defense?

DC: (Responds.)

MJ: Has a mental responsibility inquiry been conducted under RCM 706? (If not, does defense counsel believe there is reason to believe the accused lacks competence to stand trial?)

DC: (Responds.)

MJ: Do you desire a continuance in order to further investigate this issue?

DC: (Responds.)

MJ: _____, are you currently suffering from any mental disease or defect such that you cannot understand these proceedings?

ACC: (Responds.)

MJ: Have you been diagnosed with any condition that would affect your ability to understand these proceedings or cooperate with your defense counsel?

ACC: (Responds.)

MJ: Have you understood everything we've talked about today?

ACC: (Responds.)

MJ: Do you understand the roles of all the participants? Do you understand the trial counsel represents the government and has the responsibility to present evidence tending to establish your guilt of these offenses?

ACC: (Responds.)

MJ: Do you understand the defense counsel represents you and has the responsibility to challenge the evidence presented against you, cross-examine witnesses, and make legal arguments on your behalf?

ACC: (Responds.)

MJ: Do you understand I am the military judge in your case and I rule on all objections, preside over all open sessions of court, and, if you select trial by judge alone, determine your guilt or innocence and, if found guilty, will impose sentence upon you?

ACC: (Responds.)

MJ: Are you taking any medication? What medication are you taking? Are you feeling the effects of any medication? Within the last 24 hours have you taken the medication in the prescribed dosage and at the times ordered by the doctor? Does taking this medication in the prescribed manner make it difficult for you to understand these proceedings or have you understood everything we've talked about today?

ACC: (Responds.)

MJ: How long have you been taking (this) (these) medication(s)? Have you continued to perform military duties while you are taking your medication(s)? Do you have a profile limiting your military duties? Have you been assigned to quarters?

ACC: (Responds.)

MJ: I note that during my discussion with the accused today for the past ____ hours, the accused (has been engaged and attentive) (has responded appropriately to my questions) (has maintained eye contact with me) (has not slurred his word nor stuttered, stumbled, or otherwise given me any indication that he is anything but fully coherent) and (has demonstrated appropriate affect for these proceedings) (_____). It appears to me that from his participation and demeanor throughout the proceedings, the accused is not impaired and that he understands the proceedings that have taken place today and is able to participate in his defense. Have you understood the proceedings that have taken place today?

ACC: (Responds.)

MJ: Are you able to assist your defense counsel in preparing your defense?

ACC: (Responds.)

MJ: I find that the accused is not presently suffering from a mental disease or defect rendering him/her mentally incompetent to stand trial under RCM 909. The accused is able to understand the nature of these proceedings and able to (conduct) (cooperate intelligently in) the defense of this case.

2–7–28. VICTIM'S COUNSEL

MJ: _____, you indicated you are appearing as the (Special Victim Counsel) (Victim Legal Counsel) (civilian counsel) for (alleged victim's name). Please state your qualifications for the record.

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

CHAPTER 3: INSTRUCTIONS ON ELEMENTS OF OFFENSES BEFORE 1 JANUARY 2019

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 US (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, 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 apply only to certain attempted sex-related offenses, (2) that in no case shall the death penalty be adjudged, (3) that in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged. A dishonorable discharge or a dismissal is a mandatory minimum sentence for an attempt to commit a sex-related offense on or after 24 June 2014. Qualifying sex-related offenses include Article 120(a) or (b); Article 120b(a) or (b); and Forcible Sodomy, Article 125.

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 US 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); US 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: US v. Jones, 37 MJ 459 (CMA 1993); US v. Schoof, 37 MJ 96 (CMA 1993); US 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 sample 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: Attempted premeditated murder. 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 (state the name of the alleged victim).

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 (state the name of the alleged victim) 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. US 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); US 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: US v. Jones, 37 MJ 459 (CMA 1993); US v. Schoof, 37 MJ 96, (CMA 1993); US 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 US 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); US 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: US v. Jones, 37 MJ 459 (CMA 1993); US v. Schoof, 37 MJ 96 (CMA 1993); US v. Byrd, 24 MJ 286 (CMA 1987).

3–5–1. CONSPIRACY (ARTICLE 81)

a . **MAXIMUM PUNISHMENT:**

(1) Conspiracy *and* Conspiracy when offense is an offense under the law of war (not resulting in death):

(a) The maximum punishment is that which is authorized for the offense that is the object of the conspiracy.

(b) If death is an authorized punishment for the offense that is the object of the conspiracy, the maximum punishment is DD, TF, LWOP, E-1.

(2) Conspiracy when offense is an offense under the law of war and results in death: Death.

b. **MODEL SPECIFICATION:**

Conspiracy:

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 _____.

Conspiracy when offense is an offense under the law of war:

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, conspire with _____ (and _____) to commit an offense under the law of war, to wit: (murder of _____), and in order to effect the object of the conspiracy the said (state the name of the accused) did knowingly _____ (resulting in the death of _____).

c. **ELEMENTS:**

Conspiracy:

(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 conspiracy.

Conspiracy when offense is an offense under the law of war:

(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 law of war; (and)

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused knowingly 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 conspiracy; [and]

NOTE 1: Give the third element below if death to a victim is alleged:

(3) That death resulted to (state the name(s) of the alleged victim(s)).The elements of the offense which the accused is charged with conspiracy to commit are as follows:

NOTE 2: Elements listed. List the elements of the conspired offense, carefully tailoring them to be relevant to a conspiracy to commit such offense.

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

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 3: <u>More than one overt act alleged</u>. 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 4: 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 5: 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 6: 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 7: 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 8: 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.

NOTE 9: Conspiracy to violate the law of war alleged. Whether a law is a "law of war" is an interlocutory matter to be determined by the military judge and is not submitted to the members. When satisfied that the law is

a "law of war," the military judge should instruct that the matter has been legally determined.

As a matter of law, the offense the accused is alleged to have conspired to commit, that is [state the law of war offense alleged], is a law of war.

NOTE 10: Conspiracy to violate the law of war resulting in death alleged. When cause of death is in issue in a conspiracy to violate the law of war, the military judge should refer to Instruction 5-19, if necessary, and give an appropriately tailored instruction. The below instruction may also be appropriate.

If you are not convinced that the alleged conspiracy to violate the law of war resulted in [death] [grievous bodily harm], but you are convinced that the other elements of the offense have been proven, you may find the accused guilty by excepting the language alleging that the conspiracy to violate the law of war resulted in [death] [grievous bodily harm].

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: <u>Other instructions</u>. If the accused's separation was procured by a knowingly false representation, Instruction 7-3, <u>Circumstantial Evidence</u> (Knowledge), should ordinarily be given. If the accused's separation was procured by a deliberate concealment of material facts, Instruction 7-3, <u>Circumstantial Evidence</u> (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: <u>Dropped from the rolls (DFR)</u>. 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: <u>When desertion terminated by apprehension is alleged</u>. 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: <u>Voluntary termination and casual presence</u>. 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 US 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 US 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 US 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 US 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 (<u>state the type of desertion alleged attempted</u>) (that is, the act apparently would have resulted in the actual commission of the offense of desertion (<u>state the type of desertion allegedly attempted</u>) 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 US 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: <u>Voluntary termination and casual presence</u>. 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 US 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: <u>Multiple unauthorized absences under single specification</u>. 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 US 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 or about _____, 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 US 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: <u>"Deliberate avoidance" raised</u>. The following instruction should be given when the issue of "deliberate avoidance," as discussed in US 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 US 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: US v. Quezada, 40 MJ 109 (CMA 1994); US v. Gibson, 17 MJ 143 (CMA 1984); US v. Graham, 16 MJ 460 (CMA 1983); US 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 US v. New, 55 MJ 95 (CAAF 2001); US 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 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 US v. New, 55 MJ 95 (CAAF 2001); US 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 US v. New, 55 MJ 95 (CAAF 2001); US 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: 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 6: 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: US 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 a member of the armed forces, namely, (state the name and rank or grade of the person issuing the order or regulation), issued a certain lawful written (order) (regulation) in the following terms: (state the date and specific source of the alleged written 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 US v. New, 55 MJ 95 (CAAF 2001); US 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: US 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 US v. New, 55 MJ 95 (CAAF 2001); US v. Deisher, 61 MJ 313 (CAAF 2005). To be lawful the order must relate to specific military duty and emanate from a superior of the accused or from someone the accused had a duty to obey regardless of rank, such as a sentinel or a member of the armed forces police. 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 dereliction of duty resulting in death or grievous bodily harm: DD, TF, 2 years, E-1.

(2) Neglectful or culpably inefficient dereliction of duty resulting in death or grievous bodily harm: BCD, TF, 18 months, E-1.

(3) Willful dereliction of duty: BCD, TF, 6 months, E-1.

(4) Neglectful or culpably inefficient dereliction of duty: 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 _____) (, and that such dereliction of duty resulted in [grievous bodily harm to (state the name of the person alleged to have been injured), to wit: (state the alleged injury)] [the death of (state the name of the person alleged to have died)]).

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. US 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 (willfully) (through neglect or culpable inefficiency) derelict in the performance of (that duty) (those duties), by (state the manner alleged).

NOTE 4: Death or grievous bodily harm alleged. If the dereliction of duty is alleged to have resulted in death or grievous bodily harm, give element (4), below:

(4) That such dereliction of duty resulted in [death to (state the name of the person alleged to have died)] [grievous bodily harm to (state the name of the person alleged to have been injured), to wit: (state the grievous bodily harm 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 5: Death or grievous bodily harm alleged. The following definitions and instructions are appropriate if death or grievous bodily harm is alleged. If cause of death is in issue, the military judge should also refer to Instruction 5-19.

"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 serious bodily injuries.

An intent to cause death or grievous bodily harm is not required.

(If you are not convinced that the alleged dereliction of duty resulted in [death] [grievous bodily harm], but you are convinced that the other elements of the offense have been proven, you may find the accused guilty by excepting the language alleging that the dereliction of duty resulted in [death] [grievous bodily harm].)

NOTE 6: 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 7: 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. US v. Dallmon, 34 MJ 274 (CMA 1992).

(2) Noncommissioned officer's failure to report the drug use of others as an offense. US v. Medley, 33 MJ 75 (CMA 1975).

3–17–1. CRUELTY, OPPRESSION, OR MALTREATMENT OF SUBORDINATES (ARTICLE 93)

a. **MAXIMUM PUNISHMENT:** DD, TF, 2 years, 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.

To establish that the accused (was cruel toward) (oppressed) (maltreated) (state the name of the alleged victim), the government must prove that: (a) the accused knew that (state the name of the alleged victim) was subject to (his) (her) orders; (b) the accused knew that (he) (she) made the alleged statements or engaged in the alleged conduct in respect to (state the name of the alleged victim); and (c) when viewed objectively under all the circumstances, those statements or actions were abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose and caused, or reasonably could have caused, physical or mental harm or suffering.

(The (cruelty) (oppression) (or) (maltreatment) does not have to be physical.)

(The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both.)

((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.) Sexual harassment alone does not constitute the offense of maltreatment. For sexual harassment to also constitute the offense of maltreatment, the government must prove that the accused's conduct meets the elements and definitions for the offense of 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 of the alleged victim), or lack thereof, to the accused's actions. The fact that (state the name 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 of the alleged victim).)

e. REFERENCES: US v. Caldwell, 75 MJ 276 (CAAF 2016); US v. Carson, 57 MJ 410 (CAAF 2002); US 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: US 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: US 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: <u>Accused's</u> <u>belief in authority of apprehending individual</u>. 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 US 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. US v. Rhodes, 47 MJ 790 (ACCA 1998); US v. Nocifore, 31 MJ 769 (ACMR 1990); US v. Hutcherson, 29 CMR 770 (AFBR 1960); US 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. US 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. US v. Rhodes, 47 MJ 790 (ACCA 1998); US v. Nocifore, 31 MJ 769 (ACMR 1990); US v. Hutcherson, 29 CMR 770 (AFBR 1960); US 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: <u>Arrest in Quarters</u>. 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: <u>Lawfulness of arrest in issue</u>. 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 (<u>state the name of the person who ordered the accused into arrest</u>) 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. US v. Rhodes, 47 MJ 790 (ACCA 1998); US v. Nocifore, 31 MJ 769 (ACMR 1990); US v. Hutcherson, 29 CMR 770 (AFBR 1960); US 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, confinement and custody are different in nature. Confinement must be actually imposed to initiate confinement status. See US v. Edwards, 69 MJ 375 (CAAF 2011); US v. Ellsey, 37 CMR 75 (CMA 1966) (proper charge is escape from custody, not escape from confinement, when an accused who has been ordered into confinement escapes prior to being placed in a confinement facility); cf. US v. Felty, 12 MJ 438 (CMA 1982) (proper charge is escape from confinement when an accused, after having been placed in a confinement facility, escapes from a guard while outside the confinement facility for a magistrate hearing. Once confined in a military confinement facility, an accused remains in that status until released from confinement by proper authority).

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: <u>Escape from post-trial confinement alleged</u>. 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: <u>Detention cell and other locations as a confinement facility</u>. 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 US 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: <u>The status of confinement and the fact of physical restraint</u>. 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. 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 US v. Felty, 12 MJ 438 (CMA 1982) (proper charge is escape from confinement when an accused, after having been placed in a confinement facility, escapes from a guard while outside the confinement facility for a magistrate hearing) and US 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: <u>Moral suasion as confinement</u>. 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 US v. Standifer, 35 MJ 615, 617 (AFCMR 1992) (prisoner's escort allowed accused to visit wife alone); cf. US 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 US v. Standifer, 35 MJ 615, 617 (AFCMR 1992); cf. US 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 US v. Jones, 36 MJ 1154 (ACMR 1993) (escape by pushing aside unarmed escort); US 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 US v. Felty, 12 MJ 438 (CMA 1982) (escape where accused falsely told escort he had been released by magistrate and then slipped away); US 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, confinement and custody are different in nature. Confinement must be actually imposed to initiate confinement status. See US v. Edwards, 69 MJ 375 (CAAF 2011); US v. Ellsey, 37 CMR 75 (CMA 1966) (proper charge is escape from custody, not escape from confinement,

when an accused who has been ordered into confinement escapes prior to being placed in a confinement facility); cf. US v. Felty, 12 MJ 438 (CMA 1982) (proper charge is escape from confinement when an accused, after having been placed in a confinement facility, escapes from a guard while outside the confinement facility for a magistrate hearing. Once confined in a military confinement facility, an accused remains in that status until released from confinement by proper authority).

NOTE 11: 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]

[(3)] That the accused had no reasonable belief that the (apprehension) (arrest) (confinement) was lawful.

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.

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 the property was (a firearm) (an explosive) (of a value of $_____); 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 1: Explosive and firearm defined. If the property is alleged to be an explosive or a firearm, the following definitions will usually be sufficient. In

a complex case, the military judge should consult the rules and statutes cited below:

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).

("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.)

("Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.)

NOTE 2: 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 the property was (a firearm) (an explosive) (of a value of $_____); 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 1: Explosive and firearm defined. If the property is alleged to be an explosive or a firearm, the following definitions will usually be sufficient. In a complex case, the military judge should consult the rules and statutes cited below:

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).

("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.)

("Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.)

NOTE 2: 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 the property was (a firearm) (an explosive) (of a value of $_____); 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 1: <u>Explosive and firearm defined</u>. If the property is alleged to be an explosive or a firearm, the following definitions will usually be sufficient. In a complex case, the military judge should consult the rules and statutes cited below:

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).

("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.)

("Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.)

NOTE 2: <u>Other instructions</u>. Instruction 7-16, <u>Variance - Value, Damage, or Amount</u>, 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: US v. Mello, 36 MJ 1067 (ACMR 1993); US 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: <u>Other instructions</u>. Instruction 7-3, <u>Circumstantial Evidence</u> (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: <u>Other instructions</u>. Instruction 7-3, <u>Circumstantial Evidence</u> (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 (<u>state the time and place alleged</u>), 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 (<u>state the party allegedly communicated with</u>), 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 (<u>state the manner alleged</u>)) (indirectly by (<u>state the manner alleged</u>)); 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: <u>If attempted espionage raised</u>. 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 US 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: US 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 (<u>state the time and place alleged</u>), 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 (<u>state the party with whom the accused allegedly attempted to communicate</u>), 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 (<u>state the manner alleged</u>) (indirectly by (<u>state the manner alleged</u>)); 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: US 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.

A statement is official when the maker is either acting in the line of duty or the statement directly relates to the maker's official military duties, or where the receiver is either a military member carrying out a military duty when the statement is made or a civilian necessarily performing a military function when the statement is made.

NOTE 1: <u>Civilian investigations</u>. Unless occurring under one of the circumstances above, false statements to civilian law enforcement officials are not “official” and therefore are not punishable under Article 107.

NOTE 2: AAFES employees. If the accused is charged with making a false official statement to an AAFES employee, the military judge may give the following instruction:

AAFES employees who are in the performance of their duties are considered to be performing a military function.

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

e. REFERENCES: "Exculpatory no" doctrine. Brogan v. US, 522 U.S. 398 (1998); US v. Solis, 46 MJ 31 (CAAF 1997); US v. Black, 47 MJ 146 (CAAF 1997); US v. Prater, 32 MJ 433 (CMA 1991); US v. Jackson, 26 M.J 377 (CMA 1988). Defining "official" statement. US v. Spicer, 71 M.J. 470 (CAAF 2013); US v. Capel, 71 M.J. 485 (CAAF 2013); AAFES employees. US v. Passut, 73 M.J. 27 (CAAF 2014).

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.

(4a) 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. US 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 US v. Schwabauer, 37 MJ 338 (CMA 1993) (unauthorized relinquishing possession of individual weapon in full view of NCOs in combat zone) with US 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: US v. Schelin, 15 MJ 218 (CMA 1983) and US v. Simonds, 20 MJ 279 (CMA 1985).

(2) Disposition: US 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: <u>Willfully damaged, lost, or destroyed firearm or explosive</u>. <u>See</u> 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 (<u>state the time and place alleged</u>), 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 US 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 US 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: US v. Schelin, 15 MJ 218 (CMA 1983); US 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: <u>MCM</u> <u>elements and "omission"</u>. 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 US 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. US 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 US v. Schwabauer, 37 MJ 338 (CMA 1993) (unauthorized relinquishing possession of individual weapon in full view of NCOs in combat zone) with US 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 US 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 US 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: US v. Schelin, 15 MJ 218 (CMA 1983) and US v. Simonds, 20 MJ 279 (CMA 1985).

(2) Disposition: US 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: <u>If willfulness is alleged</u>. If the act was alleged as willful, the following is ordinarily applicable:

"Willfully" means intentionally or on purpose.

NOTE 2: <u>If recklessness is alleged</u>. 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 202.

(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 US 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 US 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 US 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: <u>Sufficiency of evidence when blood or breath alcohol levels alleged</u>. 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: <u>Injury and proximate and intervening cause</u>. If "causing injury" is alleged, an instruction that the accused's conduct was a proximate cause of the injury may be necessary. See US 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 US 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 (<u>state the name of person allegedly injured</u>) 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 by alcohol which is sufficient to impair the rational and full exercise of the mental or physical faculties.

“Duty” means military duty. Every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty.

“On duty” means routine duties or details in garrison, at a station, or in the field. It does not relate to those periods when the person is considered (“off duty”) (or) (“on liberty”). (In a region of active hostilities, the circumstances are often such that all members of a command may properly be considered as being continuously on duty.)

(Commanders are constantly on duty when in the actual exercise of command.)

(An officer of the day and members of the guard, or of the watch, are on duty during their entire tour.)

NOTE: If there is evidence that the accused used both alcohol and other drugs, the following instruction on proximate cause may be appropriate:

You have heard evidence that the accused used both alcohol and other drugs. The term “drunk” relates only to intoxication by alcohol. To find the accused guilty of the offense of being drunk on duty, you must be convinced beyond a reasonable doubt that the

accused's intoxication by alcohol was a proximate cause of the impairment of the rational and full exercise of the accused's mental or physical faculties. This means that the impairment of the rational and full exercise of the accused's mental or physical faculties must have been the natural and probable result of the accused's intoxication by alcohol. 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 impairment.

It is possible for the use of both alcohol and other drugs to each contribute as a proximate cause to the impairment of the rational and full exercise of the accused's mental or physical faculties. If the accused's intoxication by alcohol was a proximate cause of the impairment, the accused will not be relieved of criminal responsibility because his use of other drugs was also a proximate cause of the impairment.

In determining whether the accused's intoxication by alcohol was a proximate cause of the impairment of the rational and full exercise of his/her mental or physical faculties, and the role, if any, of the use of other drugs, 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).

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 (<u>state the time and place alleged</u>), 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: <u>Intent to distribute alleged</u>. Give the 5th element below if intent to distribute was alleged:

[(5)] That the possession was with the intent to distribute [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) 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 US 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 US 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 202 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 US 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 US v. Pitt, 35 MJ 478 (CMA 1992) when intent to distribute while on duty as a sentinel is alleged.

NOTE 13: 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 (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Newman, 14 MJ 474 (CMA 1983); US v. Ratleff, 34 MJ 80 (CMA 1992); US v. Mance, 26 MJ 244 (CMA 1988), cert. denied, 488 U.S. 942 (1988); US 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 (<u>state the time and place alleged</u>), 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: <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 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: <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 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 US 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: <u>Exceptions to wrongfulness</u>. 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 US 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: <u>Judicial notice as to nature of the substance</u>. 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 202 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 US 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: <u>Regulatory defects in collection of urinalysis samples</u>. 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. US 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 US 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: <u>Other scheduled drugs</u>. 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. <u>See</u> 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 (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Harper, 22 MJ 157, 161 (CMA 1986); compare US v. Murphy, 23 MJ 310, 312 (CMA 1987) (distinguishing Harper) with US v. Mance, 26 MJ 244 (CMA 1988), cert. denied 488 U.S. 942 (1988); US v. Newman, 14 MJ 474 (CMA 1983); US v. Pollard, 27 MJ 376 (CMA 1989); US 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 (<u>state the time and place alleged</u>), 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: <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 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: 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 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 US 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: <u>Exceptions to wrongfulness</u>. 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 US 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 202 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 US 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.

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 . (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Mance, 26 MJ 244 (CMA 1988), cert. denied 488 U.S. 942 (1988); US v. Crumley, 31 MJ 21 (CMA 1990); US v. Newman, 14 MJ 474 (CMA 1983); US 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: <u>Completeness of MCM</u> <u>form specification</u>. 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. <u>See</u> NOTEs 3 and 5 <u>infra</u> and the instructions following those NOTEs.***

c. **ELEMENTS:**

(1) That (<u>state the time and place alleged</u>), 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 US 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: <u>Exceptions to wrongfulness</u>. 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 US 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 202 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 US 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: <u>Aggravating circumstances</u>. 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 . (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Mance, 26 MJ 244 (CMA 1988), cert. denied, 488 U.S. 942 (1988); US v. Ratleff, 34 MJ 80 (CMA 1992); US v. Pitt, 35 MJ 478 (CMA 1992); US v. Newman, 14 MJ 474 (CMA 1983); US 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 (<u>state the time and place alleged</u>), 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: <u>Intent to distribute alleged</u>. 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: <u>Knowledge of presence of the substance in issue</u>. 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: <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 manufacture.)

However, a person who manufactures (cocaine) (_____), but actually believes it to be (sugar) (_____), is not guilty of wrongful manufacture of (cocaine) (_____).

NOTE 5: <u>Missile launch facility</u>. 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 US 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: <u>Exceptions to wrongfulness</u>. 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 US 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 202 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 US 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.

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. (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Newman, 14 MJ 474 (CMA 1983); US v. Mance, 26 MJ 244 (CMA 1983), cert. denied, 488 U.S. (1988); US 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: <u>Completeness of MCM</u> <u>form specification</u>. 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. <u>See</u> NOTEs 2 and 4 <u>infra</u> and the instructions following those NOTEs.***

c. **ELEMENTS:**

(1) That (<u>state the time and place alleged</u>), 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: <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 (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: <u>Missile launch facility</u>. 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: <u>"Deliberate avoidance" raised</u>. The following instruction should be given when the issue of "deliberate avoidance" as discussed in US 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: <u>Exceptions to wrongfulness</u>. 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 US 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 202 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 US 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.

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. (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Mance, 26 MJ 244 (CMA 1988), cert. denied, 488 U.S. 942 (1988); US 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]

[(3)] That the accused was receiving special pay under 37 USC section 310 at the time of alleged offense.

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:

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

NOTE 2: Drunkenness alleged. When drunkenness is alleged, include the following definition of "drunk." If there is evidence that the accused used both alcohol and other drugs, the following instruction on proximate cause may be appropriate:

"Drunk" means any intoxication by alcohol which is sufficient to impair the rational and full exercise of the mental or physical faculties.

(You have heard evidence that the accused used both alcohol and other drugs. The term “drunk” relates only to intoxication by alcohol. To find the accused guilty of the offense of misbehavior of (sentinel) (lookout), you must be convinced beyond a reasonable doubt that the accused's intoxication by alcohol was a proximate cause of the impairment of the rational and full exercise of the accused's mental or physical faculties. This means that the impairment of the rational and full exercise of the accused's mental or physical faculties must have been the natural and probable result of the accused's intoxication by alcohol. 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 impairment.

It is possible for the use of both alcohol and other drugs to each contribute as a proximate cause to the impairment of the rational and full exercise of the accused's mental or physical faculties. If the accused's intoxication by alcohol was a proximate cause of the impairment, the accused will not be relieved of criminal responsibility because his use of other drugs was also a proximate cause of the impairment.

In determining whether the accused's intoxication by alcohol was a proximate cause of the impairment of the rational and full exercise of his/her mental or physical faculties, and the role, if any, of the use of other drugs, 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 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:**

In that _____ (personal jurisdiction data), (and _____) did, (at/on board--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: (<u>state the type of work, duty, or service alleged</u>);

(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 (<u>state the manner alleged</u>); (and)

(3) That the accused's purpose or intent in doing so was to avoid the (work) (duty) (service) alleged; [and]

NOTE 1: <u>In time of war or hostile fire zone</u>. 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.

3–42A–1. WRONGFUL BROADCAST OR DISTRIBUTION OF INTIMATE VISUAL IMAGES (ARTICLE 117A)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 12 December 2017.

a. **MAXIMUM PUNISHMENT:** The President has not yet established any limits on the punishment which a court-martial may direct for this offense. See Article 56(a). The offense is also not yet listed in Part IV of the MCM. Under these circumstances, the maximum punishment should be calculated as prescribed in RCM 1003(c)(1)(B).

b. **MODEL SPECIFICATION:**

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, knowingly, wrongfully, and without the explicit consent of (state the name of the person depicted) (broadcast) (distribute) [(an) intimate visual image(s) of (state the name of the person depicted)] [(a) visual image(s) of sexually explicit conduct involving (state the name of the person depicted)], who was at least 18 years of age when the visual image(s) (was) (were) created and is identifiable from the visual image(s) or from information displayed in connection with the visual image(s), when he/she knew or reasonably should have known that the visual image(s) (was) (were) made under circumstances in which (state the name of the person depicted) retained a reasonable expectation of privacy regarding any (broadcast) (distribution) of the visual image(s), and when he/she knew or reasonably should have known that the (broadcast) (distribution) of the visual image(s) was likely to cause harm, harassment, intimidation, emotional distress, or financial loss for (state the name of the person depicted), or to harm substantially (state the name of the person depicted) with respect to his/her health, safety, business, calling, career, financial condition, reputation, or personal relationships, which conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.

c. **ELEMENTS:**

(1) That (state the time and place alleged), the accused knowingly and wrongfully (broadcast) (distributed) [(an) intimate visual image(s) of (state the name of the person depicted)] [(a) visual image(s) of sexually explicit conduct involving (state the name of the person depicted)];

(2) That (state the name of the person depicted) was at least 18 years of age when the visual image(s) (was) (were) created;

(3) That (state the name of the person depicted) is identifiable from the visual image(s) or from information displayed in connection with the visual image(s);

(4) That (state the name of the person depicted) did not explicitly consent to the (broadcast) (distribution) of the visual image(s);

(5) That the accused knew or reasonably should have known that the visual image(s) (was) (were) made under circumstances in which (state the name of the person depicted) retained a reasonable expectation of privacy regarding any broadcast or distribution of the visual image(s);

(6) That the accused knew or reasonably should have known that the (broadcast) (distribution) of the visual image(s) was likely to cause harm, harassment, intimidation, emotional distress, or financial loss for (state the name of the person depicted), or to harm substantially (state the name of the person depicted) with respect to (his) (her) health, safety, business, calling, career, financial condition, reputation, or personal relationships; and

(7) That the accused's conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

An act is done "knowingly" when it is done intentionally and on purpose. An act done as the result of a mistake or accident is not done "knowingly."

"Wrongfully" means without legal excuse or justification.

(The term "broadcast" means to electronically transmit a visual image with the intent that it be viewed by a person or persons.)

(The term "distribute" means to deliver to the actual or constructive possession of another person, including transmission by mail or electronic means.)

The term "visual image" means the following:

(A) Any developed or undeveloped photograph, picture, film, or video;

(B) Any digital or computer image, picture, film, or video made by any means, including those transmitted by any means, including streaming media, even if not stored in a permanent format; or

(C) Any digital or electronic data capable of conversion into a visual image.

The term “intimate visual image” means a visual image that depicts a private area of a person.

The term “private area” means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.

The term “sexually explicit conduct” means actual or simulated genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex, bestiality, masturbation, or sadistic or masochistic abuse.

The term “reasonable expectation of privacy” means circumstances in which a reasonable person would believe that a private area of the person, or sexually explicit conduct involving the person, would not be visible to the public.

> ***NOTE 2: Voluntary intoxication and “knew or reasonably should have known.” If there is evidence that the accused was intoxicated at the time of the broadcast/distribution, the following instruction may be appropriate with respect to whether the accused “knew or reasonably should have known” (1) the visual image was made under circumstances in which the person depicted retained a reasonable expectation of privacy regarding any broadcast/distribution, or (2) the broadcast/distribution was likely to cause harm, harassment, intimidation, etc.***

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). With respect to (that) (those) offense(s), I advised you earlier that the government is required to prove that the accused knew or reasonably should have known that the visual image(s) (was) (were) made under circumstances in which (state the name of the person depicted) retained a reasonable expectation of privacy regarding any broadcast or distribution of the visual image(s). I also advised you earlier that the government is required to prove that the accused knew or reasonably should have known that the (broadcast) (distribution) of the visual image(s) was likely to

cause harm, harassment, intimidation, emotional distress, or financial loss for (state the name of the person depicted), or to harm substantially (state the name of the person depicted) with respect to (his) (her) health, safety, business, calling, career, financial condition, reputation, or personal relationships. In deciding whether the accused had such knowledge, 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 had the required knowledge.

On the other hand, the fact that the accused may have been intoxicated at the time of the offense(s) does not necessarily indicate that (he) (she) was unable to have the required knowledge 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 had the required knowledge, you should consider the effect of intoxication, if any, as well as the other evidence in the case.

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 had the required knowledge, the accused will not avoid criminal responsibility because of voluntary intoxication.

However, on the question of whether the accused "reasonably should have known" something, you may not consider the accused's intoxication, if any, because what a person reasonably should have known refers to what an ordinary, prudent, sober adult would have reasonably known under the circumstances of this case.

In summary, voluntary intoxication should be considered in determining whether the accused had actual knowledge. Voluntary intoxication should not be considered in determining whether the accused "reasonably should have known" something.

NOTE 3: Other instructions. If a mistake of fact concerning the depicted person's explicit consent to the broadcast/distribution is raised, Instruction 5-11-2, Ignorance or Mistake – When Only General Intent is in Issue, should be given.

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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US 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: <u>Intent to kill or inflict great bodily harm in issue</u>. When the accused denies the intent to kill or inflict great bodily harm, an instruction on involuntary manslaughter must ordinarily be given.

NOTE 2: <u>Sudden passion caused by adequate provocation in issue</u>. 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: <u>Defenses</u>. When an issue of self-defense, accident, or other legal justification or excuse is raised, tailored instructions must be given.

NOTE 4: <u>Transferred intent</u>. 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 US v. Gomez, 15 MJ 954 (ACMR 1983) and US 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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US 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: US v. Stokes, 19 CMR 191(CMA 1955), US v. Berg, 31 MJ 38 (CMA 1990); US 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: <u>Elements of the felony offense</u>. 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: 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 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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US 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.

3–43–5. FELONY MURDER (ARTICLE 118)

Note 1: Applicability of this offense. Use this instruction for offenses occurring on or after 28 June 2012.

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) (sexual assault of a child) (aggravated sexual contact) (sexual abuse of a child) (robbery) (aggravated arson).

e. **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) (sexual assault of a child) (aggravated sexual contact) (sexual abuse of a child) (robbery) (aggravated arson), you must be satisfied beyond a reasonable doubt:

NOTE 1.1: 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) (sexual assault of a child) (aggravated sexual contact) (sexual abuse of 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) (sexual assault of a child) (aggravated sexual contact) (sexual abuse of 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) (sexual assault of a child) (aggravated sexual contact) (sexual abuse of a child) (robbery) (aggravated arson) and the act which caused the victim's death.

NOTE 3: 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, sexual assault of a child, aggravated sexual contact, sexual abuse of 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 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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US v. Taylor, 44 MJ 254 (CAAF 1996). Instruction 7-24 Brain Death, may be adapted for this circumstance.

NOTE 5: 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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US 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: 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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US 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, sexual assault, sexual assault of a child, sexual abuse of a child, 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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US 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:** Such punishment, other than death, as a court-martial may direct, but such punishment shall be consistent with the punishment had the bodily injury occurred to the unborn child's mother.

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:** Such punishment, other than death, as a court-martial may direct, but such punishment shall be consistent with the punishment had the death occurred to the unborn child's mother.

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 pregnant at the time 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:** Such punishment, other than death, as a court-martial may direct, but such punishment shall be consistent with the punishment had the attempt been made to kill the unborn child's mother.

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:** Such punishment, other than death, as a court-martial may direct, but such punishment shall be consistent with the punishment had the death occurred to the unborn child's mother.

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 enacted sweeping changes to the Uniform Code of Military Justice regarding sexual misconduct occurring on and after **1 October 2007**. The National Defense Authorization Act for Fiscal Year 2012 made further changes and added new articles to the Uniform Code of Military Justice regarding sexual misconduct occurring on and after **28 June 2012**. The National Defense Authorization Act for Fiscal Year 2016 enacted the most sweeping changes to the Uniform Code of Military Justice in over 60 years. These most recent changes went into effect on **1 January 2019**. Therefore, for cases involving alleged sexual misconduct, trial judges must first determine which Article 120 statutory scheme is involved: (1) pre-1 October 2007, (2) 1 October 2007 to 27 June 2012, (3) 28 June 2012 to 31 December 2018, and/or (4) on and after 1 January 2019. For offenses alleged to have occurred on and after 1 January 2019, use Chapter 3A of this Benchbook.

3–45–1. RAPE (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring before 1 October 2007.

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 1.1: 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: <u>Lack of penetration in issue</u>. 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 US v. Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CAAF 1988) and US 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: <u>Using this instruction</u>. 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. US v. Carr, 18 MJ 297 (CMA 1984), US v. Taylor, 26 MJ 127 (CMA 1988), and US 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. US 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.

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. US 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. US v. Williams, 37 MJ 352 (CMA 1993) (extra-marital affair as to victim's motive to lie) and US 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: Following US v. Jones, 68 MJ 465 (CAAF 2010) carnal knowledge is not a lesser included offense of rape.

NOTE 19: 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 20: 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 21: 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.

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); US v. Hicks, 24 MJ 3 (CMA 1987), cert. denied, 484 U.S. 827 (1987); US v. Bradley, 28 MJ 197 (CMA 1989); US v. Palmer, 33 MJ 7 (CMA 1991).

(3) Constructive force--abuse of military authority: US v. Hicks, supra; US v. Bradley, supra; US v. Clark, 35 MJ 432 (CMA 1992), cert. denied, 507 U.S. 1052 (1993).

(4) Constructive force--parental compulsion and children of tender years: US v. Palmer, supra; US v. Rhea, 33 MJ 413 (CMA 1991); US 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; US 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: US v. Henderson, 15 CMR 268 (CMA 1954); US 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; US v. Mathi, 34 MJ 33 (CMA 1992); US v. Robertson, 33 CMR 828 (AFBR 1963), rev'd on other grounds, 34 CMR 108 (CMA 1963).

3–45–2. CARNAL KNOWLEDGE (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring before 1 October 2007.

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 US v. Williams, 25 MJ 854 (AFCMR 1988), pet. denied, 27 MJ 166 (CMA 1988) and US 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: Age of victim--variance. For a conviction of the 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.***

3–45–3. RAPE (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 1 October 2007 and before 28 June 2012.

NOTE 1.1: Article 120 Affirmative Defenses. Whether instructing members or judge alone, if the MJ decides to deviate from the statutory Article 120(t)(16) burden-shift when applying an affirmative defense, the MJ should explain the reason(s) for doing so on the record (outside the presence of the members, if a members case). See US v. Medina, 69 MJ 462 (CAAF 2011). The following is a suggested explanation:

This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The CAAF has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden," in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge's Benchbook, DA Pam 27-9.

a. **MAXIMUM PUNISHMENT:**

(1) Rape: Death or other lawful punishment.

(2) Rape of a child: Death or other lawful punishment.

NOTE 2: <u>Death sentence</u>. 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: <u>Lack of penetration in issue</u>. 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 US v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) and US 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 8.1: Consent reasonably raised. Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt. See US v. Neal, 68 MJ 289 (CAAF 2010). This instruction must be given even if the defense waives the instruction on consent as an affirmative defense.

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 (_____). Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt.

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 reasonably raised. 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and 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, the prosecution need not otherwise prove lack of consent; however, evidence of consent is relevant on the elements of the offense. 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and taking the approach that mistake 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 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 and before 28 June 2012.

NOTE 1.1: Article 120 Affirmative Defenses. Whether instructing members or judge alone, if the MJ decides to deviate from the statutory Article 120(t)(16) burden-shift when applying an affirmative defense, the MJ should explain the reason(s) for doing so on the record (outside the presence of the members, if a members case). See US v. Medina, 69 MJ 462 (CAAF 2011). The following is a suggested explanation:

This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The CAAF has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden," in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge's Benchbook, DA Pam 27-9.

a. **MAXIMUM PUNISHMENT:**

(1) Aggravated sexual contact: DD, TF, 20 years, E-1.

(2) Aggravated sexual contact with 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 6.1: Consent reasonably raised. Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt. See US v. Neal, 68 MJ 289 (CAAF 2010). This instruction must be given even if the defense waives the instruction on consent as an affirmative defense.

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 contact, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____). Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt.

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 with 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 reasonably raised. 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and 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, the prosecution need not otherwise prove lack of consent; however, evidence of consent is relevant on the elements of the offense. 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and taking the approach that mistake 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 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 and before 28 June 2012.

NOTE 1.1: Article 120 Affirmative Defenses. Whether instructing members or judge alone, if the MJ decides to deviate from the statutory Article 120(t)(16) burden-shift when applying an affirmative defense, the MJ should explain the reason(s) for doing so on the record (outside the presence of the members, if a members case). See US v. Medina, 69 MJ 462 (CAAF 2011). The following is a suggested explanation:

This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The CAAF has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden," in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge's Benchbook, DA Pam 27-9.

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: <u>Caused alleged victim to engage in sexual act(s)</u>. 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: <u>Engaged in sexual act(s) with alleged victim</u>. 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 US v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) and US 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent

inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and 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 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent

inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and taking the approach that mistake 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 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 8.2: Consent reasonably raised. Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt. See US v. Neal, 68 MJ 289 (CAAF 2010). This instruction must be given even if the defense waives the instruction on consent as an affirmative defense.

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 (_____). Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt.

NOTE 9: Consent reasonably raised. 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and 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, the prosecution need not otherwise prove lack of consent; however, evidence of consent is relevant on the elements of the offense. 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 provision appears illogical, it raises questions ascertaining

Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and taking the approach that mistake 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 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 and before 28 June 2012.

NOTE 1.1: Article 120 Affirmative Defenses. Whether instructing members or judge alone, if the MJ decides to deviate from the statutory Article 120(t)(16) burden-shift when applying an affirmative defense, the MJ should explain the reason(s) for doing so on the record (outside the presence of the members, if a members case). See US v. Medina, 69 MJ 462 (CAAF 2011). The following is a suggested explanation:

This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The CAAF has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden," in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge's Benchbook, DA Pam 27-9.

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) (<u>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)</u>] [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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to

reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and 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 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent

inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and taking the approach that mistake 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 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 5.2: Consent reasonably raised. Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt. See US v. Neal, 68 MJ 289 (CAAF 2010). This instruction must be given even if the defense waives the instruction on consent as an affirmative defense.

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 abusive sexual contact, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____). Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt.

NOTE 6: Consent reasonably raised. 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and 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, the prosecution need not otherwise prove lack of consent; however, evidence of consent is relevant on the elements of the offense. 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 provision appears illogical, it raises questions ascertaining

Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and taking the approach that mistake 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 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 and before 28 June 2012.

NOTE 1.1: Article 120 Affirmative Defenses. Whether instructing members or judge alone, if the MJ decides to deviate from the statutory Article 120(t)(16) burden-shift when applying an affirmative defense, the MJ should explain the reason(s) for doing so on the record (outside the presence of the members, if a members case). See US v. Medina, 69 MJ 462 (CAAF 2011). The following is a suggested explanation:

This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The CAAF has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden," in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge's Benchbook, DA Pam 27-9.

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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and 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 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and taking the approach that mistake 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 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 and before 28 June 2012.

NOTE 1.1: Article 120 Affirmative Defenses. Whether instructing members or judge alone, if the MJ decides to deviate from the statutory Article 120(t)(16) burden-shift when applying an affirmative defense, the MJ should explain the reason(s) for doing so on the record (outside the presence of the members, if a members case). See US v. Medina, 69 MJ 462 (CAAF 2011). The following is a suggested explanation:

This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The CAAF has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden," in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge's Benchbook, DA Pam 27-9.

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: Constructive presence such as the use of a web camera to transmit a live image is not sufficient for “physical presence” (US v. Miller, 67 MJ 87 (CAAF 2008)) but may be sufficient to establish the LIO of indecent acts (Article 120) (US v. Miller, 2009 WL 1508494 (AFCCA, 30 Apr 09), aff'd __ MJ ___ (CAAF, 15 Jan 10) (summary disposition)).

NOTE 2.2: 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and 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 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and 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 marriage 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 and before 28 June 2012.

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 US v. Izquierdo, 51 MJ 421 (CAAF 1999) and US 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 and before 28 June 2012.

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. US 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 and before 28 June 2012.

NOTE 1.1: Article 120 Affirmative Defenses. Whether instructing members or judge alone, if the MJ decides to deviate from the statutory Article 120(t)(16) burden-shift when applying an affirmative defense, the MJ should explain the reason(s) for doing so on the record (outside the presence of the members, if a members case). See US v. Medina, 69 MJ 462 (CAAF 2011). The following is a suggested explanation:

This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The CAAF has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden," in Article 120(t)(16) and will apply the burden of proof in accordance with the recommended instructions in the Military Judge's Benchbook, DA Pam 27-9.

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) with _____, to wit: _____ and such sexual contact(s) (was) (were) 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.

“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 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 provision appears illogical, it raises questions ascertaining Congressional intent. In an attempt to reconcile this apparent inconsistency, the Army Trial Judiciary is treating the former as a burden of production and the latter as a burden of persuasion and 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 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: 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 4: 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 5: 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 and before 28 June 2012.

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.

3–45–13. RAPE (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. **MAXIMUM PUNISHMENT:** DD, TF, life without eligibility for parole, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for rape occurring on or after 24 June 2014.

b. **MODEL SPECIFICATION:**

In that (personal jurisdiction data), did, (at/on board—location), on or about _____, commit (a) sexual act(s) upon _____, by causing penetration of _____'s (vulva) (anus) (mouth) with his/her/a (list body part or object) by [using unlawful force against him/her] [using force causing or likely to cause death or grievous bodily harm to (him/her) (___)] [threatening or placing him/her in fear that (he/she) (_____) would be subjected to death, grievous bodily harm, or kidnapping] [first rendering him/her unconscious] [administering to him/her a drug, intoxicant, or other similar substance by force or threat of force, or without his/her knowledge or consent), thereby substantially impairing his/her ability to appraise or control his/her conduct] [with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person].

c. **ELEMENTS:**

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state name of the alleged victim), by causing penetration, however slight, of (state the name of the alleged victim)'s (vulva) (anus) (mouth) by (the accused's (penis) (state other body part)) (a (state object)); (and)

(2) That the accused did so by

(a) using unlawful force against (state the name of the alleged victim) [, to wit: (if alleged in the specification, state the force used)].

(b) using force causing or likely to cause death or grievous bodily harm to (state the name of the person alleged), [, to wit: (if alleged in the specification, state the force used)].

(c) threatening or 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, or kidnapping.

(d) first rendering (state the name of the alleged victim) unconscious.

(e) administering to (state the name of the alleged victim) a drug, intoxicant, or other similar substance by force or threat of force, or without the knowledge or consent of (state the name of the alleged victim), thereby substantially impairing the ability of (state the name of the alleged victim) to appraise or control his/her conduct; [and]

NOTE 2: Penetration by object or body part other than penis. If the penetration occurs by something other than the Accused's penis, add the following element.

[(3)] That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

NOTE 3: Lack of penetration in issue. If lack of penetration is in issue, the military judge should further define what is meant by the "vulva." The instruction below may be helpful.

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."

NOTE 4: Marriage. Marriage is not a defense for any conduct in issue in any prosecution under Article 120.

NOTE 5: By unlawful force. When the sexual act is alleged by unlawful force, include the following instruction:

"Unlawful force" means an act of force done without legal justification or excuse.

"Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the alleged victim.

NOTE 6: By force causing or likely to cause death or grievous bodily harm. When the sexual act is alleged by force causing or likely to cause death or grievous bodily harm, include the following instruction:

"Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the alleged victim.

"Grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(The force causing or likely to cause death or grievous bodily harm which caused the alleged victim to engage in the sexual act need not have been applied by the accused to the alleged victim. It is sufficient if the accused applied such force to any person, which thereby caused the alleged victim to engage in the sexual act.)

NOTE 7: By threat or placing in fear. 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 the wrongful action contemplated by the communication or action.

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

("Grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.)

("Kidnapping" means the unlawful and intentional detention of a person against that person's will. 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. (If the subject of the threat to kidnap 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 subject's parents or legal guardian.))

(The person to be (killed) (subjected to grievous bodily harm) (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) (subjected to grievous bodily harm) (kidnapped), which thereby caused the alleged victim to engage in the sexual act.)

> ***NOTE 8: Instructing on consent. The issue of "consent" may arise in two ways. First, lack of consent is an element when the accused is charged with rape by administering a drug, intoxicant, or similar substance without the consent of the alleged victim. Lack of consent is not an element when the accused is charged with rape by any other method (to include when the accused is charged with administering a drug, intoxicant, or similar substance by force or by threat of force). See US v. Neal, 68 MJ 289, 302-304 (CAAF 2010) (statutory definition of "force" does not imply an element of lack of consent). Second, evidence of the alleged victim's consent to the sexual conduct might be introduced with respect to any rape allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(a) offense require the accused to have committed sexual conduct "by" a certain method. Stated another way, "by" means the sexual conduct occurred because of that method. Consent to the sexual conduct logically precludes that causal link; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. If consent evidence has been introduced to negate other elements of the charged offense, give the second parenthetical below, along with the appropriately tailored definitions of consent. If lack of consent to the administration of a drug, intoxicant, or similar substance is an element of the charged offense, give the first parenthetical below, along with the appropriately tailored definitions of consent.***

IF LACK OF CONSENT TO THE ADMINISTRATION OF A DRUG, INTOXICANT, OR SIMILAR SUBSTANCE IS AN ELEMENT, GIVE THE FOLLOWING INSTRUCTION: (As I previously advised you, in (The) Specification(s) (_____) of (The) (Additional) Charge (___), the accused is charged with the offense of rape by administering a drug, intoxicant, or other similar substance without the consent of the alleged victim, thereby substantially impairing the ability of that other person to appraise or control conduct. For

this offense, lack of consent to the administration of the drug, intoxicant, or other similar substance is an element of the offense.)

IF CONSENT EVIDENCE HAS BEEN INTRODUCED TO NEGATE OTHER ELEMENTS OF THE CHARGED OFFENSE, GIVE THE FOLLOWING INSTRUCTION: (The evidence has (also) raised the issue of whether (state the alleged victim's name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by state the applicable element). Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by state the applicable element).

"Consent" means a freely given agreement to the conduct at issue 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 use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to being rendered unconscious.)

(A person cannot consent while under threat or fear.)

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

NOTE 9: Additional definitions related to consent. In US v. Pease, 75 MJ 180 (CAAF 2016), CAAF approved certain non-statutory definitions related to the issue of consent. Pease did not require that these definitions be provided to members. However, in the military judge's discretion, the below definitions may be given to the members when appropriate.

(A "competent person" is a person who possesses the physical and mental ability to consent.)

(An "incompetent person" is a person who lacks either the mental or physical ability to consent because he or she is: (1) asleep or unconscious; (2) impaired by a drug, intoxicant or other similar substance; or (3) suffering from a mental disease or defect or a physical disability.)

(To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. However, if the person has the ability to appreciate the conduct and communicate lack of consent, but does not do so out of fear or because of some other external influence counteracting voluntariness, the sexual conduct is not voluntary.)

(A person is "incapable of consenting" when (he/she) lacks the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make or to communicate a decision about whether (he/she) agrees to the conduct.).

NOTE 10: <u>Ignorance or mistake of fact generally</u>. Under the 28 June 2012 version of Article 120, there is no statutory mistake of fact defense. Mistake of fact is a defense in RCM 916(j). Mistake of fact under RCM 916(j) is only a defense when it negates an element. When the element goes to premeditation, specific intent, willfulness or knowledge of a particular fact, the mistake must only be honest. When the element requires only general intent or knowledge, the mistake must be honest and reasonable. When the

accused's intent or knowledge is immaterial to an element (that is, strict liability), mistake of fact is not a defense.

Accordingly, the military judge must first determine the elements of an offense. Second, the military judge must determine whether the evidence has reasonably raised the accused's mistake which negates an element. Finally, the military judge must determine into which of the above three categories that element falls.

Strict liability offenses are "disfavored." Absent some indication Congress intended to impose strict liability (and the starting point for determining intent is statutory construction), courts have applied a "presumption" of mens rea to criminal offenses. Silence by Congress regarding mens rea for the offense generally does not alone suggest Congress intended strict liability. See, generally, US v. Zachary, 61 MJ 813 (ACCA, 2005), affirmed 63 MJ 438 (CAAF 2006); Staples v. US, 511 US 600 (1994); Liparota v. US, 471 US 419 (1994); and (for a good general discussion of this topic) US v. Burwell, 690 F3d 500 (DC Cir., 2012) (Kavanagh, J., dissenting).

RCM 916(j) has been interpreted to apply not only to situations where, if the facts were as the accused mistakenly believed them, the accused would be absolved of all criminal liability, but also to situations where the accused would be absolved of criminal liability for the charged offense, but not necessarily for a lesser-included offense. See Zachary, supra.

While commonly encountered ignorance or mistake of fact instructions are below, these are not exclusive. The military judge must carefully follow the analytical methodology above to determine if mistake of fact may be applicable in other situations. In those situations, the military judge should use appropriately tailored versions of Instructions 5-11-1 or 5-11-2.

NOTE 11: Mistake of fact as to: (1) consent to the sexual conduct; or (2) knowledge of or consent to the administration of a drug, intoxicant, or other substance. When the evidence has reasonably raised mistake of fact as to consent to the sexual conduct or as to knowledge of or consent to the administration of a drug, intoxicant, or other substance, include the following instruction on honest and reasonable mistake of fact as to consent. (Note that even for offenses under Article 120(a)(2), 120(a)(3) and 120(a)(4), evidence of consent to the sexual conduct may preclude the causal link between the sexual conduct and the charged method. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction.) If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction.

The evidence has raised the issue of mistake of fact in relation to the offense(s) of (state the alleged offense(s)), as alleged in (the) specification(s) (___) of (the) (additional) Charge (___).

There has been (evidence) (testimony) tending to show that, at the time of the alleged offense(s), the accused mistakenly believed that (state the name of the victim) [consented to the sexual conduct alleged] [(knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] concerning (this) (these) offense(s).

Mistake of fact is a defense to (that) (those) charged offense(s). “Mistake of fact” means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person [consented to the sexual conduct] [(knew of) (consented to) the administration of the drug, intoxicant, or other similar substance].

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 to the sexual conduct] [(knew of) (consented to) the administration of the drug, intoxicant, or other similar substance]. (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.)

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 prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused did not believe that the alleged victim [consented to the sexual conduct] [(knew of) (consented to) the administration of the

drug, intoxicant, or other similar substance], the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim [consented to the sexual conduct] [(knew of) (consented to) the administration of the drug, intoxicant, or other similar substance], 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 12: Voluntary intoxication and mistake of fact. If the above mistake of fact instruction is given, and there is evidence of the accused's voluntary intoxication, the following instruction is appropriate.

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense(s). 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.

NOTE 13: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, if the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.

e. REFERENCES: Definition of "vulva." See US v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) and US v. Tu, 30 MJ 587 (ACMR 1990); Definition of "competent person." See US v. Pease, 75 MJ 180 (CAAF 2016).

3–45–14. SEXUAL ASSAULT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. **MAXIMUM PUNISHMENT:** DD, TF, 30 years, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for sexual assault occurring on or after 24 June 2014.

b. **MODEL SPECIFICATION:**

In that (personal jurisdiction data), did, (at/on board—location), on or about _____, commit (a) sexual act(s) upon _____, by causing penetration of _____'s (vulva) (anus) (mouth) with his/her/a (list body part or object) [by causing bodily harm to him/her, to wit: _____] [by threatening or placing him/her in fear] [by making a fraudulent representation that the sexual act(s) served a professional purpose] [by inducing a belief by artifice, pretense, or concealment that the accused was another person] [when the accused knew or reasonably should have known that _____ was asleep, unconscious, or otherwise unaware that the sexual act was occurring] [when _____ was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,) and that condition was known or reasonably should have been known by the accused] [with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person].

c. **ELEMENTS:**

Sexual Assault by Causing Bodily Harm:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), by causing penetration, however slight, of (state the name of the alleged victim)'s (vulva) (anus) (mouth) by (the accused's (penis) (state other body part)) (a (state object));

(2) That the accused did so by causing bodily harm to (state the name of the alleged victim), to wit: (state the bodily harm alleged); (and)

NOTE 2: Lack of consent as an element. When the same physical act is alleged as both the actus reus and the bodily harm for the charged sexual assault, include this as a final element:

[(3)] That the accused did so without the consent of (state the name of the alleged victim); (and)

NOTE 3: Penetration by object or body part other than penis. If the penetration occurs by something other than the Accused's penis, add the following element.

[(3) or (4)] That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

Sexual Assault by Threat/Fear, Fraudulent Representation, or Artifice:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), by causing penetration, however slight, of (state the name of the alleged victim)'s (vulva) (anus) (mouth) by (the accused's (penis) (state other body part)) (a (state object)); (and)

(2) That the accused did so by

(a) threatening or placing (state the name of the alleged victim) in fear;

(b) making a fraudulent representation that the sexual act served a professional purpose;

(c) inducing a belief by artifice, pretense, or concealment that the accused was another person; (and)

NOTE 4: Penetration by object or body part other than penis. If the penetration occurs by something other than the Accused's penis, add the following element.

[(3)] That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

Sexual Assault When Victim Asleep, Unconscious, or Otherwise Unaware:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), by causing penetration, however slight, of (state the name of the alleged victim)'s (vulva) (anus) (mouth) by (the accused's (penis) (state other body part)) (a (state object));

(2) That the accused did so when (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual act was occurring; (and)

(3) That the accused knew or reasonably should have known that (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual act was occurring; (and)

NOTE 5: Penetration by object or body part other than penis. If the penetration occurs by something other than the Accused's penis, add the following element.

[(4)] That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

Sexual Assault When the Victim is Incapable of Consenting:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), by causing penetration, however slight, of (state the name of the alleged victim)'s (vulva) (anus) (mouth) by (the accused's (penis) (state other body part)) (a (state object));

(2) That the accused did so when (state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability,) (and)

(3) That the accused knew or reasonably should have known (state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability); (and)

NOTE 6: Penetration by object or body part other than penis. If the penetration occurs by something other than the Accused's penis, add the following element.

[(4)] That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

NOTE 7: Lack of penetration in issue. If lack of penetration is in issue, the military judge should further define what is meant by the "vulva." The instruction below may be helpful.

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."

NOTE 8: Marriage. Marriage is not a defense for any conduct in issue in any prosecution under Article 120.

NOTE 9: By threat or placing in fear. 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 the wrongful action contemplated by the communication or action.

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

The threat or fear in this case must be that the alleged victim or another person would be subjected to the wrongful action.

NOTE 10: 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 (, including any nonconsensual sexual act or nonconsensual sexual contact).

NOTE 11: Fraudulent representation. When the sexual act is committed by making a fraudulent representation that it serves a professional purpose, the following may be appropriate:

A "fraudulent representation" is a representation of fact, which the accused knows to be untrue, which is intended to deceive, which does in fact deceive, and which causes the other person to engage in the sexual act(s).

(The fraudulent representation that the sexual act served a professional purpose need not have been made by the accused to (state the name of the alleged victim). It is sufficient if the accused made such a fraudulent representation to any person, which thereby caused (state the name of the alleged victim) to engage in the sexual act.)

NOTE 12: Instructing on consent. The issue of "consent" may arise in two ways. First, lack of consent is an element when the accused is charged with sexual assault by causing bodily harm, and the alleged bodily harm is the same as the alleged sexual act (i.e., the charge alleges a nonconsensual sexual act). Lack of consent is not an element when the accused is charged with sexual assault by any other method. Second, evidence of the alleged victim's consent to the sexual conduct might be introduced with respect to any sexual assault allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(b) offense require the accused to have committed sexual conduct "by" a certain method or "when" the alleged victim was in a certain state. Stated another way, "by" means the sexual conduct occurred because of that method, and "when" means the sexual conduct occurred while the alleged victim was in a state that precluded consent. Consent to the sexual conduct logically precludes these causal links; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. If consent evidence has been introduced to negate other elements of the charged offense, give the parenthetical below, along with the appropriately tailored definitions of consent. If lack of consent is an element in a charged offense of sexual assault by causing bodily harm, give the appropriately tailored definition of consent.

IF CONSENT EVIDENCE HAS BEEN INTRODUCED TO NEGATE OTHER ELEMENTS OF THE CHARGED OFFENSE, GIVE THE FOLLOWING INSTRUCTION:

(The evidence has raised the issue of whether (state the alleged victim's name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by/when state the applicable element). Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every

element of the offense) (that the sexual conduct was done by/when state the applicable element).

"Consent" means a freely given agreement to the conduct at issue 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 use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to being rendered unconscious.)

(A person cannot consent while under threat or fear.)

(A person cannot consent to a sexual act when believing, due to a fraudulent representation, that the sexual act served a professional purpose.)

(A person cannot consent to a sexual act when believing, due to artifice, pretense, or concealment, that the accused was another person.)

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

NOTE 13: <u>Additional definitions related to consent</u>. In US v. Pease, 75 MJ 180 (CAAF 2016), CAAF approved certain non-statutory definitions related to the issue of consent. Pease did not require that these definitions be provided to members. However, in the military judge's discretion, the below definitions may be given to the members when appropriate.

(A “competent person” is a person who possesses the physical and mental ability to consent.)

(An “incompetent person” is a person who lacks either the mental or physical ability to consent because he or she is: (1) asleep or unconscious; (2) impaired by a drug, intoxicant or other similar substance; or (3) suffering from a mental disease or defect or a physical disability.)

(To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. However, if the person has the ability to appreciate the conduct and communicate lack of consent, but does not do so out of fear or because of some other external influence counteracting voluntariness, the sexual conduct is not voluntary.)

(A person is “incapable of consenting” when (he/she) lacks the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make or to communicate a decision about whether (he/she) agrees to the conduct.).

NOTE 14: Ignorance or mistake of fact generally. Under the 28 June 2012 version of Article 120, there is no statutory mistake of fact defense. Mistake of fact is a defense in RCM 916(j). Mistake of fact under RCM 916(j) is only a defense when it negates an element. When the element goes to premeditation, specific intent, willfulness or knowledge of a particular fact, the mistake must only be honest. When the element requires only general intent or knowledge, the mistake must be honest and reasonable. When the accused's intent or knowledge is immaterial to an element (that is, strict liability), mistake of fact is not a defense.

Accordingly, the military judge must first determine the elements of an offense. Second, the military judge must determine whether the evidence has reasonably raised the accused's mistake which negates an element. Finally, the military judge must determine into which of the above three categories that element falls.

Strict liability offenses are “disfavored.” Absent some indication Congress intended to impose strict liability (and the starting point for determining intent is statutory construction), courts have applied a “presumption” of mens rea to criminal offenses. Silence by Congress regarding mens rea for the offense generally does not alone suggest Congress intended strict

liability. See, generally, US v. Zachary, 61 MJ 813 (ACCA, 2005), affirmed 63 MJ 438 (CAAF 2006); Staples v. US, 511 US 600 (1994); Liparota v. US, 471 US 419 (1994); and (for a good general discussion of this topic) US v. Burwell, 690 F3d 500 (DC Cir., 2012) (Kavanagh, J., dissenting).

RCM 916(j) has been interpreted to apply not only to situations where if the facts were as the accused mistakenly believed them the accused would be absolved of all criminal liability, but also to situations where the accused would be absolved of criminal liability for the charged offense, but not necessarily for a lesser-included offense. See Zachary, supra.

While a commonly encountered ignorance or mistake of fact instruction is below, it is not exclusive. The military judge must carefully follow the analytical methodology above to determine if mistake of fact may be applicable in other situations. In those situations, the military judge should use appropriately tailored versions of Instructions 5-11-1 or 5-11-2.

NOTE 15: Mistake of fact as to consent to the sexual conduct. When the evidence has reasonably raised mistake of fact as to consent to the sexual conduct, include the following instruction on honest and reasonable mistake of fact as to consent. (Note that even for offenses under Article 120(b)(1)(C) and 120(b)(1)(D), evidence of consent to the sexual conduct may preclude the causal link between the sexual conduct and the charged method. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction.) If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction.

The evidence has raised the issue of mistake of fact in relation to the offense(s) of (state the alleged offense(s)), as alleged in (the) specification(s) (___) of (the) (additional) Charge (___).

There has been (evidence) (testimony) tending to show that, at the time of the alleged offense(s), the accused mistakenly believed that (state the name of the victim) consented to the sexual conduct alleged concerning (this) (these) offense(s).

Mistake of fact is a defense to (that) (those) charged offense(s). “Mistake of fact” means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct.

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 to the sexual conduct. (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.)

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 prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused did not believe that the alleged victim consented to the sexual conduct, the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct, 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 16: Voluntary intoxication and mistake of fact. If the above mistake of fact instruction is given, and there is evidence of the accused’s voluntary intoxication, the following instruction is appropriate.

There has been some evidence concerning the accused’s state of intoxication at the time of the alleged offense(s). 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.

NOTE 17: Voluntary intoxication and "knew or reasonably should have known." When the accused is charged with sexual assault of a person who was asleep, unconscious, or otherwise unaware that the sexual act was occurring, or a person who was incapable of consenting to the sexual act, and there is evidence that the accused was intoxicated, the following instruction may be appropriate with respect to whether the accused "knew or reasonably should have known" the alleged victim's state.

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). With respect to (that) (those) offense(s), I advised you earlier that the government is required to prove that [the accused knew or reasonably should have known that (state the name of the person alleged) was asleep, unconscious, or otherwise unaware that the sexual act was occurring] [(state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,) and that condition was known or reasonably should have been known by the accused].

In deciding whether the accused had such knowledge, 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 had the required knowledge.

On the other hand, the fact that the accused may have been intoxicated at the time of the offense(s) does not necessarily indicate that he/she was unable to have the required knowledge 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 had the required knowledge, you should consider the effect of intoxication, if any, as well as the other evidence in the case.

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 had the required

knowledge, the accused will not avoid criminal responsibility because of voluntary intoxication.

However, on the question of whether the accused "reasonably should have known" that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)], you may not consider the accused's intoxication, if any, because what a person reasonably should have known refers to what an ordinary, prudent, sober adult would have reasonably known under the circumstances of this case.

In summary, voluntary intoxication should be considered in determining whether the accused had actual knowledge that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)]. Voluntary intoxication should not be considered in determining whether the accused "reasonably should have known" that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)].

NOTE 18: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, if the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.

e. REFERENCES: Definition of "vulva." See US v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) and US v. Tu, 30 MJ 587 (ACMR 1990) ; Definition of "competent person." See US v. Pease, 75 MJ 180 (CAAF 2016).

3–45–15. AGGRAVATED SEXUAL CONTACT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

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 _____, (touch) (cause _____ to touch), directly or through the clothing, the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) (_____) of _____ by [using unlawful force against him/her] [using force causing or likely to cause death or grievous bodily harm to him/her (___)] [threatening or placing him/her in fear that he/she (___) would be subjected to death, grievous bodily harm, or kidnapping] [first rendering him/her unconscious] [administering to him/her a drug, intoxicant, or other similar substance by force or threat of force, or without his/her knowledge or consent, thereby substantially impairing his/her ability to appraise or control his/her conduct] with an intent to (arouse or gratify the sexual desire of any person) (abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person).

c. **ELEMENTS:**

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused sexual contact by] (state name of the alleged victim), by (touching) (causing _____ to touch), directly or through the clothing, the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) (____) of _____;

(2) That the accused did so by

(a) using unlawful force against (state the name of the alleged victim) [, to wit: (if alleged in the specification, state the force used)];

(b) using force causing or likely to cause death or grievous bodily harm to (state the name of the person alleged) [, to wit: (if alleged in the specification, state the force used);

(c) threatening or 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, or kidnapping;

(d) first rendering (state the name of the alleged victim) unconscious;

(e) administering to (state the name of the alleged victim) a drug, intoxicant, or other similar substance by force or threat of force, or without the knowledge or consent of (state the name of the alleged victim), thereby substantially impairing the ability of (state the name of the alleged victim) to appraise or control his/her conduct; and

NOTE 2: One of the following two elements must be added, depending on the body part touched.

NOTE 2.1: Touching of the Erogenous Zones. If the touching is of the genitalia, anus, groin, breast, inner thigh, or buttocks, add the following element.

[(3)] That the accused did so with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.

NOTE 2.2: Touching of Other Body Parts. If the touching is of body parts other than in NOTE 2.1, above, add the following element.

[(3)] That the accused did so with an intent to arouse or gratify the sexual desire of any person.

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

Touching may be accomplished by any part of the body.

NOTE 3: If touching is accomplished by an object rather than a body part, give the following:

(Touching may be accomplished by an object.)

NOTE 4: Marriage. Marriage is not a defense for any conduct in issue in any prosecution under Article 120.

NOTE 5: By unlawful force. When the sexual contact is alleged by unlawful force, include the following instruction:

“Unlawful force” means an act of force done without legal justification or excuse.

"Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the alleged victim.

NOTE 6: <u>By force causing or likely to cause grievous bodily harm</u>. When the sexual contact is alleged by force causing or likely to cause death or grievous bodily harm, include the following instruction:

"Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the alleged victim.

"Grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(The force causing or likely to cause death or grievous bodily harm which caused the alleged victim to engage in the sexual contact need not have been applied by the accused to the alleged victim. It is sufficient if the accused applied such force to any person, which thereby caused the alleged victim to engage in the sexual contact.)

NOTE 7: <u>By threat or placing in fear</u>. 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 the wrongful action contemplated by the communication or action.

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

("Grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and

other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.)

("Kidnapping" means the unlawful and intentional detention of a person against that person's will. 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. (If the subject of the threat to kidnap 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 subject's parents or legal guardian.))

(The person to be (killed) (subjected to grievous bodily harm) (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) (subjected to grievous bodily harm) (kidnapped), which thereby caused the alleged victim to engage in the sexual contact.)

NOTE 8: <u>Instructing on consent</u>. The issue of "consent" may arise in two ways. First, lack of consent is an element when the accused is charged with aggravated sexual contact by administering a drug, intoxicant, or similar substance without the consent of the alleged victim. Lack of consent is not an element when the accused is charged with aggravated sexual contact by any other method (to include when the accused is charged with administering a drug, intoxicant, or similar substance by force or by threat of force). See US v. Neal, 68 MJ 289, 302-304 (CAAF 2010) (statutory definition of "force" does not imply an element of lack of consent). Second, evidence of the alleged victim's consent to the sexual conduct might be introduced with respect to any aggravated sexual contact allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(c) offense require the accused to have committed sexual conduct "by" a certain method. Stated another way, "by" means the sexual conduct occurred because of that method. Consent to the sexual conduct logically precludes that causal link; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. If consent evidence has been introduced to negate other elements of the charged offense, give the second parenthetical below, along with the appropriately tailored definitions of consent. If lack of consent to the administration of a drug, intoxicant, or similar substance is an element of

the charged offense, give the first parenthetical below, along with the appropriately tailored definition of consent.

IF LACK OF CONSENT TO THE ADMINISTRATION OF A DRUG, INTOXICANT, OR SIMILAR SUBSTANCE IS AN ELEMENT, GIVE THE FOLLOWING INSTRUCTION: (As I previously advised you, in (The) Specification(s) (_____) of (The) (Additional) Charge (___), the accused is charged with the offense of aggravated sexual contact by administering a drug, intoxicant, or other similar substance without the consent of the alleged victim, thereby substantially impairing the ability of that other person to appraise or control conduct. For this offense, lack of consent to the administration of the drug, intoxicant, or other similar substance is an element of the offense.)

<u>IF CONSENT EVIDENCE HAS BEEN INTRODUCED TO NEGATE OTHER ELEMENTS OF THE CHARGED OFFENSE, GIVE THE FOLLOWING INSTRUCTION</u>: (The evidence has (also) raised the issue of whether (state the alleged victim's name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by state the applicable element). Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by state the applicable element).

"Consent" means a freely given agreement to the conduct at issue 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 use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to being rendered unconscious.)

(A person cannot consent while under threat or fear.)

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

> ***NOTE 9: Additional definitions related to consent. In US v. Pease, 75 MJ 180 (CAAF 2016), CAAF approved certain non-statutory definitions related to the issue of consent. Pease did not require that these definitions be provided to members. However, in the military judge's discretion, the below definitions may be given to the members when appropriate.***

(A "competent person" is a person who possesses the physical and mental ability to consent.)

(An "incompetent person" is a person who lacks either the mental or physical ability to consent because he or she is: (1) asleep or unconscious; (2) impaired by a drug, intoxicant or other similar substance; or (3) suffering from a mental disease or defect or a physical disability.)

(To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. However, if the person has the ability to appreciate the conduct and communicate lack of consent, but does not do so out of fear or because of some other external influence counteracting voluntariness, the sexual conduct is not voluntary.)

(A person is “incapable of consenting” when (he/she) lacks the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make or to communicate a decision about whether (he/she) agrees to the conduct.)

NOTE 10: Ignorance or mistake of fact generally. Under the 28 June 2012 version of Article 120, there is no statutory mistake of fact defense. Mistake of fact is a defense in RCM 916(j). Mistake of fact under RCM 916(j) is only a defense when it negates an element. When the element goes to premeditation, specific intent, willfulness or knowledge of a particular fact, the mistake must only be honest. When the element requires only general intent or knowledge, the mistake must be honest and reasonable. When the accused's intent or knowledge is immaterial to an element (that is, strict liability), mistake of fact is not a defense.

Accordingly, the military judge must first determine the elements of an offense. Second, the military judge must determine whether the evidence has reasonably raised the accused's mistake which negates an element. Finally, the military judge must determine into which of the above three categories that element falls.

Strict liability offenses are “disfavored.” Absent some indication Congress intended to impose strict liability (and the starting point for determining intent is statutory construction), courts have applied a “presumption” of mens rea to criminal offenses. Silence by Congress regarding mens rea for the offense generally does not alone suggest Congress intended strict liability. See, generally, US v. Zachary, 61 MJ 813 (ACCA, 2005), affirmed 63 MJ 438 (CAAF 2006); Staples v. US, 511 US 600 (1994); Liparota v. US, 471 US 419 (1994); and (for a good general discussion of this topic) US v. Burwell, 690 F3d 500 (DC Cir., 2012) (Kavanagh, J., dissenting).

RCM 916(j) has been interpreted to apply not only to situations where if the facts were as the accused mistakenly believed them the accused would be absolved of all criminal liability, but also to situations where the accused would be absolved of criminal liability for the charged offense, but not necessarily for a lesser-included offense. See Zachary, supra.

While commonly encountered ignorance or mistake of fact instructions are below, these are not exclusive. The military judge must carefully follow the analytical methodology above to determine if mistake of fact may be applicable in other situations. In those situations, the military judge should use appropriately tailored versions of Instructions 5-11-1 or 5-11-2.

NOTE 11: Mistake of fact as to: (1) consent to the sexual conduct; or (2) knowledge of or consent to the administration of a drug, intoxicant, or other substance. When the evidence has reasonably raised mistake of fact as to consent to the sexual conduct or as to knowledge of or consent to the

administration of a drug, intoxicant, or other substance, include the following instruction on honest and reasonable mistake of fact as to consent. (Note that even for offenses under Article 120(a)(2), 120(a)(3) and 120(a)(4), evidence of consent to the sexual conduct may preclude the causal link between the sexual conduct and the charged method. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction.) If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction.

The evidence has raised the issue of mistake of fact in relation to the offense(s) of (state the alleged offense(s)), as alleged in (the) specification(s) (___) of (the) (additional) Charge (___).

There has been (evidence) (testimony) tending to show that, at the time of the alleged offense(s), the accused mistakenly believed that (state the name of the victim) [consented to the sexual conduct alleged] [(knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] concerning (this) (these) offense(s).

Mistake of fact is a defense to (that) (those) charged offense(s). “Mistake of fact” means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person [consented to the sexual conduct] [(knew of) (consented to) the administration of the drug, intoxicant, or other similar substance].

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 to the sexual conduct] [(knew of) (consented to) the administration of the drug, intoxicant, or other similar substance]. (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.)

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 prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused did not believe that the alleged victim [consented to the sexual conduct] [(knew of) (consented to) the administration of the drug, intoxicant, or other similar substance], the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim [consented to the sexual conduct] [(knew of) (consented to) the administration of the drug, intoxicant, or other similar substance], 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 12: Voluntary intoxication and mistake of fact. If the above mistake of fact instruction is given, and there is evidence of the accused's voluntary intoxication, the following instruction is appropriate.

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense(s). 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.

NOTE 13: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, regarding the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.

e. REFERENCES: Definition of "vulva." See US v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) and US v. Tu, 30 MJ 587 (ACMR 1990) ; Definition of "competent person." See US v. Pease, 75 MJ 180 (CAAF 2016); US v. Schloff, 74 MJ 312 (2015) ("Sexual contact" may encompass both body-to-body and object-to-body contact.).

3–45–16. ABUSIVE SEXUAL CONTACT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

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 _____, (touch) (cause _____ to touch), directly or through the clothing, the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) (_____) of _____ [by causing bodily harm to him/her, to wit: _____] [by threatening or placing him/her in fear] [by making a fraudulent representation that the sexual contact served a professional purpose] [by inducing a belief by artifice, pretense, or concealment that the accused was another person] [when the accused knew or reasonably should have known that _____ was asleep, unconscious, or otherwise unaware that the sexual contact was occurring] [when _____ was incapable of consenting to the sexual contact due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,) and that condition was known or reasonably should have been known by the accused], with an intent to (arouse or gratify the sexual desire of any person) (abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person).

c. **ELEMENTS:**

Abusive Sexual Contact by Causing Bodily Harm:

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused sexual contact by] (state the name of the alleged victim), by (touching) (causing _____ to touch), directly or through the clothing, the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) (_____) of _____;

(2) That the accused did so by causing bodily harm to (state the name of the alleged victim), to wit: (state the bodily harm alleged); (and)

NOTE 2: One of the following two elements must be added, depending on the body part touched.

NOTE 2.1: Touching of the Erogenous Zones. If the touching is of the genitalia, anus, groin, breast, inner thigh, or buttocks, add the following element.

(3) That the accused did so with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; (and)

NOTE 2.2: Touching of Other Body Parts. If the touching is of body parts other than in NOTE 2.1, above, add the following element.

(3) That the accused did so with an intent to arouse or gratify the sexual desire of any person; (and)

NOTE 3: Lack of consent as an element. When the same physical act is alleged as both the actus reus and the bodily harm for the charged sexual contact, include this as a final element:

[(4)] That the accused did so without the consent of (state the name of the alleged victim).

Abusive Sexual Contact Threat/Fear, Fraudulent Representation, or Artifice:

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused sexual contact by] (state the name of the alleged victim), by (touching) (causing _____ to touch), directly or through the clothing, the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) (_____) of _____;

(2) That the accused did so by

(a) threatening or placing (state the name of the alleged victim) in fear;

(b) making a fraudulent representation that the sexual contact served a professional purpose;

(c) inducing a belief by artifice, pretense, or concealment that the accused was another person; (and)

NOTE 4: One of the following two elements must be added, depending on the body part touched.

NOTE 4.1: Touching of the Erogenous Zones. If the touching is of the genitalia, anus, groin, breast, inner thigh, or buttocks, add the following element.

(3) That the accused did so with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.

NOTE 4.2: Touching of Other Body Parts. If the touching is of body parts other than in NOTE 4.1, above, add the following element.

(3) That the accused did so with an intent to arouse or gratify the sexual desire of any person.

Abusive Sexual Contact When Victim Asleep, Unconscious, or Otherwise Unaware:

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused sexual contact by] (state the name of the alleged victim), by (touching) (causing _____ to touch), directly or through the clothing, the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) (_____) of _____;

(2) That the accused did so when (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual contact was occurring;

(3) That the accused knew or reasonably should have known that (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual act was occurring; (and)

NOTE 5: One of the following two elements must be added, depending on the body part touched.

NOTE 5.1: Touching of the Erogenous Zones. If the touching is of the genitalia, anus, groin, breast, inner thigh, or buttocks, add the following element.

(4) That the accused did so with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.

NOTE 5.2: Touching of Other Body Parts. If the touching is of body parts other than in NOTE 5.1, above, add the following element.

(4) That the accused did so with an intent to arouse or gratify the sexual desire of any person.

Abusive Sexual Contact When Victim is Incapable of Consenting:

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused sexual contact by] (state the name of the alleged victim), by (touching) (causing _____ to touch), directly or through the clothing, the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) (_____) of _____;

(2) That the accused did so when (state the name of the alleged victim) was incapable of consenting to the sexual contact due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,);

(3) That the accused knew or reasonably should have known (state the name of the alleged victim) was incapable of consenting to the sexual contact due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability); (and); (and)

NOTE 6: One of the following two elements must be added, depending on the body part touched.

NOTE 6.1: <u>Touching of the Erogenous Zones</u>. If the touching is of the genitalia, anus, groin, breast, inner thigh, or buttocks, add the following element.

(4) That the accused did so with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.

NOTE 6.2: <u>Touching of Other Body Parts</u>. If the touching is of body parts other than in NOTE 6.1, above, add the following element.

(4) That the accused did so with an intent to arouse or gratify the sexual desire of any person.

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

Touching may be accomplished by any part of the body.

NOTE 7: If touching is accomplished by an object rather than a body part, give the following:

(Touching may be accomplished by an object.)

NOTE 8: Marriage. Marriage is not a defense for any conduct in issue in any prosecution under Article 120.

NOTE 9: By threat or placing in fear. 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 the wrongful action contemplated by the communication or action.

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

The threat or fear in this case must be that the alleged victim or another person would be subjected to the wrongful action.

NOTE 10: 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, including any nonconsensual sexual act or nonconsensual sexual contact).

NOTE 11: Fraudulent representation. When the sexual contact is committed by making a fraudulent representation that it serves a professional purpose, the following may be appropriate:

A "fraudulent representation" is a representation of fact, which the accused knows to be untrue, which is intended to deceive, which does in fact deceive, and which causes the other person to engage in the sexual contact.

The fraudulent representation that the sexual contact served a professional purpose need not have been made by the accused to (state the name of the alleged victim). It is sufficient if the accused made such a fraudulent representation to any person, which thereby caused (state the name of the alleged victim) to engage in the sexual contact.

NOTE 12: Instructing on consent. The issue of "consent" may arise in two ways. First, lack of consent is an element when the accused is charged with abusive sexual contact by causing bodily harm, and the alleged bodily

harm is the same as the alleged sexual contact (i.e., the charge alleges a nonconsensual sexual contact). Lack of consent is not an element when the accused is charged with abusive sexual contact by any other method. Second, evidence of the alleged victim's consent to the sexual conduct might be introduced with respect to any abusive sexual contact allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(d) offense require the accused to have committed sexual conduct "by" a certain method or "when" the alleged victim was in a certain state. Stated another way, "by" means the sexual conduct occurred because of that method, and "when" means the sexual conduct occurred while the alleged victim was in a state that precluded consent. Consent to the sexual conduct logically precludes these causal links; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. If consent evidence has been introduced to negate other elements of the charged offense, give the parenthetical below, along with the appropriately tailored definitions of consent. If lack of consent is an element in a charged offense of abusive sexual contact by causing bodily harm, give the appropriately tailored definitions of consent.

<u>IF CONSENT EVIDENCE HAS BEEN INTRODUCED TO NEGATE OTHER ELEMENTS OF THE CHARGED OFFENSE, GIVE THE FOLLOWING INSTRUCTION</u>:

(The evidence has raised the issue of whether (state the alleged victim's name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by/when state the applicable element). Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by/when state the applicable element).

"Consent" means a freely given agreement to the conduct at issue 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 use of force, threat of force, or placing another person in fear does not constitute consent. A

current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to being rendered unconscious.)

(A person cannot consent while under threat or fear.)

(A person cannot consent to sexual contact when believing, due to a fraudulent representation, that the sexual contact served a professional purpose.)

(A person cannot consent to sexual contact when believing, due to artifice, pretense, or concealment, that the accused was another person.)

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

> ***NOTE 13: Additional definitions related to consent. In US v. Pease, 75 MJ 180 (CAAF 2016), CAAF approved certain non-statutory definitions related to the issue of consent. Pease did not require that these definitions be provided to members. However, in the military judge's discretion, the below definitions may be given to the members when appropriate.***

(A "competent person" is a person who possesses the physical and mental ability to consent.)

(An "incompetent person" is a person who lacks either the mental or physical ability to consent because he or she is: (1) asleep or unconscious; (2) impaired by a drug, intoxicant or other similar substance; or (3) suffering from a mental disease or defect or a physical disability.)

(To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. However, if the person has the ability to appreciate the conduct and communicate lack of consent, but does not do so out of fear or because of some other external influence counteracting voluntariness, the sexual conduct is not voluntary.)

(A person is “incapable of consenting” when (he/she) lacks the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make or to communicate a decision about whether (he/she) agrees to the conduct.)

NOTE 14: Ignorance or mistake of fact generally. Under the 28 June 2012 version of Article 120, there is no statutory mistake of fact defense. Mistake of fact is a defense in RCM 916(j). Mistake of fact under RCM 916(j) is only a defense when it negates an element. When the element goes to premeditation, specific intent, willfulness or knowledge of a particular fact, the mistake must only be honest. When the element requires only general intent or knowledge, the mistake must be honest and reasonable. When the accused's intent or knowledge is immaterial to an element (that is, strict liability), mistake of fact is not a defense.

Accordingly, the military judge must first determine the elements of an offense. Second, the military judge must determine whether the evidence has reasonably raised the accused's mistake which negates an element. Finally, the military judge must determine into which of the above three categories that element falls.

Strict liability offenses are “disfavored.” Absent some indication Congress intended to impose strict liability (and the starting point for determining intent is statutory construction), courts have applied a “presumption” of mens rea to criminal offenses. Silence by Congress regarding mens rea for the offense generally does not alone suggest Congress intended strict liability. See, generally, US v. Zachary, 61 MJ 813 (ACCA, 2005), affirmed 63 MJ 438 (CAAF 2006); Staples v. US, 511 US 600 (1994); Liparota v. US, 471 US 419 (1994); and (for a good general discussion of this topic) US v. Burwell, 690 F3d 500 (DC Cir., 2012) (Kavanagh, J., dissenting).

RCM 916(j) has been interpreted to apply not only to situations where if the facts were as the accused mistakenly believed them the accused would be absolved of all criminal liability, but also to situations where the accused would be absolved of criminal liability for the charged offense, but not necessarily for a lesser-included offense. See Zachary, supra.

While a commonly encountered ignorance or mistake of fact instruction is below, it is not exclusive. The military judge must carefully follow the analytical methodology above to determine if mistake of fact may be applicable in other situations. In those situations, the military judge should use appropriately tailored versions of Instructions 5-11-1 or 5-11-2.

NOTE 15: Mistake of fact as to consent to the sexual conduct. When the evidence has reasonably raised mistake of fact as to consent to the sexual conduct, include the following instruction on honest and reasonable mistake of fact as to consent. (Note that even for offenses under Article 120(b)(1)(C) and 120(b)(1)(D), evidence of consent to the sexual conduct may preclude the causal link between the sexual conduct and the charged method. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction.) If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction.

The evidence has raised the issue of mistake of fact in relation to the offense(s) of (state the alleged offense(s)), as alleged in (the) specification(s) (___) of (the) (additional) Charge (___).

There has been (evidence) (testimony) tending to show that, at the time of the alleged offense(s), the accused mistakenly believed that (state the name of the victim) consented to the sexual conduct alleged concerning (this) (these) offense(s).

Mistake of fact is a defense to (that) (those) charged offense(s). “Mistake of fact” means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct.

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 to the sexual conduct. (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.)

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 prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused did not believe that the alleged victim consented to the sexual conduct, the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct, 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 16: Voluntary intoxication and mistake of fact. If the above mistake of fact instruction is given, and there is evidence of the accused's voluntary intoxication, the following instruction is appropriate.

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense(s). 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.

NOTE 17: Voluntary intoxication and "knew or reasonably should have known". When the accused is charged with abusive sexual contact of a person who was asleep, unconscious, or otherwise unaware that the sexual contact was occurring, or a person who was incapable of consenting to the sexual contact, and there is evidence that the accused was intoxicated, the following instruction may be appropriate with respect to whether the accused "knew or reasonably should have known" the alleged victim's state.

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). With respect to (that) (those) offense(s), I advised you earlier that the government was required to prove that [the accused knew or reasonably should have known that (state the name of the person alleged) was asleep, unconscious, or otherwise unaware that the sexual contact was occurring] [(state the name of the alleged victim) was incapable of consenting to the sexual contact due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,) and that condition was known or reasonably should have been known by the accused].

In deciding whether the accused had such knowledge, you should consider the evidence of voluntary intoxication.

The law recognizes that a person's ordinary thought process may be materially affected when you 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 had the required knowledge.

On the other hand, the fact that the accused may have been intoxicated at the time of the offense(s) does not necessarily indicate that you were unable to have the required knowledge because a person may be drunk yet still be aware at that time of your actions and their probable results.

In deciding whether the accused had the required knowledge, you should consider the effect of intoxication, if any, as well as the other evidence in the case.

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 had the required knowledge, the accused will not avoid criminal responsibility because of voluntary intoxication.

However, on the question of whether the accused "reasonably should have known" that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual contact was occurring] [incapable of consenting to the sexual contact

due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)], you may not consider the accused's intoxication, if any, because what a person reasonably should have known refers to what an ordinary, prudent, sober adult would have reasonably known under the circumstances of this case.

In summary, voluntary intoxication should be considered in determining whether the accused had actual knowledge that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual contact was occurring] [incapable of consenting to the sexual contact due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)]. Voluntary intoxication should not be considered in determining whether the accused "reasonably should have known" that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual contact was occurring] [incapable of consenting to the sexual contact due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)].

NOTE 18: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, regarding the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.

e. REFERENCES: Definition of "vulva." See US v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) and US v. Tu, 30 MJ 587 (ACMR 1990) ; Definition of "competent person." See US v. Pease, 75 MJ 180 (CAAF 2016); US v. Schloff, 74 MJ 312 (2015) ("Sexual contact" may encompass both body-to-body and object-to-body contact.).

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.

3–45B–1. RAPE OF A CHILD (ARTICLE 120B)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. **MAXIMUM PUNISHMENT:** DD, TF, life without eligibility for parole, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for rape of a child occurring on or after 24 June 2014.

b. **MODEL SPECIFICATION:**

(1) **Rape of a child involving contact between penis and vulva or anus or mouth**.

(a) *Rape of a child who has not attained the age of 12*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, a child who had not attained the age of 12 years, by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis.

(b) *Rape by force of a child who has attained the age of 12 years*: In that (personal jurisdiction data), did (at/on board location), on or about _____20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis, by using force against _____, to wit: _____.

(c) *Rape by threatening or placing in fear a child who has attained the age of 12 years*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by causing penetration of _____' s (vulva) (anus) (mouth) with _____'s penis by (threatening _____) (placing _____in fear).

(d) *Rape by rendering unconscious of a child who has attained the age of 12 years*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis by rendering _____ unconscious by _____.

(e) *Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12 years*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis by administering to _____ a (drug) (intoxicant) (_____), to wit: _____.

(2) **Rape of a child involving penetration of the vulva or anus or mouth by any part of the body or any object**.

(a) *Rape of a child who has not attained the age of 12*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, a child who had not attained the age of 12 years, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(b) *Rape by force of a child who has attained the age of 12 years*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), by using force against _____, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(c) *Rape by threatening or placing in fear a child who has attained the age of 12 years*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), by (threatening _____) (placing _____ in fear), with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(d) *Rape by rendering unconscious of a child who has attained the age of 12 years*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), by rendering _____ unconscious, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(e) *Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12 years*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), by administering to _____ a (drug) (intoxicant) (_____), to wit: _____, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

c. **ELEMENTS:**

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), to wit: (state the act(s) alleged); (and)

NOTE 2: 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 3: 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:

[(2)] That the accused did so by

(a) using force against (state the name of the alleged victim or other person against whom force was allegedly used), to wit: (state the force alleged);

(b) threatening or placing (state the name of the alleged victim) in fear;

(c) rendering (state the name of the alleged victim) unconscious;

(d) administering to (state the name of the alleged victim) a drug, intoxicant, or other similar substance.

[(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:**

“Child” means any person who has not attained the age of 16 years.

The prosecution is not required to prove the accused knew the age of (state the name of the alleged victim) at the time the alleged sexual act(s) occurred.

“Sexual act” means the penetration, however slight, of the vulva or anus or mouth (by the penis) (of another by any part of the body 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).

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." The instruction below may be helpful.

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."

NOTE 5: By force. When the sexual act is alleged by force, include the following instruction:

"Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain or injure a child; or inflicting physical harm.

(In the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force.)

(The force which caused the alleged victim to engage in the sexual act need not have been applied by the accused to the alleged victim. It is sufficient if the accused applied such force to any person, which thereby caused 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 child in fear" means a communication or action that is of sufficient consequence to cause the child to fear that non-compliance will result in the child or another person being subjected to the action contemplated by the communication or action.

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(The person subject to the action contemplated by the threat need not be the alleged victim. It is sufficient if the accused threatened or placed the alleged victim in fear that any person would subject to the action contemplated by the threat, which thereby caused the alleged victim to engage in the sexual act.)

NOTE 7: Marriage. Marriage is not a defense for rape of a child under Article 120b.

NOTE 8: Evidence of consent. Generally, the elements of an Article 120b(a)(2) offense require the accused to have committed sexual conduct "by" a certain method. Stated another way, "by" means the sexual conduct occurred because of that method. Consent logically precludes that causal link; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, if the alleged offense is rape of a child who has attained the age of 12 years, evidence that the alleged victim consented to the sexual conduct at issue may be relevant to negate an element, even though lack of consent may not be a separate element. In such situations the following instruction, properly tailored, would be appropriate. (Note that even for offenses under Article 120b(a)(2)(B) and 120b(a)(2)(C), evidence of consent to the sexual conduct may preclude the causal link between the sexual conduct and the charged method. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction.)

The evidence has raised the issue of whether (state the alleged victim's name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by _____) (state the element(s) to which the evidence concerning consent relates) beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by _____) (state the element(s) to which the evidence concerning consent relates).

NOTE 9: Mistake of fact as to consent to the sexual conduct. When the evidence has reasonably raised mistake of fact as to consent to the sexual conduct, include the following instruction on honest and reasonable mistake of fact as to consent. If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction. The burden of proof in the instruction below is taken from RCM 916(b)(1). The military judge should state on the record that he/she will not instruct on the burden of proof as provided in RCM 916(b)(4), as that burden has been held to be a "legal impossibility" and the

statutory language upon which RCM 916(b)(4) was based has now been repealed for offenses occurring on or after 28 June 2012. See US v. Prather, 69 MJ 338 (CAAF 2011).

RCM 916(j) has been interpreted to apply not only to situations where, if the facts were as the accused mistakenly believed them, the accused would be absolved of all criminal liability, but also to situations where the accused would be absolved of criminal liability for the charged offense, but not necessarily for a lesser-included offense. See US v. Zachary, 61 MJ 813 (ACCA, 2005), affirmed 63 MJ 438 (CAAF 2006). Accordingly, when mistake of fact as to consent is an issue when the accused is charged with rape of a child under Article 120b(a)(2)(A) or (D), the military judge should also instruct the members on sexual assault of a child under Article 120b(b) as a lesser included offense.

(Note that even for offenses under Article 120b(a)(2)(B) and 120b(a)(2)(C), evidence of consent to the sexual conduct may preclude the causal link between the sexual conduct and the charged method. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of 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 conduct alleged concerning the offense(s) of (state the alleged offense(s)), 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 charged sexual conduct consented to (all) that sexual conduct. 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.)

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 prosecution has the burden of proving beyond a reasonable doubt that the accused did not reasonably believe that (state the name of the alleged victim) consented to the charged sexual conduct. If you are convinced beyond a reasonable doubt, at the time of the charged offense(s), the accused did not believe that the alleged victim consented to the sexual conduct alleged, the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct alleged, 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 10: Voluntary intoxication and mistake of fact as to consent to the sexual conduct. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

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.

NOTE 11: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, if the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.

3–45B–2. SEXUAL ASSAULT OF A CHILD (ARTICLE 120B)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. **MAXIMUM PUNISHMENT:** DD, TF, 30 years, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for sexual assault of a child occurring on or after 24 June 2014.

b. **MODEL SPECIFICATION:**

(a) *Sexual assault of a child who has attained the age of 12 years involving contact between penis and vulva or anus or mouth*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis.

(b) *Sexual assault of a child who has attained the age of 12 years involving penetration of vulva or anus or mouth by any part of the body or any object*: In that (personal jurisdiction data), did (at/on board location), on or about _____20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

c. **ELEMENTS:**

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), to wit: (state the act(s) alleged); and

(2) That at the time, (state the name of the alleged victim) had attained the age of 12 years, but had not attained the age of 16 years.

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

"Child" means any person who has not attained the age of 16 years.

The prosecution is not required to prove the accused knew that (state the name of the alleged victim) had not attained the age of 16 years at the time the alleged sexual act(s) occurred.

"Sexual act" means the penetration, however slight, of the vulva or anus or mouth (by the penis) (of another by any part of the body 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).

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 "vulva." The instruction below may be helpful.

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."

NOTE 3: Mistake of fact as to age. Mistake of fact as to age is an affirmative defense to sexual assault of a child. If raised by some evidence, the military judge must advise the members that the defense has the burden of proving by a preponderance of the evidence that mistake existed. When mistake of fact as to age has been raised, include the following instruction. The burden of proof in the instruction below is as provided in the statute. The military judge should not instruct on the burden of proof as provided in RCM 916(b)(3), as it is inapplicable to this offense.

The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of 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) had not attained 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 defense to establish the accused was under this mistaken belief, by a preponderance of the evidence. A “preponderance” means more likely than not. If you are not convinced by a preponderance of the evidence that, at the time of the charged sexual assault of a child, the accused was 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 not convinced by preponderance of the evidence that, at the time of the charged sexual assault of a child, the accused's mistake was reasonable, 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 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) was at least 16 years of age 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: Marriage. Marriage is an affirmative defense to sexual assault of a child. If raised by some evidence, the military judge must advise the members that the defense has the burden of proving by a preponderance of the evidence that a marriage existed. When marriage between the accused and the alleged victim of the sexual assault of a child 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 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 defense of marriage does not exist where the accused commits the alleged sexual act(s) upon (state the name of the alleged victim) when the accused knows or reasonably should know that she/he is asleep, unconscious or otherwise unaware that the sexual act(s) (is) (are) occurring or when she / he is incapable of consenting to the sexual act(s) due to impairment by any drug, intoxicant or other similar substance, and that condition was known or reasonably should have been known by the accused.)

The defense has the burden of proving by a preponderance of the evidence that the defense of marriage exists. The term “preponderance” means more likely than not. Therefore, unless you are convinced by a preponderance of the evidence that at the time of the sexual act(s) alleged, the accused and (state the name of the alleged victim) were married to each other, the defense of marriage does not exist.

(Even if you are convinced by a preponderance of the evidence that at the time of the sexual act(s) alleged, the accused and (state the name of the alleged victim) were married to each other, if you are not also convinced by a preponderance of the evidence that (state the name of the alleged victim) was not (asleep, unconscious or otherwise unaware of the sexual act(s) occurring) (incapable of consenting to the sexual act(s) due to impairment by any drug, intoxicant or other similar substance) or that the accused was not aware of and should not have been aware of such condition, the defense of marriage does not exist.)

NOTE 6: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, if the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.

3–45B–3. SEXUAL ABUSE OF A CHILD (ARTICLE 120B)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. **MAXIMUM PUNISHMENT:**

(1) Cases involving sexual contact: DD, TF, 20 years, E-1.

(2) Other cases: DD, TF, 15 years, E-1.

b. **MODEL SPECIFICATION:**

(a) *Sexual abuse of a child involving sexual contact involving the touching of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by intentionally [(touching) (causing _____ to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with an intent to (abuse) (humiliate) (degrade) _____.

(b) *Sexual abuse of a child involving sexual contact involving the touching of any body part of any person*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by intentionally [(touching) (causing _____ to touch)] [(directly) (through the clothing)] (name of body part) of _____, with an intent to (arouse) (gratify the sexual desire of) _____.

(c) *Sexual abuse of a child involving indecent exposure*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by intentionally exposing [his(genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)] to _____, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(d) *Sexual abuse of a child involving indecent communication*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by intentionally communicating to _____ indecent language to wit: _____, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(e) *Sexual abuse of a child involving indecent conduct*: In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by engaging in indecent conduct, to wit: _____, intentionally done (with) (in the presence of) _____, which conduct amounted to a 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.

c. **ELEMENTS:**

By Sexual Contact:

(1) That (state the time and place alleged), the accused committed a lewd act upon (state the name of the alleged victim), by (touching) (causing _____ to touch), directly or through the clothing, the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) (_____) of _____;

(2) That at the time, (state the name of the alleged victim) had not attained the age of 16 years; (and)

NOTE 2: One of the following two elements must be added, depending on the body part touched.

NOTE 2.1: Touching of the Erogenous Zones. If the touching is of the genitalia, anus, groin, breast, inner thigh, or buttocks, add the following element.

[(3)] That the accused did so with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

NOTE 2.2: Touching of Other Body Parts. If the touching is of body parts other than in NOTE 2.1, above, add the following element.

[(3)] That the accused did so with an intent to arouse or gratify the sexual desire of any person.

By Indecent Exposure or Communication:

(1) That (state the time and place alleged), the accused committed a lewd act upon (state the name of the alleged victim), by

(a) intentionally exposing his/her (genitalia) (anus) (buttocks) (areola) (nipple) to _____ by any means (, including via any communication technology);

(b) intentionally communicating to _____ indecent language, to wit: _____, by any means (, including via any communication technology);

(2) That at the time, (state the name of the alleged victim) had not attained the age of 16 years; and

(3) That the accused did so with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.

By Indecent Conduct:

(1) That (state the time and place alleged), the accused committed a lewd act upon (state the name of the alleged victim), by engaging in indecent conduct, to wit: _____, intentionally done (with) (in the presence of) _____ (, including via any communication technology);

(2) That at the time, (state the name of the alleged victim) had not attained the age of 16 years; and

(3) That the conduct amounts to a 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.

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

“Child” means any person who has not attained the age of 16 years.

The prosecution is not required to prove the accused knew the age of (state the name of the alleged victim) at the time the alleged sexual act(s) occurred.

(Touching may be accomplished by any part of the body.)

NOTE 3: If touching is accomplished by an object rather than a body part, give the following:

(Touching may be accomplished by an object.)

NOTE 4: Mistake of fact as to age. Mistake of fact as to age is an affirmative defense to sexual abuse of a child, if the child had in fact attained the age of 12 years. If raised by some evidence, the military judge must advise the members that the defense has the burden of proving by a preponderance of the evidence that mistake existed. When mistake of fact as to age has been raised, include the following instruction. The burden of proof in the instruction below is as provided in the statute.

The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of 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 lewd act(s) occurred.

(First, if you find beyond a reasonable doubt that (state the name of the alleged victim) had not attained the age of 12 years, the defense of mistake of fact does not exist. The defense of mistake of fact can only be considered, as described below, if you find beyond a reasonable doubt that (state the name of the alleged victim) had attained the age of 12 but had not attained the age of 16.)

The prosecution is not required to prove the accused knew that (state the name of the alleged victim) had not attained the age of 16 years at the time the alleged lewd 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 defense to establish the accused was under this mistaken belief, by a preponderance of the evidence. A “preponderance” means more likely than not. If you are not convinced by a preponderance of the evidence that, at the time of the charged sexual abuse of a child, the accused was 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 not convinced by preponderance of the evidence that, at the time of the charged sexual abuse of a child, the accused’s mistake was reasonable, 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 sexual abuse 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) was at least 16 years of age 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: Marriage. Marriage is an affirmative defense to sexual abuse of a child. If raised by some evidence, the military judge must advise the members that the defense has the burden of proving by a preponderance of the evidence that a marriage existed. When marriage between the accused and the alleged victim of the sexual abuse of a child 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 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 lewd 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 defense of marriage does not exist where the accused commits the alleged lewd act(s) upon (state the name of the alleged victim) when the accused knows or reasonably should know that she / he is asleep, unconscious or otherwise unaware that the lewd act(s) (is) (are) occurring or when she / he is incapable of consenting to the lewd act(s) due to impairment by any drug, intoxicant or other similar substance, and that condition was known or reasonably should have been known by the accused.)

The defense has the burden of proving by a preponderance of the evidence that the defense of marriage exists. The term "preponderance" means more likely than not. Therefore, unless you are convinced by a preponderance of the evidence that at the time of the lewd act(s) alleged, the accused and (state the name of the alleged victim) were married to each other, the defense of marriage does not exist.

(Even if you are convinced by a preponderance of the evidence that at the time of the lewd act(s) alleged, the accused and (state the name of the alleged victim) were married to each other, if you are not also convinced by a preponderance of the evidence that (state the name of the alleged victim) was not (asleep, unconscious or otherwise unaware of the lewd act(s) occurring) (incapable of consenting to the lewd act(s) due to impairment by any drug, intoxicant or other similar substance) or that the accused was not aware of and should not have been aware of such condition, the defense of marriage does not exist.)

> ***NOTE 7: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, if the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.***

e. REFERENCES: US v. Schloff, 74 MJ 312 (2015) ("Sexual contact" may encompass both body-to-body and object-to-body contact.).

3–45C–1. INDECENT VIEWING, INDECENT RECORDING, OR BROADCASTING/DISTRIBUTION OF AN INDECENT RECORDING (ARTICLE 120C)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. **MAXIMUM PUNISHMENT:**

(1) Indecent viewing: DD, TF, 1 year, E-1.

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

(3) Broadcasting or distribution of an indecent recording: DD, TF, 7 years, E-1.

b. **MODEL SPECIFICATION:**

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, knowingly and wrongfully [view the private area of _____, without his/her consent and under circumstances in which he/she had a reasonable expectation of privacy] [(photograph) (videotape) (film) (make a recording of) the private area of _____, without his/her consent and under circumstances in which he/she had a reasonable expectation of privacy] [(broadcast) (distribute) a recording of the private area of _____, when the said accused knew or reasonably should have known that the said recording was made without the consent of _____ and under circumstances in which he/she had a reasonable expectation of privacy].

c. **ELEMENTS:**

Indecent Viewing:

(1) That (state the time and place alleged), the accused knowingly and wrongfully viewed the private area of (state the name of the alleged victim);

(2) That the accused did so without the consent of (state the name of the alleged victim); and

(3) That the viewing took place under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy.

Indecent Recording:

(1) That (state the time and place alleged), the accused knowingly and wrongfully (recorded) (photographed) (videotaped) (filmed) (recorded by means of _____) the private area of (state the name of the alleged victim);

(2) That the accused did so without the consent of (state the name of the alleged victim); and

(3) That the (recording) (photograph) (videotape) (film) (recording by means of _____) was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy.

Broadcasting an Indecent Recording:

(1) That (state the time and place alleged), the accused knowingly and wrongfully broadcast a recording of the private area of (state the name of the alleged victim);

(2) That the recording was made without the consent of (state the name of the alleged victim);

(3) That the accused knew or reasonably should have known that the recording was made without the consent of (state the name of the alleged victim);

(4) That the recording was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy; and

(5) That the accused knew or reasonably should have known that the recording was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy.

Distributing an Indecent Recording:

(1) That (state the time and place alleged), the accused knowingly and wrongfully distributed a recording of the private area of (state the name of the alleged victim);

(2) That the recording was made without the consent of (state the name of the alleged victim);

(3) That the accused knew or reasonably should have known that the recording was made without the consent of (state the name of the alleged victim);

(4) That the recording was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy; and

(5) That the accused knew or reasonably should have known that the recording was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy.

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

"Wrongful" means without legal justification or lawful authorization.

An act is done "knowingly" when it is done intentionally and on purpose. An act done as the result of a mistake or accident is not done "knowingly."

The term "private area" means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.

The term "under circumstances in which that other person has a reasonable expectation of privacy" or "reasonable expectation of privacy" means:

(A) circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured; or

(B) circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.

(The term "broadcast" means to electronically transmit a visual image with the intent that it be viewed by a person or persons.)

(The term "distribute" means delivering to the actual or constructive possession of another, including transmission by electronic means.)

(The term “recording” means a still or moving visual image captured or recorded by any means.)

NOTE 2: Defining “consent.” Article 120c does not define the word “consent.” The definition of “consent” provided below is taken from Article 120. If necessary, and at the judge’s discretion, the below instruction may be used to define the concept of “consent.” Prior to defining “consent,” the judge should consult the parties on whether a definition of “consent” is necessary and whether the below definition is correct.

“Consent” means a freely given agreement to the conduct at issue 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 or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

Lack of consent may be inferred based on the circumstances of the offense. All of the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person’s actions.

NOTE 3: Mistake of fact as to consent. When the accused is charged with indecent viewing or recording, and the evidence has reasonably raised mistake of fact as to consent, include the following instruction on honest and reasonable mistake of fact as to consent. If instructing on an attempted offense, only the honest mistake of fact instruction should be given.

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 conduct concerning the offense(s) of indecent (viewing) (recording), 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 consented to the (viewing) (photographing)

(videotaping) (filming) (recording). 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 (viewing) (photographing) (videotaping) (filming) (recording), the defense does not exist. Even if you conclude the accused was under a mistaken belief that the alleged victim consented to the (viewing) (photographing) (videotaping) (filming) (recording), 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 4: 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 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 mistaken belief, if any, was reasonable, you may not consider the accused’s intoxication because 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: Voluntary intoxication and “knew or reasonably should have known.” When the accused is charged with broadcasting or distributing an indecent recording, and there is evidence that the accused was intoxicated, the following instruction may be appropriate with respect to whether the

accused "knew or reasonably should have known" the circumstances under which the recording was made.

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). With respect to (that) (those) offense(s), I advised you earlier that the government is required to prove that the accused knew or reasonably should have known that the recording was made without the consent of (state the name of the alleged victim), and that the accused knew or reasonably should have known that the recording was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy.

In deciding whether the accused had such knowledge, 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 had the required knowledge.

On the other hand, the fact that the accused may have been intoxicated at the time of the offense(s) does not necessarily indicate that (he) (she) was unable to have the required knowledge 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 had the required knowledge, you should consider the effect of intoxication, if any, as well as the other evidence in the case.

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 had the required knowledge, the accused will not avoid criminal responsibility because of voluntary intoxication.

However, on the question of whether the accused "reasonably should have known" that the recording was made without the consent of (state the name of the alleged victim), and the question of whether the accused "reasonably should have known" that the

recording was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy, you may not consider the accused's intoxication, if any, because what a person reasonably should have known refers to what an ordinary, prudent, sober adult would have reasonably known under the circumstances of this case.

In summary, voluntary intoxication should be considered in determining whether the accused had actual knowledge that the recording was made without the consent of (state the name of the alleged victim), and under circumstances in which (state the name of alleged victim) had a reasonable expectation of privacy. Voluntary intoxication should not be considered in determining whether the accused "reasonably should have known" that the recording was made without the consent of (state the name of the alleged victim), and under circumstances in which (state the name of alleged victim) had a reasonable expectation of privacy.

3–45C–2. FORCIBLE PANDERING (ARTICLE 120C)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. **MAXIMUM PUNISHMENT:** DD, TF, 12 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.

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.

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

"Act of prostitution" means a sexual act or sexual contact on account of which anything of value is given to, or received by, any person.

"Compel" means causing another to do something against (his) (her) will by force, threats, or overwhelming pressure.

"Sexual act" means the penetration, however slight, of the vulva or anus or mouth (by the penis) (of another by any part of the body 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:

(A) touching, or 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

(B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.

Touching may be accomplished by any part of the body.

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 "vulva." The instruction below may be helpful.

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."

NOTE 3: 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. US v. Miller, 47 MJ 352 (CAAF 1997).

NOTE 4: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, if the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.

3–45C–3. INDECENT EXPOSURE (ARTICLE 120C)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

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 (genitalia) (anus) (buttocks) (female areola) (female nipple).

c. **ELEMENTS:**

(1) That (state the time and place alleged), the accused exposed (his) (her) ((genitalia) (anus) (buttocks) (female areola) (female nipple));

(2) That such exposure was intentional; and

(3) That such exposure was done in an indecent manner.

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

"Indecent manner" means conduct that amounts to a 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.

"Intentional" means willful or on purpose. An act done as the result of a mistake or accident is not done "intentionally."

NOTE 2: On the issue of whether the exposure was indecent, if raised by the evidence, the Military Judge should give the following, specifically tailored to the evidence in the case:

(In determining whether an intentional exposure was indecent, you should consider all the facts and circumstances surrounding the exposure. Specifically, factors you should consider include but are not limited to: (whether the person witnessing the exposure consented to the exposure); (the age of the accused and the person(s) witnessing the exposure (to include any actual and reasonable mistake of fact as to age by the accused, if the person witnessing the exposure is a minor)); (whether the exposure was

made in a public or private setting); (proximity of age between the accused and the alleged victim); (and) (prior relationship between the accused and the alleged victim).)

NOTE 3: Mistake of fact as to age. Mistake of fact as to age is not a defense, but if raised by the evidence, is a factor in determining whether the charged exposure was indecent. If such mistake of fact is raised by the evidence, give the following instruction In addition to the tailored instruction in NOTE 2:

“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 (name of 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.

A minor is a person under the age of 16 years.

NOTE 4: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent.

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 US v. Kastner, 17 MJ 11 (CMA 1983) (overruling the "innocent purpose defense" of US v. Roark, 31 CMR 64 (CMA 1961)), and US 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: <u>Bailment and withholding by conversion--other than pay and allowances erroneously paid</u>. 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 US v. Hale, 28 MJ 310 (CMA 1989) and US 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: <u>Withholding of pay and/or allowances</u>. 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 US 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 US 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 US 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: <u>Custodian of a fund</u>. 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: <u>Military property</u>. For a definition of military property, See US v. Schelin, 15 MJ 218 (CMA 1983), and US 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: <u>"Money" as military property</u>. In US 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 previously addressed the issue, such as US 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); US v. Newsome, 35 MJ 749 (NMCMR 1992) (treasury checks are military property); US v. Field, 36 MJ 697 (AFCMR 1992)

(appropriated funds for PCS and TDY travel are military property); or US 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: <u>Military or specified property, variance</u>. 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: <u>Value alleged as $500 or less and property in evidence</u>. 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: <u>Value alleged in excess of $500</u>. If value in excess of $500 is alleged, Instruction 7-16, <u>Value, Damage, or Amount</u>, 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: <u>Asportation</u>. 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 US 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 US 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 US v. Roane, 43 MJ 93 (CMA 1995), US v. Abeyta, 12 MJ 507 (ACMR 1981) and US 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: US v. Wiederkehr, 33 MJ 539 (AFCMR 1991); Pay and allowances: US 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: <u>Bailment and withholding by conversion -- other than pay and allowances erroneously paid</u>. 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 US v. Hale, 28 MJ 310 (CMA 1989) and US 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: <u>Withholding of pay and/or allowances</u>. 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 US 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 US 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 US 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: <u>Custodian of a fund</u>. 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 US 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 US v. Roane, 43 MJ 93 (CMA 1995), US v. Abeyta, 12 MJ 507 (ACMR 1981) and US 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: US v. Wederkehr, 33 MJ 539 (AFCMR 1991). Pay and allowances: US 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, usually composed of larceny and some form of assault. Be prepared to instruct upon the various forms of assault reasonably raised by the evidence, as well as larceny and wrongful appropriation. Neither form of aggravated assault is an LIO of robbery, as both forms of aggravated assault contain elements not included in robbery. Likewise, no form of assault is an LIO of robbery by fear of damage to property. 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: <u>Used to legal harm alleged</u>. 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 (<u>state the time and place alleged</u>), the accused falsely (made) (altered) a certain ((signature to a) (check) (writing) (_____)) (part of a (check) (writing) (_____)), as described in the specification, to wit: (<u>describe the signature, part of a writing, or writing allegedly falsely made or altered</u>);

(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 (<u>here, if alleged, set forth the manner in which the legal status of another could be or was allegedly harmed</u>)); 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: 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 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: No evidence of actual defrauding. 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: 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 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 (here 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: <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 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: <u>No evidence of actual defrauding</u>. 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: <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 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 US v. Wade, 34 CMR 287 (CMA 1964).

a. **MAXIMUM PUNISHMENT:** (If "mega-spec" alleged, see US 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 US 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 US v. Wallace, 36 CMR 148 (CMA 1966), US v. Allberry, 44 MJ 226 (CAAF 1996); US 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 US v. Walter, 23 CMR 275 (CMA 1957), and US 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: 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 US v. Wade, 34 CMR 287 (CMA 1964); US 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 US 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: <u>Gambling debts and checks for gambling funds</u>. In US 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 US v. Wallace, 36 CMR 148 (CMA 1966), US v. Allberry, 44 MJ 226 (CAAF 1996); US 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 US v. Walter, 23 CMR 275 (CMA 1957), and US 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: 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: Applicability of this instruction. Use this instruction for offenses occurring before 26 December 2013. The offense of consensual sodomy was repealed by the FY 2014 National Defense Authorization Act, which was signed into law by the President on 26 December 2013.

NOTE 1.1: Using this instruction. If non-forcible sodomy is separately charged for conduct occurring before 26 December 2013, use this instruction. If forcible sodomy is the charged offense, use Instruction 3-51-2.

NOTE 1.2: Care inquiry. A providence inquiry for this offense must contain a discussion with (using lay terminology) and acknowledgement by the accused that: (1) the facts surrounding the accused's conduct satisfy the three part test in US v. Marcum, 60 MJ 198 (CAAF 2004); and (2) the accused understands that those facts cause his/her conduct to fall outside what would otherwise be constitutionally protected behavior and subject the accused to criminal sanction. See US v. Hartman, 69 MJ 467 (CAAF 2011).

Lawrence v. Texas, 539 US 558 (2003) recognized a liberty interest in private sexual practices, with full and mutual consent, between two adults. Marcum used a three part test to apply Lawrence to the military: (1) Is the accused's conduct within the liberty interest identified by the Supreme Court in Lawrence? (2) Does the conduct encompass any behavior or factors identified as outside the analysis in Lawrence (i.e., public acts, prostitution, minors, persons who might be injured or coerced or who might not easily refuse consent)? (3) Are there additional factors relevant solely in the military environment affecting the reach of the Lawrence liberty interest? See also US v. Stirewalt, 60 MJ 297 (CAAF 2004).

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: Sodomy not involving a child. The existence of factors that make an act of non-forcible sodomy between adults criminal (that is, take it outside the liberty interest identified in Lawrence and recognized in Marcum, as in NOTE 1.2 above) are matters of fact, not matters of law. Accordingly, the judge must identify through appropriate instructions those factors that would, if found by the members, place the conduct outside that liberty interest. See US v. Castellano, 72 MJ 217 (CAAF 2013):

Not every act of adult consensual sodomy is a crime. Adult consensual sodomy is a crime only if you find beyond a reasonable doubt that the sodomy alleged : was public

behavior; was an act of prostitution; involved persons who might be injured, coerced or who are situated in relationships where consent might not easily be refused; or implicates a unique military interest.

Sodomy may be public behavior when the participants know that someone else is present. This may include a person who is present and witnesses the sodomy, or is present and aware of the sodomy through senses other than vision. On the other hand, sodomy that is not performed in the close proximity of someone else, and which passes unnoticed, may not be considered public behavior. Sodomy may also be considered public behavior 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.

Sodomy is an act of prostitution when, on account of the sodomy, a thing of value is given to or received by any person.

In determining whether the alleged sodomy in this case implicates a unique military interest, 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);

(whether the sodomy occurred while the accused or the co-actor was on or off duty);

(the impact, if any, of the sodomy 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 sodomy);

(the impact of the sodomy, 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);

(where the sodomy occurred);

(who may have known of the sodomy);

(the nature, if any, of the official and personal relationship between the accused and (state the name of co-actor)).

> ***NOTE 3.1: 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 US v. Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA1988) (licking clitoris is penetration) and US 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 US 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."

e. REFERENCES: Liberty interest in adult consensual sodomy: Lawrence v. Texas, 539 U.S. 558 (2003); US v. Marcum, 60 MJ 198 (CAAF 2004); US v. Castellano, 72 MJ 217 (CAAF 2013).

3–51–2. FORCIBLE SODOMY (ARTICLE 125)

NOTE 1: Applicability of this instruction. Use this instruction only for offenses occurring BEFORE 26 December 2013.

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 1.1: 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 US v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) (licking clitoris is penetration) and US 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 US 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: <u>Using this instruction</u>. 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 US v. Carr, 18 MJ 297 (CMA 1984); US v. Taylor, 26 MJ 127 (CMA 1988); and US 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. US 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 non-forcible sodomy was intended. In such cases, the military

judge must remind the members that mistake of fact as to consent does not apply to non-forcible 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. US 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. US v. Williams, 37 MJ 352 (CMA 1993) (extra-marital affair as to victim's motive to lie) and US 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 non-forcible sodomy, the military judge must carefully analyze what lesser included offenses are raised, bearing in mind the accused may be found guilty of non-forcible sodomy only if the conduct charged occurred before 26 December 2013.

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: Non-forcible sodomy as a lesser included offense. If non-forcible sodomy is a lesser included offense and the charged conduct occurred before 26 December 2013, give the following instruction. An accused may be found guilty of non-forcible sodomy only if the charged conduct occurred before the date this offense was repealed (26 December 2013). Note that the existence of factors that make an act of non-forcible sodomy criminal (that is, take it outside the liberty interest identified in Lawrence and recognized in Marcum, as in NOTE 1.2 above) are matters of fact, not matters of law. Accordingly, the judge must identify through appropriate instructions those factors that would, if found by the members, place the conduct outside that liberty interest. See US v. Castellano, 72 MJ 217 (CAAF 2013):

Non-forcible 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 are convinced beyond a reasonable doubt that an act of sodomy occurred between the accused and (state the name of the alleged victim), then you should consider the lesser included offense of non-forcible sodomy.

Not every act of adult consensual sodomy is a crime. Adult consensual sodomy is a crime only if you find beyond a reasonable doubt that the sodomy alleged: was public behavior; was an act of prostitution; involved persons who might be injured, coerced or who are situated in relationships where consent might not easily be refused; or implicates a unique military interest.

Sodomy may be public behavior when the participants know that someone else is present. This may include a person who is present and witnesses the sodomy, or is present and aware of the sodomy through senses other than vision. On the other hand,

sodomy that is not performed in the close proximity of someone else, and which passes unnoticed, may not be considered public behavior. Sodomy may also be considered public behavior 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.

Sodomy is an act of prostitution when, on account of the sodomy, a thing of value is given to or received by any person.

In determining whether the alleged sodomy in this case implicates a unique military interest, 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);

(whether the sodomy occurred while the accused or the co-actor was on or off duty);

(the impact, if any, of the sodomy 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 sodomy);

(the impact of the sodomy, 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);

(where the sodomy occurred);

(who may have known of the sodomy);

(the nature, if any, of the official and personal relationship between the accused and (state the name of co-actor)).

The lesser included offense of non-forcible sodomy differs from the charged offense of forcible sodomy, in that non-forcible sodomy does not require you be convinced beyond a reasonable doubt that the sodomy was committed by force and without consent of the other person.

However, in order to find the accused guilty of this lesser included offense, you must find beyond a reasonable doubt both that the physical act of sodomy occurred and that it involved public behavior; an act of prostitution; persons who might be injured, coerced or who are situated in relationships where consent might not easily be refused; or a unique military interest.

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); US v. Hicks, 24 MJ 3 (CMA 1987), cert. denied, 484 U.S. 827 (1987); US v. Bradley, 28 MJ 197 (CMA 1989); US v. Palmer, 33 MJ 7 (CMA 1991).

(3) Constructive force—abuse of military authority: US v. Hicks, supra; US v. Bradley, supra; US v. Clark, 35 MJ 432 (CMA 1992), cert. denied, 507 U.S. 1052 (1993).

(4) Constructive force—parental compulsion and children of tender years: US v. Palmer, supra; US v. Rhea, 33 MJ 413 (CMA 1991), aff'd, 37 MJ 213 (CMA 1993); US 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; US 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: US v. Henderson, 15 CMR 268 (CMA 1954); US 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; US v. Mathi, 34 MJ 33 (CMA 1992); US v. Robertson, 33 CMR 828 (AFBR 1963), rev'd on other grounds, 34 CMR 108 (CMA 1963).

(7) Liberty interest in adult consensual sodomy: Lawrence v. Texas, 539 U.S. 558 (2003); US v. Marcum, 60 MJ 198 (CAAF 2004); US v. Castellano, 72 MJ 217 (CAAF 2013).

3–51–3. FORCIBLE SODOMY (ARTICLE 125)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on or after 26 December 2013.

a. **MAXIMUM PUNISHMENT:** DD, TF, life without eligibility for parole, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for forcible sodomy occurring on or after 24 June 2014.

b. **MODEL SPECIFICATION:**

In that _____ (personal jurisdictional data), did, (at/on board— location), on or about _____, engage in unnatural carnal copulation with _____, (by unlawful 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); (and)

(2) That the act was done (by unlawful force) (or) (without the consent of the said state the name of the alleged victim).

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

"Sodomy" is unnatural carnal copulation. "Unnatural carnal copulation" occurs when a person (takes into his/her (mouth) (anus) the sexual organ of another person) (places his/her sexual organ into the (mouth) (anus) of another) (penetrates the female sex organ with his/her (mouth) (lips) (tongue)) (places his/her sexual organ into any opening of the body, except the sexual parts, of another person).

Penetration of the (mouth) (anus) (female sexual organ) (opening of the body) (_____), 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 US v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) (licking clitoris is penetration) and US 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 US 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. Witnesses and counsel should avoid using the terms "private parts" or the "pubic area" to describe touching the vagina since it may lead to confusion about whether penetration 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: <u>Using this instruction</u>. Article 125 contains two methods to commit a violation: "by unlawful force" and "without . . . consent." NOTEs 4 through 12 and the instructions that follow address common scenarios involving potential force and consent issues. The military judge must identify which methods are charged, those issues raised by the evidence and select the appropriate instruction. Where multiple issues of force and 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 carefully tailor the instructions to the factual situation present:

a. Actual, physical force: 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. Evidence of consent when sodomy is "by unlawful force": NOTE 8.

f. Victim incapable of giving consent (children of tender years): 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.

i. BOTH unlawful force and without consent charged: NOTE 12.

NOTE 4: <u>Actual, physical force</u>. 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 AND NOTE 8 below:

"Unlawful Force" means an act of force done without legal justification or excuse, and includes physical violence or power applied by the accused to the victim. An act of sodomy occurs "by unlawful force" when the accused uses physical violence or power to compel the victim to submit against his/her will.

NOTE 5: <u>Constructive force by intimidation or threats</u>. Where the evidence raises the issue of constructive force by threat or intimidation, give the following instructions AND NOTE 8 below:

"Unlawful Force" means an act of force done without legal justification or excuse. In the law of sodomy, various types of conduct are sufficient to constitute unlawful 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 unlawful 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 unlawful 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 unlawful force.

NOTE 6: <u>Constructive force—abuse of military power</u>. When there is some evidence the accused employed constructive force based upon his military position, rank, or authority, give the following instructions AND NOTE 8 below:

"Unlawful Force" means an act of force done without legal justification or excuse. In the law of sodomy, various types of conduct are sufficient to constitute unlawful 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 unlawful 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 unlawful 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 unlawful force.

The evidence has raised the issue of whether 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 physical injury would be inflicted on her/him and that (further) resistance would be futile.

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 AND NOTE 8 below:

"Unlawful Force" means an act of force done without legal justification or excuse. In the law of sodomy, various types of conduct are sufficient to constitute unlawful 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 unlawful 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 unlawful 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 unlawful 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 sodomy was done by force.

> ***NOTE 8: Evidence of consent when sodomy is "by unlawful force." "By" means the sodomy occurred because of the unlawful force. Evidence of consent to the sodomy logically precludes that causal link; when the alleged victim consented, the sodomy occurred because of the consent, not because of the force. Although lack of consent is not an element when sodomy is charged "by unlawful force," evidence that the alleged victim consented to the sodomy may be relevant to negate that causal link. In all situations in which "by unlawful force" is alleged, the following instruction, properly tailored, would be appropriate.***

The evidence has raised the issue of whether (state the alleged victim's name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by unlawful force) (state the element(s) to which the evidence concerning consent relates) beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every

element of the offense) (that the sexual conduct was done by unlawful force) (state the element(s) to which the evidence concerning consent relates).

NOTE 9: Victims incapable of giving consent—children of tender years. If 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:

When a victim is incapable of consenting because she/he lacks the mental capacity to understand the nature of the act, there is no 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 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 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:

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 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 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:***

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 unlawful force) (without consent) (by unlawful force and without consent).

NOTE 12: BOTH unlawful force and without consent charged: When both methods are charged, in addition to the appropriate force / consent instructions above, the military judge must give the following instruction:

Either unlawful force or lack of consent are necessary to the offense; it is not required that you find both to convict the accused.

NOTE 13: 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 US v. Carr, 18 MJ 297 (CMA 1984); US v. Taylor, 26 MJ 127 (CMA 1988); and US 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:

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 14: 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 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. US 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. US v. Williams, 37 MJ 352 (CMA 1993) (extra-marital affair as to victim's motive to lie) and US v. Kelley, 33 MJ 878 (ACMR 1991) (victim's public and aggressive sexual behavior to show accused's mistaken belief as to consent.)

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); US v. Hicks, 24 MJ 3 (CMA 1987), cert. denied, 484 U.S. 827 (1987); US v. Bradley, 28 MJ 197 (CMA 1989); US v. Palmer, 33 MJ 7 (CMA 1991).

(3) Constructive force—abuse of military authority: US v. Hicks, supra; US v. Bradley, supra; US v. Clark, 35 MJ 432 (CMA 1992), cert. denied, 507 U.S. 1052 (1993).

(4) Constructive force—parental compulsion and children of tender years: US v. Palmer, supra; US v. Rhea, 33 MJ 413 (CMA 1991), aff'd, 37 MJ 213 (CMA 1993); US 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; US 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: US v. Henderson, 15 CMR 268 (CMA 1954); US 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; US v. Mathi, 34 MJ 33 (CMA 1992); US v. Robertson, 33 CMR 828 (AFBR 1963), rev'd on other grounds, 34 CMR 108 (CMA 1963).

3–51–4. BESTIALITY (ARTICLE 125)

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

b. **MODEL SPECIFICATION:**

In that _____ (personal jurisdictional data), did, (at/on board— location), on or about _____, engage in unnatural carnal copulation with (state the alleged animal).

c. **ELEMENTS:**

(1) That (state the time and place alleged), the accused engaged in unnatural carnal copulation with (state the alleged animal).

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

"Bestiality" is unnatural carnal copulation with an animal. "Unnatural carnal copulation" with an animal occurs when a person (takes into his/her (mouth) (anus) the sexual organ of an animal) (places his/her sexual organ into an animal's (mouth) (anus)) (places his/her sexual organ into the sexual organ of an animal) (takes the animal's sexual organ into his/her sexual organ).

Penetration of the (mouth) (anus) (sexual organ), however slight, is required to establish this offense. An ejaculation is not required.

The "female sexual 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."

3–52–1. 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: 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: US v. Acevedo-Velez, 17 MJ 1 (CMA 1983); US v. Caldwell, 17 MJ 8 (CMA 1983); US v. DeSha, 23 MJ 66 (CMA 1986); US v. Banta, 26 MJ 109 (CMA 1988); US 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: 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: US v. Acevedo-Velez, 17 MJ 1 (CMA 1983); US v. Caldwell, 17 MJ 8 (CMA 1983); US v. DeSha, 23 MJ 66 (CMA 1986); US v. Banta, 26 MJ 109 (CMA 1988); US 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: Other instructions. Instructions 7-16, Variance - Value, Damage, or Amount, is ordinarily applicable.

e. REFERENCES: US v. Acevedo-Velez, 17 MJ 1 (CMA 1983); US v. Caldwell, 17 MJ 8 (CMA 1983); US v. DeSha, 23 MJ 66 (CMA 1986); United States v. Banta, 26 MJ 109 (CMA 1988); US 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: <u>Culpable negligence</u>. 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 1: <u>Culpable negligence</u>. 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 2: 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 battery upon a child even if the accused reasonably believed that (state the name of the alleged victim) was at least 16 years old.

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 used in a manner "likely" to produce death or grievous bodily harm when the natural and probable consequence 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).

The question is not whether the (weapon) (means) (force) itself is likely to produce death or grievous bodily harm, but instead whether the manner in which it is used is likely to produce death or grievous bodily harm. Ultimately, therefore, you must decide whether the charged use of the (weapon) (means) (force) was "likely" to bring about death or grievous bodily harm, using the plain meaning of the word "likely." 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: 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 5: 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 6: 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 7: 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 8: 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 9: 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 10: 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 11: 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.

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. Under those circumstances, consent is not a defense.

NOTE 12: Other instructions. Instruction 5-4, Accident, may be raised by the evidence.

e. REFERENCES: Likelihood of death or grievous bodily harm: US v. Weatherspoon, 49 MJ 209 (CAAF 1998); US v. Gutierrez, 74 MJ 61 (CAAF 2015).

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: <u>Aggravating Circumstance Alleged</u>. 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: <u>Child under the age of 16 years alleged</u>. 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: Further definitions of grievous bodily harm. 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 intended to cause grievous bodily harm.

An alleged victim may not lawfully consent to an intentional infliction of grievous bodily harm. Consent is not a defense to this offense.

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 US v. Davis, 56 MJ 299 (CAAF 2002) citing US 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: Purely Military Offense. An intent to commit a “purely military offense” will not support a housebreaking charge under Article 130, UCMJ. Whether an offense is a “purely military” one is a question of law for the military judge. A “purely military” offense is one that expressly or by necessary implication applies only to military members. See U.S. v. Contreras, 69 MJ 120 (CAAF 2010).

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 (judicial proceeding) (a course of justice), that is: (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 gave certain testimony, namely: (set forth the testimony alleged);

(5) That the testimony was material;

(6) That the testimony was false; and

(7) That the accused did not then believe the testimony 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.)

The offense of perjury by giving false testimony requires that the false testimony be given in a “judicial proceeding” or in “a course of justice.” (A “judicial proceeding” includes a court-martial.) (A “course of justice” includes an investigation conducted under Article 32, UCMJ.)

“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 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 (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 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: 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.

3–58–1. 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”) (“forged and 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 (<u>state the name of the person alleged</u>);

(3) That for the (receipt) (certificate), the accused (<u>state the time and place alleged</u>), knowingly delivered to (<u>state the name of the person alleged</u>) (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 (<u>state the name of the person who allegedly received the money or property</u>) 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 US 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 closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses." But see US v. Beaty, 70 MJ 39 (CAAF 2011) (holding that, when confronted with an Article 134 offense that is not specifically listed in the MCM, that is not closely related to or included in a listed offense, that does not describe acts that are criminal under the US Code, and that has no maximum punishment authorized by the custom of the service, the offense is punishable as a general or simple disorder, with a maximum sentence of 4 months confinement and forfeiture of 2/3 pay per month for 4 months).

b. **MODEL SPECIFICATION:**

NOTE 2: The MCM does not provide a Model Specification for violation of unlisted offenses under Clauses 1 or 2 of Article 134. Ordinarily a specification alleging an unlisted offense in violation of Article 134 substantially as below should be sufficient. Because the specification must contain all the elements of the offense, it must allege that the conduct was "to the prejudice of good order and discipline in the armed forces," "of a nature to bring discredit upon the armed forces," or "to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces." See US v. Fosler, 70 MJ 225 (CAAF 2011).

In that _____ (personal jurisdiction data), did, at/on board--location, on or about _____, (state the act or omission alleged), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (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) (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 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) (or) (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) (_____.))

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 US 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: US 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 US 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) (_____), an offense not capital, 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.

NOTE 6: Terminal Element. The specification must expressly allege, and the military judge must instruct as a separate element, that the charged State offense is not a capital offense.

d. **DEFINITIONS AND OTHER INSTRUCTIONS:**

Provide all pertinent definitions.

e. REFERENCES: US v. Irvin, 21 MJ 184 (CMA 1986); US v. Perry, 12 MJ 112 (CMA 1981).

3–60–3. DELETED

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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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) (_____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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)

NOTE: <u>Applicability of this instruction after 15 September 2016</u>. Use this instruction only for offenses occurring prior to 16 September 2016.

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) (_____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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.)

3–61–2. ANIMAL ABUSE (ARTICLE 134)

NOTE 1: Applicability of this instruction before 16 September 2016. Use this instruction only for offenses occurring on or after 16 September 2016.

a. **MAXIMUM PUNISHMENT:**

Abuse, neglect, or abandonment of an animal. Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

Abuse, neglect, or abandonment of a public animal. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 2 years.

Sexual act with an animal or cases where the accused caused the serious injury or death of the animal. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

b. **MODEL SPECIFICATION:**

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, (wrongfully [abuse] [neglect] [abandon]) (engage in a sexual act, to wit: ____, with) a certain (public) animal (and caused [serious injury to] [the death of] the animal), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

c. **ELEMENTS:**

Abuse, neglect, or abandonment of an animal:

(1) That (state the time and place alleged), the accused wrongfully abused, neglected, or abandoned a certain (public) animal (and caused the serious injury or death of the animal); 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) (of a nature to bring discredit upon the armed forces).

Sexual act with an animal:

(1) That (state the time and place alleged), the accused engaged in a sexual act with a certain animal; 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) (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.)

"Animal" means pets and animals of the type that are raised by individuals for resale to others, including but not limited to: cattle, horses, sheep, pigs, goats, chickens, dogs, cats, and similar animals owned or under the control of any person. Animal does not include reptiles, insects, arthropods, or any animal defined or declared to be a pest by the administrator of the United States Environmental Protection Agency.

("Public animal" means any animal owned or used by the United States or any animal owned or used by a local or state government in the United States, its territories or possessions. This would include, for example, drug detector dogs used by the government.)

NOTE 2: Abuse, neglect, or abandonment of an animal. When abuse, neglect, or abandonment of an animal is charged, give the following definitions, as applicable:

("Abuse" means intentionally and unjustifiably: overdriving, overloading, overworking, tormenting, beating, depriving of necessary sustenance, allowing to be housed in a manner that results in chronic or repeated serious physical harm, carrying or confining in or upon any vehicles in a cruel or reckless manner, or otherwise mistreating an animal. (Abuse may include any sexual touching of an animal if not included in the definition of "sexual act with an animal" below.))

("Neglect" means allowing another to abuse an animal, or, having the charge or custody of any animal, intentionally, knowingly, recklessly, or negligently failing to provide it with

proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved.)

(“Abandon” means the intentional, knowing, reckless or negligent leaving of an animal at a location without providing minimum care while having the charge or custody of that animal.)

“Wrongfully” means without legal justification or excuse.

This offense does not include legal hunting, trapping, or fishing; reasonable and recognized acts of training, handling, or disciplining of an animal; normal and accepted farm or veterinary practices; research or testing conducted in accordance with approved military protocols; protection of person or property from an unconfined animal; or authorized military operations or military training. If the alleged conduct falls into one of these categories, then the conduct was not wrongful.

“Intentionally” means on purpose or by design.

(“Knowingly” means voluntary and intentional. An act done because of mistake or accident or other innocent reasons is not done “knowingly.”)

(“Recklessly” means a culpable disregard of foreseeable consequences 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 animal.)

(“Negligently” means 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 an animal which a reasonably careful person would have used under the same or similar circumstances.)

(“Serious injury of an animal” means physical harm that involves a temporary but substantial disfigurement; causes a temporary but substantial loss or impairment of the function of any bodily part or organ; causes a fracture of any bodily part; causes

permanent maiming; causes acute pain of a duration that results in suffering; or carries a substantial risk of death. Serious injury includes, but is not limited to, burning, torturing, poisoning, or maiming.)

NOTE 3: Sexual act with an animal. When sexual act with an animal is charged, give the following definition:

“Sexual act with an animal” means contact between the sex organ, anus, or mouth of a person and an animal or between the sex organ, mouth, or anus of an animal and a person or object manipulated by a person if done with an intent to arouse or gratify the sexual desire of any person.

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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: <u>Lack of penetration in issue</u>. 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 US v. Williams, 25 MJ 854 (AFCMR 1988), pet. denied, 27 MJ 166 (CMA 1988) and US 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. 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 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) (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), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: <u>Applicability of this instruction after 1 October 2007</u>. 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: <u>Nature of the offense of indecent assault</u>. Based upon the elements in the MCM and US 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: <u>Assault by attempt</u>. 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: <u>Assault by offer</u>. 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: 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 _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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. US 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: _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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 _____) (_____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

c. **ELEMENTS:**

(1) That (<u>state the time and place alleged</u>), the accused wrongfully (asked for) (accepted) (received) (the sum of_____ dollars) (_____, of a value of (about) _____ dollars) (_____) from (<u>state the name of the person or organization alleged</u>);

(2) That, at that time, the accused (occupied an official position) (had official duties), namely, (<u>state the official position or official duties, as alleged</u>);

(3) That the accused (asked for) (accepted) (received) this (sum) (_____)

(a) (with intent to have (his) (her) (decision) (action) influenced with respect to (<u>state the matter alleged</u>), or

(b) (as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by (him) (her) in relation to (<u>state the matter alleged</u>);

(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) (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 _____) (_____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

c. **ELEMENTS:**

(1) That (state the time and place alleged), the accused wrongfully (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) (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: _____) (_____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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 US 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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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 US 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 US v. Wallace, 36 CMR 148 (CMA 1966), US v. Allberry, 44 MJ 226 (CAAF 1996); US 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 US v. Walter, 23 CMR 275 (CMA 1957), and US 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. US 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: _____)], such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

c. **ELEMENTS:**

(1) That (state the time and place alleged), 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 then under the age of 16 years;

(3) That (state the time and place alleged), the accused endangered (state the name of the alleged victim)'s (mental health) (physical health) (safety) (welfare) through (design) (culpable negligence) by _____; (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) (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: <u>If actual harm not alleged</u>. 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: <u>If harm is alleged</u>. 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: <u>If grievous bodily harm is alleged</u>. 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: <u>Other Instructions</u>. If "by design" is alleged, Instruction 7-3, <u>Circumstantial Evidence</u> (Intent), is normally applicable; Instruction 5-12, <u>Voluntary Intoxication</u>, may be raised by the evidence.

3–68B–1. CHILD PORNOGRAPHY (ARTICLE 134)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 12 January 2012.

a. **MAXIMUM PUNISHMENT:**

(1) Possessing, receiving or viewing: DD, TF, 10 years and E-1.

(2) Possessing with intent to distribute: DD, TF, 15 years and E-1.

(3) Distribution: DD, TF, 20 years and E-1.

(4) Production: DD, TF, 30 years and E-1.

b. **MODEL SPECIFICATION:**

Possessing, receiving, viewing, possessing with intent to distribute, distributing, or producing child pornography:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ knowingly and wrongfully (possess) (possess with intent to distribute) (receive) (view) (distribute) (produce) child pornography, to wit: a (photograph) (picture) (film) (video) (digital image) (computer image) of a minor (or what appears to be a minor) engaging in sexually explicit conduct, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

c. **ELEMENTS:**

Possessing, receiving, or viewing child pornography:

(1) That (state the time and place alleged), the accused knowingly and wrongfully (possessed) (received) (viewed) child pornography, to wit: _____; 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) (of a nature to bring discredit upon the armed forces).

Possessing child pornography with intent to distribute:

(1) That (state the time and place alleged) the accused knowingly and wrongfully possessed child pornography, to wit: _____;

(2) That the possession was with the intent to distribute; 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) (of a nature to bring discredit upon the armed forces).

Distributing child pornography:

(1) That (state the time and place alleged) the accused knowingly and wrongfully distributed child pornography, to wit: _____, to (state the name of the person to whom distributed); 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) (of a nature to bring discredit upon the armed forces).

Producing child pornography:

(1) That (state the time and place alleged) the accused knowingly and wrongfully produced child pornography, to wit: _____; 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) (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: Defining "child pornography." The definition of "child pornography" used below will depend upon the evidence presented. The first definition below should be given where actual minors are in issue. The second definition below should be given where the depictions do not

involve the use of actual minors, or there is some question as to whether actual minors were used in the depictions. If appropriate, give both definitions.

("Child pornography" means material that contains a visual depiction of an actual minor engaging in sexually explicit conduct.)

("Child pornography" (also) means material that contains an obscene visual depiction of a minor engaging in sexually explicit conduct. Such a depiction need not involve an actual minor, but instead only what appears to be a minor. "Obscene" means that the average person applying contemporary community standards would find that the visual images depicting minors engaging in sexually explicit conduct, when taken as a whole, appeal to the prurient interest in sex and portray sexual conduct in a patently offensive way; and that a reasonable person would not find serious literary, artistic, political, or scientific value in the visual images depicting minors engaging in sexually explicit conduct.)

"Minor" and "child" mean any person under the age of 18 years.

"Sexually explicit conduct" means actual or simulated:

(a) sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) lascivious exhibition of the genitals or pubic area of any person.

NOTE 3. <u>Lascivious Exhibition</u>. The following instruction on "lascivious exhibition" should be given when there is an issue as to whether an exhibition of the genitals or pubic area of any person was lascivious. Note that an exhibition of the genitals or pubic area may be lascivious even if those areas are clothed. Note also that nudity and sexually provocative depictions of minors that do not involve the exhibition of the genitals or

pubic area of any person, or other sexually explicit conduct, are not child pornography.

("Lascivious" means exciting sexual desires or marked by lust. Not every exposure of the genitals or pubic area constitutes a lascivious exhibition. Consideration of the overall content of the visual depiction should be made to determine if it constitutes a lascivious exhibition. In making this determination, you should consider such factors as whether the focal point of the depiction is on the genitals or pubic area, whether the setting is sexually suggestive, whether the child is depicted in an unnatural pose or in inappropriate attire considering the child's age, whether the child is partially clothed or nude, whether the depiction suggests sexual coyness or willingness to engage in sexual activity, and whether the depiction is intended or designed to elicit a sexual response in the viewer, as well as any other factors that may be equally if not more important in determining whether a visual depiction contains a lascivious exhibition. A visual depiction, however, need not involve all these factors to be a lascivious exhibition.)

"Visual depiction" includes any developed or undeveloped photograph, picture, film or video; any digital or computer image, picture, film or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image.

("Distributing" means delivering to the actual or constructive possession of another.)

("Possessing" means exercising 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 something in a locker or a car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible for more than one person to possess an item simultaneously, as when several people share control over an item.)

("Producing" means creating or manufacturing. As used in this paragraph, it refers to making child pornography that did not previously exist. It does not include reproducing or copying.)

"Wrongful" means without any legal justification or excuse. Any facts or circumstances that show that a visual depiction of child pornography was unintentionally or inadvertently acquired are relevant to wrongfulness, including, but not limited to, the method by which the visual depiction was acquired, the length of time the visual depiction was maintained, and whether the visual depiction was promptly, and in good faith, destroyed or reported to law enforcement.

An accused may not be convicted of (possessing) (receiving) (viewing) (distributing) (producing) child pornography if he/she did not know that the images were of minors, or what appeared to be minors, engaged in sexually explicit conduct. An act is done "knowingly" if done voluntarily and intentionally. An act done because of mistake or accident or other innocent reasons is not done "knowingly." Knowledge may be inferred from circumstantial evidence, such as the name of a computer file or folder, the name of the host website from which a visual depiction was viewed or received, search terms used, and the number of images possessed. However, the drawing of this inference is not required. Thus, in order to convict the accused you must be convinced beyond a reasonable doubt that the accused knew that he/she (possessed) (received) (viewed) (distributed) (produced) the child pornography. However, it is not required that the accused knew the actual ages of the persons in the child pornography, but he/she must have known or believed the persons to be minors.

NOTE 4. <u>Redacted Exhibits</u>. On motion of the government, in any prosecution under this paragraph, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography or visual depiction or copy thereof shall not be admissible and may be redacted from any otherwise admissible evidence, and the panel shall be instructed, upon request of the Government, that it can draw no inference from the absence of such evidence. Below is a suggested instruction:

Certain information in Prosecution Exhibit(s) _____ has been redacted as not relevant to these proceedings. You are not to speculate as to what has been redacted nor are you to draw any adverse inference to either side from that redaction.

NOTE 5: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), Instruction 7-3, Circumstantial Evidence (Intent) (when the offense is possession with the intent to distribute), and Instructions 5-11-1 or 5-11-2, Mistake of Fact, may be applicable.

e. REFERENCES:

(1) Definition of “lascivious exhibition”. See US v. Roderick, 62 MJ 425, 429-430 (CAAF 2006), citing US v. Dost, 636 F.Supp 828 (S.D.Cal., 1986).

(2) “Lascivious exhibition of the genitals or pubic area of any person” does not require nudity; the minor or other person in the depiction with the minor may be clothed, provided the genitals or pubic area is a focus of the depiction. See US v. Knox, 32 F.3d 733 (3d Cir. 1994), cert. denied, 513 US 1109 (1995), cited by US v. Anderson, 2010 WL3938363 (ACCA 2010), review denied, 69 MJ 451 (CAAF 2010).

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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: <u>Proof of underlying offense prohibited</u>. 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: <u>Status of person ordering correctional custody</u>. 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 _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: <u>Proof of underlying offense prohibited</u>. 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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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 US 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 US v. Wallace, 36 CMR 148 (CMA 1966), US v. Allberry, 44 MJ 226 (CAAF 1996); US 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 US v. Walter, 23 CMR 275 (CMA 1957), and US 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: <u>Mistake of fact--criminal state of mind and satisfaction on the obligation</u>. 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 US v. Moseley, 35 MJ 481 (CMA 1992) with respect to this issue in a worthless check prosecution. Instruction 5-11, <u>Mistake of Fact</u>, may be applicable.***

e. REFERENCES: US 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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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.)

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), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

c. **ELEMENTS:**

(1) That (<u>state the time and place alleged</u>), 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) (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: Conduct pled as both prejudicial to good order and discipline and service discrediting. When the conduct is pled as both prejudicial to good order and discipline and service discrediting, the following instruction should be given:

The government has alleged that the conduct in question in (the) specification (___) of (the) (additional) Charge (___) was to the prejudice of good order and discipline in the armed forces and 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 the accused's conduct was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces. 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 (drunkenness) (disorderly conduct) (drunk and disorderly conduct). In this event, you must make appropriate findings by excepting the language "of a nature to bring discredit upon the armed forces." On the other hand, if you are convinced of all the elements except the element of prejudice to good order and discipline in the armed forces, you may still

convict the accused of (drunkenness) (disorderly conduct) (drunk and disorderly conduct). In this event, you must make appropriate findings by excepting the language “to the prejudice of good order and discipline in 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 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 (___) 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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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) , such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

c. **ELEMENTS:**

(1) That (state the time and place alleged), the accused wrongfully 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) (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 US 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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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) (_____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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 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], such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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

(5) 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 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], such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: <u>Fraternization by noncommissioned officers</u>. 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 US v. March, 32 MJ 740 (ACMR 1991); US v. Clarke, 25 MJ 631 (ACMR 1987); US 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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: <u>Other instructions</u>. Instruction 7-3, <u>Circumstantial Evidence</u> (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) (_____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: US v. Kick, 7 MJ 82 (CMA 1979); US 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 _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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: <u>Impersonating by wearing rank and insignia</u>. 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: <u>Exercising or asserting a certain position</u>. 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) (of a nature to bring discredit upon the armed forces); [and]

NOTE 4: <u>Intent to defraud alleged</u>. 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 (US 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: US v. Pasha, 24 MJ 87 (CMA 1987); US v. Yum, 10 MJ 1 (CMA 1980) (concurring opinion); US 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 _____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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 _____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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:** BCD, 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 _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: BCD, 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: _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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.

(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, by direct or circumstantial evidence, that ##the accused's## conduct was (prejudicial to good order and discipline in the armed forces) (or) (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 (<u>state the name of the alleged victim</u>) (the effect, if any, upon the accused's (or (<u>state the name of the alleged victim or other individual alleged to have been affected</u>) 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: US v. Negron, 60 MJ 136 (CAAF 2004); US v. Brinson, 49 MJ 360 (CAAF 1998); US v. Hullett, 40 MJ 189 (CMA 1994); US 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 _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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 1.1: 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 US v. Izquierdo, 51 MJ 421 (CAAF 1999) and US v. Leak, 58 MJ 869 (ACCA 2003).

Article 134, 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.

3–91–1. 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), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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.)

“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 US 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 US v. Scioli, 22 CMR 292 (CMA 1957) and US 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 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 _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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;

(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) (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: <u>Exceptions to wrongfulness</u>. 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 US 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.” US v. Rayfield, 30 CMR 307 (CMA 1961); US v. Manausa, 30 CMR 37 (CMA 1960); US v. McCline, 32 MJ 356 (CMA 1991); US v. Smith, 27 MJ 914 (ACMR 1989); US v. Sullivan, 25 MJ 635 (ACMR 1987); US v. Scioli, 22 CMR 292 (CMA 1957).

(3) Value is not an element. US v. Gaudet, 29 CMR 488 (CMA 1960).

(4) Intent to obstruct correspondence. US v. Rayfield, 30 CMR 307 (CMA 1961); US 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 US 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 US v. Scioli, 22 CMR 292 (CMA 1957) and US 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's Sample 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), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: <u>Exceptions to wrongfulness</u>. 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 US 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.” US v. Rayfield, 30 CMR 307 (CMA 1961); US v. Manausa, 30 CMR 37 (CMA 1960); US v. McCline, 32 MJ 356 (CMA 1991); US v. Smith, 27 MJ 914 (ACMR 1989); US v. Sullivan, 25 MJ 635 (ACMR 1987); US v. Scioli, 22 CMR 292 (CMA 1957).

(3) Value is not an element. US 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 US 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 US v. Scioli, 22 CMR 292 (CMA 1957) and US 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), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: “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 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.” US v. Rayfield, 30 CMR 307 (CMA 1961); US v. Manausa, 30 CMR 37 (CMA 1960); US v. McCline, 32 MJ 356 (CMA 1991); US v. Smith, 27 MJ 914 (ACMR 1989); US v. Sullivan, 25 MJ 635 (ACMR 1987); US v. Scioli, 22 CMR 292 (CMA 1957).

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: _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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**: US 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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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

(5) 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 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.

3–96–1. 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) (subject-matter jurisdiction data, if required), on or about _____, wrongfully (endeavor to) (impede (a trial by court-martial) (an investigation) (a preliminary hearing) (_____)) [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) (a preliminary hearing) (_____)] 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) (before such preliminary hearing officer)] [_____], such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

c. **ELEMENTS:**

(1) That (<u>state the time and date alleged</u>), the accused wrongfully did (a) certain act(s), that is, (<u>state the act(s) alleged</u>);

(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) (of a nature to bring discredit upon the armed forces); [and]

NOTE 1: <u>When the accused's actions involve a potential witness</u>. 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:**

("Criminal proceedings" includes (lawful searches) (criminal investigations conducted by police or command authorities) (Article 15 non-judicial punishment proceedings) (Article 32 preliminary hearings) (courts-martial) (state and federal criminal trials) (_____).)

("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.)

NOTE 2: Administrative process as "criminal proceedings." Criminal proceedings do not include administrative processes. US 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: <u>When charges not pending or investigation not begun</u>. 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. US v. Athey, 34 MJ 44 (CMA 1992); and US 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: <u>Communication with victims or witnesses</u>. 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, <u>infra</u>, also addresses issues where the accused may have advised a witness to exercise a right to remain silent.) See US 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); US 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); US 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 US 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 US 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: <u>Advising a witness to exercise a right to remain silent</u>. 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. US, 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: <u>What constitutes obstruction of justice—acts embraced in the "original" offense</u>. 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. US 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. US 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. US, 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. US v. Jones, 20 MJ 38 (CMA 1985); US v. Williams, supra; and US 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: US v. Turner, 33 MJ 40 (CMA 1991); US v. Athey, 34 MJ 44 (CMA 1992); US v. Finsel, 36 MJ 441 (CMA 1993); US v. Guerrero, 28 MJ 223 (CMA 1989); US v. Kirks, 34 MJ 646 (ACMR 1992); US v. Asfeld, 30 MJ 917 (ACMR 1990); US v. Hullet, 36 MJ 938 (ACMR 1993), rev'd on other grounds, 40 MJ 189 (CMA 1994); Cole v. US, 339 F.2d 437 (9th Cir.), cert. denied, 377 U.S. 954 (1964); US v. Williams, 29 MJ 41 (CMA 1989); US v. Jones, 20 MJ 38 (CMA 1985); US v. Barner, 56 MJ 131 (CAAF 2001).

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)] [_____], such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

c. **ELEMENTS:**

(1) That (<u>state the time and date alleged</u>), the accused wrongfully did (a) certain act(s), that is, (<u>state the act(s) alleged</u>);

(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) (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 US v. Athey, 34 MJ 44 (CMA 1992); and US 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 US 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); US 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); US 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 US 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 US 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. US, 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. US, 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. US v. Jones, 20 MJ 38 (CMA 1985); US v. Williams, supra; and US 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: US v. Turner, 33 MJ 40 (CMA 1991); US v. Athey, 34 MJ 44 (CMA 1992); US v. Finsel, 36 MJ 441 (CMA 1993); US v. Guerrero, 28 MJ 223 (CMA 1989); US v. Kirks, 34 MJ 646 (ACMR 1992); US v. Asfeld, 30 MJ 917 (ACMR 1990); US v. Hullet, 36 MJ 938 (ACMR 1993), rev'd on other grounds, 40 MJ 189 (CMA 1994); Cole v. US, 339 F.2d 437 (9th Cir.), cert. denied, 377 U.S. 954 (1964); US v. Williams, 29 MJ 41 (CMA 1989); US v. Jones, 20 MJ 38 (CMA 1985); US 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) (_____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: <u>Requirement for compensation</u>. 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. US 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: _____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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. US 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 _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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: <u>Pandering as requiring three persons</u>. Pandering requires three persons. If only two are involved, the evidence may raise the offense of solicitation to commit prostitution. US v. Miller, 47 MJ 352 (CAAF 1997).

NOTE 2: <u>Compensation not required</u>. Pandering charged under MCM, Part IV, Paragraph 97(b)(3) does not require that the act be done for compensation. US 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_____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) (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. See US 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 _____) (_____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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 , such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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 _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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.)

The conduct must have been "likely" to bring about death or grievous bodily harm. It is not necessary that death or grievous bodily harm actually result.

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.

"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: <u>Consent as a defense</u>. 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 US 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 3: Other instructions. Instruction 5-4, Accident, may be raised by the evidence.

e. REFERENCES:

(1) Likelihood of death or grievous bodily harm: US v. Weatherspoon, 49 MJ 209 (CAAF 1998); US v. Gutierrez , 74 MJ 61 (CAAF 2015).

(2) Executive Order 13140, dated 6 October 1999, which established this offense, cited US 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)

This offense was removed from the MCM, 1995 edition.

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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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 1340

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) , such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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) , such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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. US 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: US v. Ramsey, 35 MJ 733 (ACMR 1992), aff'd 40 MJ 71 (CMA 1994); US 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 _____], such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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 _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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. US v. Mitchell, 15 MJ 214 (CMA 1983); US v. Seeloff, 15 MJ 978, pet. denied, 17 MJ 18 (CMA 1983); and US 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. US v. Asfeld, 30 MJ 917 (ACMR 1990). The accused must have specifically intended the solicited offense be committed. US v. Taylor, 23 MJ 314 (CMA 1987), and US 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 US v. Roa, 12 MJ 210 (CMA 1982) and US 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: US v. Oakley, 23 CMR 197 (CMA 1957); US v. Higgins, 40 MJ 67 (CMA 1994).

3–106–1. STOLEN PROPERTY–KNOWLINGLY 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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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 a preliminary hearing 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)) , such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

c. **ELEMENTS:**

(1) That the accused was in the presence of (a) (an) (general) (special) court-martial (duly appointed board of officers) (officer conducting a preliminary hearing under Article 32, Uniform Code of Military Justice) (officer taking a deposition), or (_____) (of) (for) the United States, of which (<u>state the name and rank of the presiding official</u>) 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: (<u>set forth the question(s) alleged</u>);

(3) That (<u>state the time and place alleged</u>), 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 his/her 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 his/her 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)] , such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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 _____) (_____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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, expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;

(2) That the communication was made known to (state the name of the person threatened, or a third person, as alleged);

(3) That the communication 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:**

The language used must, under the circumstances, be such that a reasonable person would understand it as expressing a present determination or intention to wrongfully injure another immediately or in the future. However, it is not necessary that the accused actually intended to do the injury threatened.

A communication is “wrongful” if the accused transmitted it for the purpose of issuing a threat, transmitted it with the knowledge that it would be viewed as a threat, or acted recklessly with regard to whether it would be viewed as a threat. “Reckless” means

conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved.

A communication is not “wrongful” if it is made in jest or as idle banter, or for an innocent or legitimate purpose.

(“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: In general. This offense requires both an objective expression of intent (that is, the first element) and a subjective intent by the accused (contained in the element of wrongfulness). Thus, the offense is not committed by only the objective expression of intent to commit an unlawful act involving injury to another. Additionally, even if accompanied by the required subjective intent, the offense is not committed by the objective expression of intent to commit an unlawful act not involving injury to another.***
>
> ***NOTE 2: Wrongfulness. “Wrongfulness” is properly understood to reference the accused’s subjective intent. If the evidence raises a “legitimate purpose” for the statement (which would negate “wrongfulness”), the military judge must, sua sponte, instruct carefully and comprehensively on the issue. For example, if the evidence reasonably raises that the accused made the communication in self-defense or in defense of property, the military judge must, sua sponte, give the appropriately tailored self-defense or defense of property instructions.***

e. REFERENCES:

(1) Defense of property and self-defense negate wrongfulness: See US v Viers, 75 MJ 554 (ACCA 2015).

(2) Mens rea: See MCM (2016), Part IV, para. 110.c. and US v. Rapert, 75 MJ 164 (CAAF 2016).

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 _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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 _____, such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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: US 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) (_____), such conduct being (to the prejudice of good order and discipline in the armed forces) (and) (of a nature to bring discredit upon the armed forces).

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.

CHAPTER 3A: INSTRUCTIONS ON ELEMENTS OF OFFENSES ON AND AFTER 1 JANUARY 2019

3A–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 3A 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 for 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.

3A–1–2. JOINT OFFENDERS (ARTICLE 77)

When an accused is charged as a joint offender, the military judge should consult Instruction 7-2 for assistance in drafting appropriate instructions.

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

a. MAXIMUM PUNISHMENT: Maximum authorized for the principal offense, except: no death; no more than 1/2 of the authorized confinement for the principal offense; and no more than 10 years confinement in any case.

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) for the purpose of [(hindering) (preventing)] the [(apprehension) (trial) (punishment)] of (state the name of the principal).

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: <u>Principal offense housebreaking or burglary</u>. 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: <u>Maximum punishment for principal offense affected by value</u>. 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: obtaining services by false pretenses (Article 121b), fraud against the United States (Article 124), knowingly receiving stolen property (Article 122a), and other offenses in violation of Articles 108, 108a, 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: <u>Conviction of the principal not required</u>. 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. An accused may be convicted as an accessory after the fact despite the acquittal, in a separate trial, of the principal the accused allegedly comforted, received, or assisted.

3A–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. A lesser included offense is one that is raised by the evidence and: (1) is “necessarily included” in the greater offense charged (See, elements test outlined in US v. Jones, 68 M.J. 465 (2010), US v. Alston, 69 M.J. 214 (2010)); or (2) is designated a lesser included offense by the President (See Appendix 12A, Manual for Courts-Martial). The offenses expressly designated as lesser included offenses by the President in Appendix 12A only apply to offenses committed on or after 1 January 2019.

b. When the evidence raises a lesser included offense, 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.

3A–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 (use Instruction 3-4-2) and attempted voluntary manslaughter (use Instruction 3-4-3). 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 compel surrender (use Instruction 3-24-2), attempted espionage (use Instruction 3-27a-2), attempting to aid the enemy (use Instruction 3-27b-2) and attempting to kill an unborn child (use Instruction 3-43a-3).

a. MAXIMUM PUNISHMENT: That authorized for commission of the offense attempted, except (1) in no case shall the death penalty be adjudged, (2) in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged, and (3) mandatory minimum sentences only apply to offenses that are not sex-related. A dishonorable discharge or a dismissal is a mandatory minimum sentence for an attempted sex-related offense committed on or after 24 June 2014 under Article 120(a) or (b); Article 120b(a) or (b); and Forcible Sodomy, Article 125. As of 1 January 2019, Article 125, Forcible Sodomy, ceased to exist and the act of forcible sodomy was subsumed under Article 120. However, Article 125, Forcible Sodomy may still be charged as an offense or as an attempted offense for conduct alleged to have occurred before that date as long as not barred by the applicable statute of limitations.

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 overt 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) (may have been) 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 (his) (her) 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 US 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); US 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: US v. Jones, 37 MJ 459 (CMA 1993); US v. Schoof, 37 MJ 96 (CMA 1993); US v. Byrd, 24 MJ 286 (CMA 1987).

3A–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, 15 years, E-1.

(3) Attempted voluntary manslaughter of a child: DD, TF, 20 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 overt 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: Attempted premeditated murder. 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 (state the name of the alleged victim).

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 (state the name of the alleged victim) 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 3-42-2) 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. US 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); US 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: US v. Jones, 37 MJ 459 (CMA 1993); US v. Schoof, 37 MJ 96 (CMA 1993); US v. Byrd, 24 MJ 286 (CMA 1987).

3A–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:

(1) Attempted voluntary manslaughter: DD, TF, 15 years, E-1.

(2) Attempted voluntary manslaughter of a child: DD, TF, 20 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 3-42-2) 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 US 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); US 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: US v. Jones, 37 MJ 459 (CMA 1993); US v. Schoof, 37 MJ 96 (CMA 1993); US v. Byrd, 24 MJ 286 (CMA 1987).

3A–5–1. CONSPIRACY (ARTICLE 81)

a. MAXIMUM PUNISHMENT:

(1) Conspiracy and Conspiracy when offense is an offense under the law of war (not resulting in death): The maximum punishment is that which is authorized for the offense that is the object of the conspiracy, except that in no case shall the death penalty be imposed.

(2) Conspiracy when offense is an offense under the law of war (resulting in death): Death.

b. MODEL SPECIFICATIONS:

Conspiracy:

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 _____.

Conspiracy when offense is an offense under the law of war (resulting in death):

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, conspire with _____ (and _____) to commit an offense under the law of war, to wit: (murder of _____), and in order to effect the object of the conspiracy the said _____ knowingly did _____ resulting in the death of _____.

c. ELEMENTS:

Conspiracy:

(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 conspiracy.

Conspiracy when offense is an offense under the law of war:

(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 law of war; (and)

(2) That, while the agreement continued to exist and while the accused remained a party to the agreement, the accused knowingly 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 conspiracy; [and]

NOTE 1: Give the third element below if death to a victim is alleged:

[(3)] That death resulted to (state the name(s) of the alleged victim(s)).

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

NOTE 2: 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 3: 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 4: 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 5: 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 6: 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 7: 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 8: 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.

NOTE 9: Conspiracy to violate the law of war alleged. Whether a law is a "law of war" is an interlocutory matter to be determined by the military judge and is not submitted to the members. When satisfied that the law is a "law of war," the military judge should instruct that the matter has been legally determined.

As a matter of law, the offense the accused is alleged to have conspired to commit, that is [state the law of war offense alleged], is a law of war.

NOTE 10: Conspiracy to violate the law of war resulting in death alleged. When cause of death is in issue in a conspiracy to violate the law of war, the military judge should refer to Instruction 5-19, if necessary, and give an appropriately tailored instruction. The below instruction may also be appropriate.

If you are not convinced that the alleged conspiracy to violate the law of war resulted in death, but you are convinced that the other elements of the offense have been proven, you may find the accused guilty by excepting the language alleging that the conspiracy to violate the law of war resulted in death.

3A–6–1. SOLICITING DESERTION, MUTINY, MISBEHAVIOR BEFORE THE ENEMY, OR SEDITION (ARTICLE 82)

NOTE 1: This instruction only applies to solicitation to commit mutiny, desertion, misbehavior before the enemy, and sedition offenses committed on or after 1 January 2019. For offenses committed before 1 January 2019, see Instructions 3-6-1 and 3-6-2.

a. MAXIMUM PUNISHMENT:

(1) If offense solicited or advised is committed or attempted: maximum punishment for underlying offense.

(2) If offense solicited or advised is not committed or attempted: DD, TF, 15 years, E-1 or maximum punishment for underlying offense, whichever is less.

b. MODEL SPECIFICATION:

Soliciting desertion (Article 85) or mutiny (Article 94(a)):

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(a)) [*and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____, (at/on board—location), (attempted) (committed) by _____ (and _____)]. *Note: This language should be added at the end of the specification if the offense solicited or advised is actually attempted or committed.

Soliciting sedition (Article 94(a)) or misbehavior before or in the presence of the enemy (Article 99):

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(a)) [*and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____, (at/on board—location), committed by _____ (and _____)]. *Note: This language should be added at the end of the specification if the offense solicited or advised is actually attempted or committed.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused solicited or advised (state the name of the person(s) allegedly solicited or advised) to commit (specify the offense allegedly solicited or advised); (and)

(2) That the accused specifically intended that (state the name of person allegedly solicited or advised) commit the offense of (specify the offense allegedly solicited or advised); [and]

NOTE 2: If the offense solicited or advised was actually attempted or committed, add the following element.

[(3)] That the offense (solicited) (advised) was (committed) (attempted) as the proximate result of the solicitation.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Solicit") ("Advise") means any statement, oral or written, or any other act or conduct which reasonably may be construed as a serious request or advice to commit the offense named in the specification.

The offense of solicitation is complete when the solicitation is made or advice is given with the specific intent to influence another or others to commit the offense named in the specification. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice.

(It is not necessary that the accused act alone in the solicitation or in the advising; the accused may act through other persons in committing this offense.)

The accused must have intended that (<u>state the name(s) of the person(s) solicited or advised</u>) commit every element of the offense of (desertion) (mutiny) (misbehavior before or in the presence of the enemy) (sedition). The elements of (desertion) (mutiny) (misbehavior before or in the presence of the enemy) (sedition) are as follows: (<u>state the elements of the offense allegedly solicited along with necessary definitions</u>).

NOTE 3: No allegation offense solicited or advised was attempted or committed. If there is no allegation that the offense solicited or advised was attempted or committed, give the following instruction.

Proof that the offense of (desertion) (mutiny) (misbehavior before or in the presence of the enemy) (sedition) was actually attempted or committed is not required.

NOTE 4: Solicited offense was allegedly committed. If the specification alleges that the solicited offense was committed, give the following instruction.

Although I previously told you that it is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice, in this case the government has alleged that the offense solicited or advised was, in fact, committed. As a result, the government must prove that (state the name(s) of the person(s) allegedly committing the offense) committed the offense of (desertion) (mutiny) (misbehavior before or in the presence of the enemy) (sedition) as the proximate result of the solicitation.

("Proximate result" means a consequence which proceeds naturally in the ordinary course of things from the cause. It is an ordinary and probable result of a certain act. Something that is a mere possibility is not sufficient to constitute a proximate result.)

To prove that (state the name(s) of the person(s) allegedly committing the offense) committed the offense of (desertion) (mutiny) (misbehavior before or in the presence of the enemy) (sedition), the government must prove that: (list the elements of the offense solicited, ensuring to indicate that the person named in the specification is the person who committed the offense; or the judge may reference the elements previously listed for the solicited offense, so long as it is clear that the person alleged in the specification is the one who committed the offense.)

(If you are not convinced that (state the name(s) of the person(s) allegedly committing the offense) actually committed the offense of (desertion) (mutiny) (misbehavior before or in the presence of the enemy) (sedition) as the proximate result of the solicitation, but you are satisfied that all of the other elements of the offense have been proven, then you may find the accused guilty of the specification by excepting the language that indicates that the offense was actually committed.)

NOTE 5: Solicited offense was allegedly attempted. If the specification alleges that the solicited offense was attempted, give the following instruction.

Although I previously told you that it is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice, in this case the government has alleged that the offense solicited or advised was, in fact, attempted. As a result, the government must prove that (state the name(s) of the person(s) allegedly committing the offense) attempted to commit the offense of (desertion) (mutiny) (misbehavior before or in the presence of the enemy) (sedition) as the proximate result of the solicitation.

("Proximate result" means a consequence which proceeds naturally in the ordinary course of things from the cause. It is an ordinary and probable result of a certain act. Something that is a mere possibility is not sufficient to constitute a proximate result.)

To prove that (state the name(s) of the person(s) allegedly attempting the offense) attempted to commit the offense of (desertion) (mutiny) (misbehavior before or in the presence of the enemy) (sedition), the government must prove that: (list the elements of an attempt to commit the solicited offense, using Instruction 3-4-1, Attempts, as a guide, carefully tailoring to the evidence and consistent with the allegation in the specification.)

(If you are not convinced that (state the name(s) of the person(s) allegedly committing the offense) attempted to commit the offense of (desertion) (mutiny) (misbehavior before or in the presence of the enemy) (sedition) as the proximate result of the solicitation, but you are satisfied that all of the other elements of the offense have been proven, then you may find the accused guilty of the specification by excepting the language that indicates that the offense was attempted.)

3A–6–2. SOLICITING THE COMMISSION OF OTHER OFFENSES (ARTICLE 82)

NOTE 1: This instruction only applies to solicitation to commit offenses under the UCMJ (other than mutiny, desertion, misbehavior before the enemy, and sedition) allegedly committed on or after 1 January 2019. For prior solicitation to commit offenses under Article 134, see Instruction 3-105-1.

a. MAXIMUM PUNISHMENT:

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

(2) Other Offenses: DD, TF, 10 years, E-1 or maximum punishment for underlying offense, whichever is less.

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 (solicited) (advised) (state the name of the person(s) allegedly solicited or advised) to commit (specify the offense allegedly solicited or advised), in violation of Article ___, UCMJ; and

(2) That the accused specifically intended that (state the name of person allegedly solicited or advised) commit the offense of (specify the offense allegedly solicited or advised).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Solicit") ("Advise") means any statement, oral or written, or any other act or conduct which reasonably may be construed as a serious request or advice to commit the offense named in the specification.

The offense of solicitation is complete when the solicitation is made or advice is given with the specific intent to influence another or others to commit the offense named in the

specification. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice.

(It is not necessary that the accused act alone in the solicitation or in the advising; the accused may act through other persons in committing this offense.)

The accused must have intended that (state the name(s) of the person(s) solicited or advised) commit every element of the offense of (state the offense alleged in the specification). The elements of (state the offense alleged in the specification), in violation of Article ___, UCMJ, are as follows: (state the elements of the offense allegedly solicited along with necessary definitions).

Proof that the offense of (state the offense alleged in the specification) was actually attempted or committed is not required.

NOTE 2: 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 3: 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 must 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 2 above.

NOTE 4: 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 US v. Roa, 12 MJ 210 (CMA 1982) and US v. DeAlva, 34 MJ 1256 (ACMR 1992).

e. REFERENCES: US v. Oakley, 23 CMR 197 (CMA 1957); US v. Higgins, 40 MJ 67 (CMA 1994) (the person solicited must know that the act requested of him is part of a criminal venture).

3A–7–1. MALINGERING (ARTICLE 83)

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 self-inflicted injury: DD, TF, 5 years, E-1.

(4) Intentional self-inflicted 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 knew of (his) (her) (assignment to) (prospective assignment to) (availability for) the performance of (work) (duty) (service), that is: (<u>state the type of work, duty, or service alleged</u>);

(2) That (<u>state the time and place alleged</u>), the accused

(a) feigned (illness) (physical disablement) (mental lapse) (mental derangement), or

(b) intentionally inflicted injury upon (himself) (herself) by (<u>state the manner alleged</u>); (and)

(3) That the accused's intent in doing so was to avoid the (work) (duty) (service); [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:

"Intent" refers to an act done willfully or on purpose.

("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 any sickness or disability. (Thus voluntary starvation that results in a debility is a self-inflicted injury.) (Similarly, the injury may be inflicted by another at the accused's request.))

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

3A–8–1. BREACH OF MEDICAL QUARANTINE (ARTICLE 84)

a. MAXIMUM PUNISHMENT:

(1) Breach of Medical Quarantine Involving a Quarantinable Communicable Disease Defined by 42 CFR § 70.1. DD, TF, 1 year, E-1.

(2) All Other Cases: BCD, 2/3 pay/month x 6 months, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), having been placed in medical quarantine by a person authorized to order the accused into medical quarantine (for a quarantinable communicable disease defined in 42 CFR § 70.1, to wit: _____), having knowledge of the quarantine and the limits of the quarantine, did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _____, break said medical quarantine.

c. ELEMENTS:

(1) That (state the name of the person ordering the accused into medical quarantine) ordered the accused into medical quarantine;

(2) That (state the name of the person ordering the accused into medical quarantine) was authorized to order the accused into medical quarantine;

(3) That the accused knew of the medical quarantine and the limits thereof; (and)

(4) That (state the time and place alleged), the accused went beyond the limits of the medical quarantine before being released therefrom by proper authority; [and]

NOTE 1: If the offense alleges a violation of a medical quarantine imposed in response to emergence of a "quarantinable communicable disease" as defined in 42 CFR § 70.1, add the following element.

[(5)] That the medical quarantine was imposed in reference to a quarantinable communicable disease, to wit: _____, as defined in 42 CFR § 70.1.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Ordered into 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. Putting a person “on quarters” or otherwise excusing a person from duty because of illness does not of itself constitute a medical quarantine.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (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 accused’s knowledge, may be applicable.

3A–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 (_____), 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 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 terminated by apprehension; [and]

((6)) That the accused's absence was in time of war.

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.) (It is not necessary that the accused be absent entirely from military jurisdiction and control.)

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: <u>Voluntary termination and casual presence</u>. 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 US 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: <u>Multiple unauthorized absences under single specification</u>. An accused may be found guilty of two or more separate unauthorized absences under one specification, provided that each absence is included

within the period alleged in the specification and provided that the accused was not mislead. 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.

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.

3A–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), knowing that (he) (she) would be required to perform (hazardous duty) (important service), namely: _____, did, on or about _____, (a time of war) with intent to (avoid said hazardous duty) (shirk said important service), quit (his) (her) (unit) (organization) (place of duty), to wit: _____, located at (_____), 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) (service to be performed was important);

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

(5) That the accused remained so absent until _____; [and]

NOTE 1: Aggravating factor alleged. If the specification alleges the offense occurred in "a time of war," include the following element.

[(6)] That the accused's absence was in time of war.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Quit" means to go absent without 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 2: 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 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), is ordinarily applicable.

3A–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 (<u>state the time and place alleged</u>), and before (he) (she) received notice of the acceptance of the resignation, the accused quit (his) (her) (post) (proper duties), that is, (<u>state the post or proper duties alleged</u>), 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 (<u>state the date alleged</u>); [and]

NOTE 1: <u>Aggravating factors alleged</u>. 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 terminated by apprehension; [and]

((6)) That the accused's absence was in time of war.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Quit" means to go absent without authority.

The intent to remain away permanently from the (post) (proper duties) 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.) (It is not necessary that the accused be absent entirely from military jurisdiction and control.)

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: 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 3: When apprehension is contested. 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 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 US 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: <u>Multiple unauthorized absences under single specification</u>. An accused may be found guilty of two or more separate unauthorized absences under one specification, provided that each absence is included within the period alleged in the specification and provided that the accused was not mislead. 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.

3A–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 commit the offense of desertion;

(3) That the act amounted to more than mere preparation; that is, it was a substantial step and 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, (that is, the act apparently would have resulted in the actual commission of the offense of desertion except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (_____) which prevented the completion of that offense); [and]

NOTE 1: <u>Aggravating factor alleged</u>. In the event the aggravating factor is alleged, the military judge must advise the court members of the aggravating factor as an element.

((5)) That the accused's absence was in time of war.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Proof that the offense of desertion 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 the offense of desertion. The elements of desertion are: (list the elements of the particular type of desertion allegedly intended, along with necessary definitions and instructions).

NOTE 2: 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.

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

a. MAXIMUM PUNISHMENT: 2/3 pay/month 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 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 US 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.

3A–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 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: <u>Apprehension controverted</u>. 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: <u>Apprehension by civil authorities</u>. 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: <u>Voluntary termination and casual presence</u>. 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 US 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: <u>Multiple unauthorized absences under single specification</u>. An accused may be found guilty of two or more separate unauthorized absences under one specification, provided that each absence is included within the period alleged in the specification and provided that the accused was not mislead. 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.***

3A–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 or about _____, 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 authority;

(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) (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 US 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 US 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. An accused may be found guilty of two or more separate unauthorized absences under one specification, provided that each absence is included within the period alleged in the specification and provided that the accused was not mislead. 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.

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

3A–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); (and)

(3) That this absence was without 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.

3A–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 a (ship) (aircraft) (unit), to wit: (<u>state the ship, aircraft, or unit alleged</u>);

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

(3) That (<u>state the time and place alleged</u>), the accused missed the movement of the (aircraft) (unit) (ship) through (design) (neglect).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Movement” includes a move, transfer, or shift of a ship, aircraft, or unit involving a substantial distance and period of time. “Movement” does not include practice marches of a short duration with a return to the point of departure, and minor changes in location of ships, aircraft, or units.

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

3A–11–2. JUMPING FROM VESSEL INTO THE WATER (ARTICLE 87)

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; and

(2) That such act by the accused was wrongful and intentional.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"In use by the armed forces" 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.

3A–11A–1. RESISTING APPREHENSION (ARTICLE 87A)

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 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 actively resisted the apprehension.

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 1: Flight. In US 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 87a (See Instruction 3a-11a-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 2: 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 this article. Specifically, resisting apprehension by non-military affiliated law enforcement officers for non-military offenses is not a violation of this article. 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 determine as a matter of law 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: Mistake of Fact. The accused's belief at the time that no basis exists for the apprehension is not a defense. It is a defense, however, that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so. If there is evidence raising such a defense, the following instruction should be given.

The evidence has raised the issue of mistake on the part of the accused concerning whether (state the name and status of the person alleged to be apprehending) was authorized to apprehend (him) (her).

The accused is not guilty of the offense of resisting apprehension (1) if (he) (she) mistakenly believed that (state the name and status of the person alleged to be apprehending) was not authorized to apprehend (him) (her), and (2) if such belief on (his) (her) part was reasonable.

(The accused's belief that (state the name and status of the person alleged to be apprehending) had no basis to apprehend (him) (her) is not a defense.)

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 and status of the person alleged to be apprehending) was not authorized to apprehend him/her. (Additionally, the 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, the accused was not under the mistaken belief that (state the name and status of the person alleged to

be apprehending) was not authorized to apprehend (him) (her), the defense of mistake does not exist. Even if you conclude that the accused was under the mistaken belief that (state the name and status of the person alleged to be apprehending) was not authorized to apprehend (him) (her), 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 4: Voluntary intoxication and mistake of fact. If there is evidence the accused may have been under the influence of an intoxicant, the following instruction should ordinarily be given in conjunction with the above mistake of fact instruction:

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 belief was reasonable, you may not consider the accused's intoxication, if any, because 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.

3A–11A–2. FLEEING APPREHENSION (ARTICLE 87A)

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.

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 1: <u>Lawfulness of apprehension at issue</u>. 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. Fleeing a person not authorized to apprehend does not constitute an offense under this article. Specifically, fleeing apprehension by non-military affiliated

law enforcement officers for non-military offenses is not a violation of this article. 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 determine as a matter of law 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 2: Mistake of Fact. The accused's belief at the time that no basis exists for the apprehension is not a defense. It is a defense, however, that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so. If there is evidence raising such a defense, the following instruction should be given.

The evidence has raised the issue of mistake on the part of the accused concerning whether (state the name and status of the person alleged to be apprehending) was authorized to apprehend (him) (her).

The accused is not guilty of the offense of fleeing apprehension (1) if (he) (she) mistakenly believed that (state the name and status of the person alleged to be

apprehending) was not authorized to apprehend him/her, and (2) if such belief on his/her part was reasonable.

(The accused's belief that (state the name and status of the person alleged to be apprehending) had no basis to apprehend (him) (her) is not a defense.)

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 and status of the person alleged to be apprehending) was not authorized to apprehend him/her. (Additionally, the 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, the accused was not under the mistaken belief that (state the name and status of the person alleged to be apprehending) was not authorized to apprehend (him) (her), the defense of mistake does not exist. Even if you conclude that the accused was under the mistaken belief that (state the name and status of the person alleged to be apprehending) was not authorized to apprehend (him) (her), 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 3: Voluntary intoxication and mistake of fact. If there is evidence the accused may have been under the influence of an intoxicant, the following instruction should ordinarily be given in conjunction with the above mistake of fact instruction:

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 belief was

reasonable, you may not consider the accused's intoxication, if any, because 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.

3A–11A–3. BREAKING ARREST (ARTICLE 87A)

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 (state the name and status of the person ordering the accused into arrest) ordered the accused into arrest (in quarters) (in his/her company area) (_____);

(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 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.

3A–11A–4. ESCAPE FROM CUSTODY (ARTICLE 87A)

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 (state the name and status of the person who apprehended the accused) 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 custody before being released by proper authority.

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.

NOTE 1: <u>Lawfulness of apprehension at issue</u>. 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. Escape from a person not authorized to apprehend is not an offense under this article. 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 determine as a matter of law 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 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 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 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 apprehension.

NOTE 2: Escape from confinement and custody distinguished. Though escape from confinement and custody both include throwing off of lawful restraint, confinement and custody are different in nature. Confinement must be actually imposed to initiate confinement status. See US v. Edwards, 69 MJ 375 (CAAF 2011); US v. Ellsey, 37 CMR 75 (CMA 1966) (proper charge is escape from custody, not escape from confinement, when an accused who has been ordered into confinement escapes prior to being placed in a confinement facility); cf. US v. Felty, 12 MJ 438 (CMA 1982) (proper charge is escape from confinement when an accused, after having been placed in a confinement facility, escapes from a guard while outside the confinement facility for a magistrate hearing. Once confined in a military confinement facility, an accused remains in that status until released from confinement by proper authority).

3A–11A–5. ESCAPE FROM CONFINEMENT–PRETRIAL AND POST-TRIAL CONFINEMENT (ARTICLE 87A)

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 said 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 order of (state the name and status of the person ordering the accused into confinement);

(2) That (state the name and status of the person ordering the accused into confinement) was authorized to order the accused into confinement; (and)

(3) That (state the time and place alleged), the accused freed (himself) (herself) from confinement before being released by proper authority; [and]

NOTE 1: <u>Escape from post-trial confinement alleged</u>. If escape from post-trial confinement is alleged, add the following element:

[(4)] 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: <u>Detention cell and other locations as a confinement facility</u>. 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 US 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: <u>The status of confinement and the fact of physical restraint</u>. 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. 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 US v. Felty, 12 MJ 438 (CMA 1982) (proper charge is escape from confinement when an accused, after having been placed in a confinement facility, escapes from a guard while outside the confinement facility for a magistrate hearing) and US 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).

NOTE 4: <u>Moral suasion as confinement</u>. 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 US v. Standifer, 35 MJ 615, 617 (AFCMR 1992) (prisoner's escort allowed accused to visit wife alone); cf. US 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: <u>Escape from moral suasion</u>. 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 US v. Standifer, 35 MJ 615, 617 (AFCMR 1992); cf. US 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: <u>Effectiveness of the guard's restraint</u>. 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 US v. Jones, 36 MJ 1154 (ACMR 1993) (escape by pushing aside unarmed escort); US 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 US v. Felty, 12 MJ 438 (CMA 1982) (escape where accused falsely told escort he had been released by magistrate and then slipped away); US 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, confinement and custody are different in nature. Confinement must be actually imposed to initiate confinement status. See US v. Edwards, 69 MJ 375 (CAAF 2011); US v. Ellsey, 37 CMR 75 (CMA 1966) (proper charge is escape from custody, not escape from confinement, when an accused who has been ordered into confinement escapes prior to being placed in a confinement facility); cf. US v. Felty, 12 MJ 438 (CMA 1982) (proper charge is escape from confinement when an accused, after having been placed in a confinement facility, escapes from a guard while outside the confinement facility for a magistrate hearing. Once confined in

a military confinement facility, an accused remains in that status until released from confinement by proper authority).

NOTE 11: Legality of the confinement. Ordinarily, the legality of confinement is a question of law to be decided by the military judge.

3A–11B–1. ESCAPE FROM CORRECTIONAL CUSTODY (ARTICLE 87B)

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 (state the name of the person who placed the accused in correctional custody) placed the accused in correctional custody;

(2) That (state the name of the person who placed the accused in correctional custody) was authorized to place the accused in correctional custody;

(3) That, while in such correctional custody, the accused was under physical restraint; and

(4) That (state the time and place alleged), the accused freed (himself) (herself) from the physical restraint of this correctional custody before being released therefrom by proper authority.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“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 1: <u>Proof of underlying offense prohibited</u>. 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 2: <u>Status of person ordering correctional custody</u>. 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, (<u>state the name and rank of the person alleged</u>), was in such a position of authority is a question of fact which you must decide.

3A–11B–2. BREACH OF CORRECTIONAL CUSTODY (ARTICLE 87B)

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 (state the name of the person who placed the accused in correctional custody) placed the accused in correctional custody;

(2) That (state the name of the person who placed the accused in correctional custody) was authorized to place the accused in correctional custody;

(3) That, while in such correctional custody, the accused was restrained by (state the manner of restraint alleged); and

(4) That (state the time and place alleged), the accused went beyond the limits of the restraint imposed before having been (released from the correctional custody) (relieved of the restraint) by proper authority.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"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 1: <u>Proof of underlying offense prohibited</u>. 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 2: <u>Status of person ordering correctional custody</u>. 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.

3A–11B–3. BREACH OF RESTRICTION (ARTICLE 87B)

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 (state the name to the person who ordered restriction) ordered the accused to be restricted to the limits of (state the limits of the restriction alleged);

(2) That (state the name to the person who ordered restriction) was authorized to order this restriction;

(3) That the accused knew of the restriction and the limits thereof; and

(4) That (state the time and place alleged), the accused went beyond the limits of the restriction before being released therefrom by proper authority.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Restriction" is the moral restraint of a person imposed by an order directing a person to remain within certain specified limits.

NOTE 1: <u>Proof of underlying offense prohibited</u>. 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.

3A–12–1. CONTEMPT TOWARD OFFICIALS (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 _____) (_____), a (State) (_____) 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 _____) (_____a possession of the United States), a (State) (Commonwealth) (possession) in which the accused was then (on duty) (present);

(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 words, used against an official in either their official or private capacity, which are insulting, rude, and disdainful conduct, or which otherwise

disrespectfully attribute to another a quality of meanness, disreputableness, or worthlessness. The truth or falsity of the statement(s) is immaterial.

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

a. MAXIMUM PUNISHMENT:

(1) Toward superior commissioned officer in command: BCD, TF, 1 year, E-1.

(2) Toward superior commissioned officer in rank: BCD, TF, 6 months, 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 (in command) (in rank), then known by the said _____ to be (his) (her) superior commissioned officer (in command) (in rank), by (saying to (him) (her) "_____," or words to that effect) (contemptuously turning from and leaving (him) (her) while (he) (she), the said _____, was talking to (him) (her), the said _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused [(did) (omitted) (a) certain act(s)] [used certain language] concerning (state the name and rank of the alleged officer), to wit: _____;

(2) That such (behavior) (language) was directed toward (state name and rank of the alleged officer);

(3) That (state name and rank of the alleged officer) was the superior commissioned officer in (rank) (and) (command) of the accused;

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

(5) That, under the circumstances, the (behavior) (language), was disrespectful to (state name and rank of the alleged officer).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Superior commissioned officer" means a commissioned officer superior in rank or command.

"Disrespectful behavior" is behavior that detracts from the respect due the authority and person of a superior commissioned officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual.

(Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense.)

(Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior 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: 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 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3A–13–2. ASSAULT OF SUPERIOR COMMISSIONED OFFICER (ARTICLE 89)

a. MAXIMUM PUNISHMENT:

(1) In time of war: Death

(2) All other times: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATION:

Striking superior commissioned officer

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (a time of war) strike _____, (his) (her) superior commissioned officer (in command) (in rank), then known by the said _____ to be (his) (her) superior commissioned officer (in command) (in rank), who was then in the execution of (his) (her) office, (in) (on) the _____ with (a) ((his) (her)) _____.

Drawing or lifting up a weapon against superior commissioned officer

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (a time of war) (draw) (lift up) a weapon, to wit: a _____, against _____, (his) (her) superior commissioned officer (in command) (in rank), then known by the said _____ to be (his) (her) superior commissioned officer (in command) (in rank), who was then in the execution of (his) (her) office.

Offering violence to superior commissioned officer

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, (a time of war) offer violence against _____, against _____, his/her superior commissioned officer (in command) (in rank), then known by the said _____ to be (his) (her) superior commissioned officer (in command) (in rank), who was then in the execution of (his) (her) office, by _____.

c. ELEMENTS:

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

(a) struck (state the name and rank of the alleged victim) (in) (on) _____ with _____;

(b) (drew) (lifted up) a weapon against (state the name and rank of the alleged victim), to wit: (state the weapon alleged);

(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;

(3) That the accused then 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 then in the execution of his/her office; [and]

NOTE 1: <u>Aggravating factor alleged</u>. In the event the aggravating factor is alleged, the military judge must advise the court members of the aggravating factor as an element.

((5)) That the offense was committed in time of war.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Superior commissioned officer” means a commissioned officer superior in rank or command.

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 commissioned 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 contact and includes any offensive touching of the person of an officer, however slight.)

(The phrase “(drew) (lifted up) a weapon against” includes the drawing of any weapon in an aggressive manner or the raising or brandishing of the same in a threatening manner

in the presence of and at the superior. (The phrase "lifted up" includes the raising in a threatening manner of a firearm, whether or not loaded, of a club, or of anything by which a serious blow or injury could be given.))

("Offered violence against" includes any type of assault.)

NOTE 2: Defining assault. When necessary, the judge should supplement these instructions with appropriately tailored instructions on "assault" and "assault consummated by battery." See para. 3-52-1 and 3-52-2.

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

3A–14–1. WILLFULLY DISOBEYING A SUPERIOR COMMISSIONED OFFICER (ARTICLE 90)

a. MAXIMUM PUNISHMENT:

(1) In time of war: Death.

(2) Any other time: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), having received a lawful command from _____, (his) (her) superior commissioned officer, then known by the said _____ to be (his) (her) superior commissioned officer, to _____, or words to that effect, did, (at/on board—location), on or about _____, 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 (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 then 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; [and]

NOTE 1: <u>Aggravating factor alleged</u>. In the event the aggravating factor is alleged, the military judge must advise the court members of the aggravating factor as an element.

((5)) That the offense was committed in time of war.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Willful disobedience” means an intentional defiance of authority.

"Superior commissioned officer" means a commissioned officer superior in rank or command.

NOTE 2: <u>Lawfulness of command</u>. 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 US v. New, 55 MJ 95 (CAAF 2001); US v. Deisher, 61 MJ 313 (CAAF 2005). 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. 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. 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. (The four 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 3: <u>Form or method of communication in issue</u>. 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 4: <u>Time for compliance</u>. 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 5: 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 6: 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 3a-13-2, but similar to the offense in 3a-13-1.

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

3A–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 _____, (strike) (assault) _____, a _____ officer, then known to the said _____ 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 servicemember) (a warrant officer);

(2) That (state the time and place alleged) the accused (struck) (assaulted) (state the name and rank or grade of the person alleged) by (state the alleged manner of the striking or assault);

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

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

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

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

[(6)] That the accused then knew that (state the name and rank or grade of the person alleged) 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 engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage.

(The term "(noncommissioned) (petty) officer" does not include an acting (noncommissioned) (petty) officer.)

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

NOTE 2: Defining assault. When necessary, the judge should supplement these instructions with appropriately tailored instructions on "assault" and "assault consummated by battery." See para. 3-52-1 and 3-52-2.

NOTE 3: Assault on superior charged. If charged with assault upon a superior noncommissioned or petty officer, give the following instruction:

"Superior (noncommissioned) (petty) officer" means a (noncommissioned) (petty) officer superior in rank to the accused.

NOTE 4: 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 5: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3A–15–2. WILLFULLY DISOBEYING A 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 said _____ 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 then 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 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 US v. New, 55 MJ 95 (CAAF 2001); US v. Deisher, 61 MJ 313 (CAAF 2005). 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. 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. 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. The four 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: <u>Form or method of communication in issue</u>. 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 3: <u>Divestiture of status raised</u>. 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 (<u>state the name and rank or grade of the person alleged</u>) 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 4: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge and Intent), is ordinarily applicable.

3A–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 by the said _____ 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 (<u>state the time alleged</u>), the accused was (an enlisted service member) (a warrant officer);

(2) That (<u>state the time and place alleged</u>), the accused [(did) (omitted) (a) certain act(s)] [used certain language], to wit: _____;

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

(4) That the accused then knew that (<u>state the name and rank or grade of the person alleged</u>) was a (noncommissioned) (warrant) (petty) officer;

(5) That (<u>state the name and rank or grade of the person alleged</u>) 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) (<u>state the name and rank or grade of the person alleged</u>);

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; and

[(8)] That the accused then knew that (state the name and rank or grade of the person alleged) 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 engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage.

(The term "(noncommissioned) (petty) officer" does not include an acting (noncommissioned) (petty) officer.)

("Superior (noncommissioned) (petty) officer" means a (noncommissioned) (petty) officer 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.)

("Disrespectful" means behavior that detracts from the respect due the authority and person of a (warrant) (noncommissioned) (petty) officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the (warrant) (noncommissioned) (petty) officer as an officer or as a private individual.)

(Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense.)

(Disrespect by acts includes (neglecting the customary salute, or) showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the (warrant) (noncommissioned) (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.

3A–16–1. VIOLATING GENERAL ORDER OR REGULATION (ARTICLE 92)

a. MAXIMUM PUNISHMENT: DD, TF, 2 years, E-1 (but see paragraph 18d (Note), Part IV, MCM).

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), which was (his) (her) duty to obey, 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 effect a certain lawful general (order) (regulation), to wit: (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 US v. New, 55 MJ 95 (CAAF 2001); US v. Deisher, 61 MJ 313 (CAAF 2005). 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. To be lawful, the order or regulation must relate to specific military duty and be one that the person 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. 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. (The four 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: <u>Dispute as to whether order was general</u>. 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 4: <u>Order issued by previous commander</u>. 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 5: 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).

NOTE 6: Mens Rea. When there is an issue regarding mens rea, see Elonis v. US, 135 S.Ct. 2001 (2015) and US v. Haverty, 76 M.J.199 (CAAF 2017).

e. REFERENCES: US v. Cuffee, 10 MJ 381 (CMA 1981).

3A–16–2. VIOLATING OTHER WRITTEN ORDER OR REGULATION / FAILING TO OBEY OTHER LAWFUL ORDER (ARTICLE 92)

a. MAXIMUM PUNISHMENT: BCD, TF, 6 months, E-1 (but see paragraph 18d (Note), Part IV, MCM).

b. MODEL SPECIFICATION:

Violation or failure to obey other lawful written order

In that _____, (personal jurisdiction data), having knowledge of a lawful order issued by _____, to wit: (paragraph, (the Combat Group Regulation No. _____) (USS _____, Regulation _____), 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) _____.

Failure to obey other lawful order

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 (at/on board— location), on or about _____, fail to obey the same (by (wrongfully) _____.

c. ELEMENTS:

(1) That (state the name and rank or grade of the person issuing the order or regulation), a member of the armed forces, issued a lawful order, to wit: (state the date and specific source of the alleged order and quote the 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 by (state the manner alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: Applicability of this instruction. This instruction should be given in any case arising under Article 92(2), when the written order is not "general" in the sense of Article 92(1).

NOTE 2: Lawfulness of order or regulation. 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 US v. New, 55 MJ 95 (CAAF 2001); US v. Deisher, 61 MJ 313 (CAAF 2005). 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. To be lawful, the order must relate to specific military duty and be one that the person 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. 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. (The four 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 3: Exceptions to prohibited acts. When an alleged order 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 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: US v. Cuffee, 10 MJ 381 (CMA 1981).

3A–16–3. DERELICTION OF DUTY (ARTICLE 92)

a. MAXIMUM PUNISHMENT:

(1) Neglectful or culpably inefficient dereliction of duty: 2/3 x 3 months, 3 months, E-1.

(2) Neglectful or culpably inefficient dereliction of duty resulting in death or grievous bodily harm: BCD, TF, 18 months, E-1.

(3) Willful dereliction of duty: BCD, TF, 6 months, E-1.

(4) Willful dereliction of duty resulting in death or grievous bodily harm: DD, TF, 2 years, 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 [, and that such dereliction of duty resulted in (grievous bodily harm, to wit: (broken leg) (deep cut) (fractured skull) (_____) to (_____) (the death of (_____)].

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. US 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 (duty) (duties), that is: (state the nature of the duties alleged);

NOTE 2: Willful dereliction alleged. If a willful dereliction is alleged, give the following as element (2):

[(2)] That the accused knew of the (duty) (duties); (and)

NOTE 3: Neglect or culpable inefficiency. If a willful dereliction is not alleged, give the following as element (2):

[(2)] That the accused knew or reasonably should have known of the (duty) (duties); (and)

(3) That (state the time and place alleged), the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of (that duty) (those duties), by (state the manner alleged); [and]

NOTE 4: Death or grievous bodily harm alleged. If the dereliction of duty is alleged to have resulted in death or grievous bodily harm, give element (4), below:

(4) That such dereliction of duty resulted in [death to (state the name of the person alleged to have died)] [grievous bodily harm to (state the name of the person alleged to have been injured), to wit: (state the grievous bodily harm alleged)].

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.

A person is "derelict" in the performance of duty when (he) (she) (willfully) ((or) (negligently)) fails to perform his/her duties (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 omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances.)

("Culpably inefficiency" is inefficiency for which there is no reasonable or just excuse.)

(That an individual reasonably should have known of duties may be demonstrated by regulations, training or operating manuals, customs of the service, academic literature

or testimony, testimony of persons who have held similar or superior positions, or similar evidence.)

NOTE 5: Death or grievous bodily harm alleged. The following definitions and instructions are appropriate if death or grievous bodily harm is alleged. If cause of death is in issue, the military judge should also refer to Instruction 5-19.

"Grievous bodily harm" means a bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

An intent to cause death or grievous bodily harm is not required.

(If you are not convinced that the alleged dereliction of duty resulted in [death] [grievous bodily harm], but you are convinced that the other elements of the offense have been proven, you may find the accused guilty by excepting the language alleging that the dereliction of duty resulted in [death] [grievous bodily harm].)

NOTE 6: 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 7: 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. US v. Dallmon, 34 MJ 274 (CMA 1992).

(2) Noncommissioned officer's failure to report the drug use of others as an offense. US v. Medley, 33 MJ 75 (CMA 1975).

3A–17–1. CRUELTY, OPPRESSION, OR MALTREATMENT OF SUBORDINATES (ARTICLE 93)

a. MAXIMUM PUNISHMENT: DD, TF, 3 years, 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 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: US v. Carson, 57 MJ 410 (CAAF 2002); US v. Fuller, 54 MJ 107 (CAAF 2001).

3A–17A–1. PROHIBITED ACTIVITIES WITH RECRUIT OR TRAINEE BY PERSON IN POSITION OF SPECIAL TRUST (ARTICLE 93A)

NOTE: This offense, first enacted in the FY17 NDAA, applies to offenses committed on or after 1 January 2019.

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

b. MODEL SPECIFICATION:

Prohibited Acts with Specially Protected Junior Member of the Armed Forces:

In that _____ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, while in a position of authority over _____ did, (at/on board--location), on or about _____, engage in a prohibited act, to wit: _____ with _____, whom the accused (knew) (reasonably should have known) was a specially protected junior Servicemember in initial active duty training.

Prohibited Acts with an Applicant for Military Service:

In that _____ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, while in a position of authority over _____ did, (at/on board--location), on or about _____20____, engage in a prohibited act, to wit: _____ with _____ , whom the accused (knew) (reasonably should have known) was (an applicant to the armed forces via (_____)) (a specially protected junior enlisted member of the armed forces enlisted under a delayed entry program).

c. ELEMENTS:

Abuse of Training Leadership Position:

(1) That the accused was a (commissioned) (warrant) (noncommissioned) (petty) officer;

(2) That the accused was in a training leadership position with respect to (<u>state the name of the alleged victim</u>), a specially protected junior member of the armed forces; and

(3) That (<u>state the time and place alleged</u>), the accused engaged in prohibited sexual activity with (<u>state the name of the alleged victim</u>), a person the accused knew or reasonably should have known was a specially protected junior member of the armed forces.

Abuse of Position as a Military Recruiter:

(1) That the accused was a (commissioned) (warrant) (noncommissioned) (petty) officer;

(2) That the accused was a military recruiter; and

(3) That (state the time and place alleged), the accused engaged in prohibited sexual activity with (state the name of the alleged victim), a person the accused knew or reasonably should have known was (an applicant for military service) (a specially protected junior member of the armed forces who was enlisted under a delayed entry program).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Prohibited sexual activity" means, as specified in [cite the regulation(s) prescribed by the Secretary concerned, including paragraph number], inappropriate physical intimacy, including: [describe the prohibited conduct described in the regulation(s)].

Consent is not a defense to this offense.

("Specially protected junior member of the armed forces" means:

(a) a member of the armed forces who is assigned to, or is awaiting assignment to, basic training or other initial active duty for training, including a member who is enlisted under a delayed entry program;

(b) a member of the armed forces who is a cadet, a midshipman, an officer candidate, or a student in any other officer qualification program; and

(c) a member of the armed forces in any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial entry career qualification.)

(“Applicant for military service” means a person who, under regulations prescribed by the Secretary concerned, is an applicant for original enlistment or appointment in the armed forces.)

(“Training leadership position” means, with respect to a specially protected junior member of the armed forces, any of the following:

(a) any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officers' training corps unit, a training program for entry into the armed forces, or any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification, and

(b) faculty and staff at the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the United States Coast Guard Academy.)

(“Military recruiter” means a person who, under regulations prescribed by the Secretary concerned, has the primary duty to recruit persons for military service.)

3A–18–1. 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) (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: US v. Duggan, 15 CMR 396 (CMA 1954).

3A–18–2. 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) (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 3a-14-1, Willfully Disobeying a Superior Commissioned Officer, 3a-15-2, Willfully Disobeying a Warrant, Noncommissioned, or Petty Officer, 3a-16-1, Violating General Order or Regulation, and 3a-16-2, Violating Other Written Order or Regulation, may also be helpful in tailoring appropriate instructions.

e. REFERENCES: US v. Duggan, 15 CMR 396 (CMA 1954).

3A–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.

3A–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 3a-18-1 or 3a-18-2, or Sedition, Instruction 3a-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).

3A–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) commander of a (mutiny) (sedition) among the (Soldiers) (Sailors) (Airmen) (Marines) (_____) of _____, which (mutiny) (sedition) (he) (she), the said _____ (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) commander 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: <u>Instructions on elements of mutiny or sedition</u>. The members must be instructed on the elements of the offense of <u>Mutiny</u>, Instruction 3a-18-1 or 3a-18-2, or <u>Sedition</u>, Instruction 3a-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.

A "superior commissioned officer" means a superior commissioned officer in the accused's chain of command.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), may be applicable.

3A–18–6. ATTEMPTED MUTINY (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 _____, 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 3a-18-1 or 3a-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 5-17, Evidence Negating Mens Rea, or Instruction 5-12, Voluntary Intoxication, as bearing on the issue of intent to commit mutiny, may be applicable.

3A–19–1. SENTINEL OR LOOKOUT–DRUNK OR SLEEPING ON OR LEAVING POST (ARTICLE 95)

a. MAXIMUM PUNISHMENT:

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

(2) While receiving special pay under 37 USC § 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 § 310), being (posted) (on post) as a (sentinel) (lookout) at (warehouse no. 7) (post no. 11) (for radar observation) (_____) (was (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) (<u>state the post alleged</u>); (and)

(2) That (<u>state the time and place alleged</u>), the accused [was (drunk) (sleeping) while on post] [left (his) (her) post before being regularly relieved]; [and]

NOTE 1: <u>Aggravating conditions alleged</u>. Add element (3) only if it is alleged that the offense occurred in time of war or while the accused was receiving special pay under 37 USC § 310:

[(3)] That the offense was committed (in time of war) (while the accused was receiving special pay under 37 USC § 310).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “sentinel” or a “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.

("Post" is the area where the sentinel or lookout is required to be for the performance of duties. It is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary for the proper performance of the duties for which the sentinel or lookout was posted.) (The offense of leaving post is not committed when a sentinel or lookout goes an immaterial distance from the post, unless it is such a distance that the ability to fully perform the duty for which posted is impaired.) (A sentinel or lookout becomes "on post" after having been given a lawful order to go "on post" as a sentinel or lookout and being formally or informally posted. The fact that a sentinel or lookout is not posted in the regular way is not a defense. It is sufficient, for example, if the sentinel or lookout has taken the post in accordance with proper instruction, whether or not formally given.)

(A sentinel or lookout is "on post" within the meaning of this offense not only when at a post physically defined, as is ordinarily the case in garrison or aboard ship, but also, for example, when stationed in observation against the approach of an enemy, or detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.)

NOTE 2: Drunkenness alleged. When drunkenness is alleged, include the following definition of "drunk." If there is evidence that the accused used both alcohol and other drugs, the following instruction on proximate cause may be appropriate:

"Drunk" means any intoxication by alcohol which is sufficient to impair the rational and full exercise of the mental or physical faculties.

(You have heard evidence that the accused used both alcohol and other drugs. The term "drunk" relates only to intoxication by alcohol. To find the accused guilty of the offense of misbehavior of (sentinel) (lookout), you must be convinced beyond a reasonable doubt that the accused's intoxication by alcohol was a proximate cause of the impairment of the rational and full exercise of the accused's mental or physical faculties. This means that the impairment of the rational and full exercise of the accused's mental or physical faculties must have been the natural and probable result

of the accused's intoxication by alcohol. 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 impairment.

It is possible for the use of both alcohol and other drugs to each contribute as a proximate cause to the impairment of the rational and full exercise of the accused's mental or physical faculties. If the accused's intoxication by alcohol was a proximate cause of the impairment, the accused will not be relieved of criminal responsibility because his use of other drugs was also a proximate cause of the impairment.

In determining whether the accused's intoxication by alcohol was a proximate cause of the impairment of the rational and full exercise of his/her mental or physical faculties, and the role, if any, of the use of other drugs, 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 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: Other instructions. Instruction 5-9-1, Physical Impossibility, may be applicable.

3A–19–2. SENTINEL OR LOOKOUT–LOITERING (ARTICLE 95)

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); (and)

(2) That (state the time and place alleged), while posted as a (sentinel) (lookout), the accused (loitered) (wrongfully sat down) on post; [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 §310, add the following element:

[(3)] That the accused was so posted (in time of war) (while receiving special pay under 37 USC §310).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “sentinel” or a “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.

(“Post” is the area where the sentinel or lookout is required to be for the performance of duties. It is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary for the proper performance of the duties for which the sentinel or lookout was posted.) A sentinel or lookout becomes “on post” after having been given a lawful order to go “on post” as a sentinel

or lookout and being formally or informally posted. The fact that a sentinel or lookout is not posted in the regular way is not a defense. It is sufficient, for example, if the sentinel or lookout has taken the post in accordance with proper instruction, whether or not formally given.

(A sentinel or lookout is “on post” within the meaning of this offense not only when at a post physically defined, as is ordinarily the case in garrison or aboard ship, but also, for example, when stationed in observation against the approach of an enemy, or detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.)

(“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.)

3A–19A–1. DISRESPECT TOWARDS SENTINEL OR LOOKOUT (ARTICLE 95A)

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 _____, and that such language was directed toward and within the hearing of _____,] [behave in a disrespectful manner toward _____, by _____, and that such behavior was directed toward and within the sight of _____,] the (sentinel) (lookout) in the execution of (his) (her) duty.

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 (language) (behavior) was wrongful;

(5) That the (language) (behavior) was directed toward and within the (sight) (hearing) of (state name of the sentinel or lookout alleged); and

(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).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A "sentinel" or a "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 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).

“Wrongful” means without any legal justification or excuse.

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

3A–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 authority, release _____, a prisoner.

c. ELEMENTS:

(1) That (state the name of the prisoner alleged to have been released) was a prisoner; and

(2) That (state the time and place alleged), the accused released (state the name of the prisoner alleged to have been released) without authority.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “prisoner” is a person who is in confinement or custody imposed pursuant to lawful apprehension, pre-trial restraint, or pre-trial confinement, or by the sentence of a court-martial, and who has not been set free by a person with authority to release the prisoner.

“Release” refers to the 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).

3A–20–2. ALLOWING A PRISONER TO ESCAPE THROUGH NEGLECT (ARTICLE 96)

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

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, through neglect, allow _____, a prisoner, to escape.

c. ELEMENTS:

(1) That (state the name of the prisoner alleged to have escaped) was a prisoner;

(2) That (state the name of the prisoner alleged) escaped;

(3) That (state the time and place alleged), the accused allowed (state the name of the prisoner alleged to have escaped) to escape by not taking such care to prevent the escape as a reasonably careful 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:

A "prisoner" is a person who is in confinement or custody imposed pursuant to lawful apprehension, pre-trial restraint, or pre-trial confinement, or by the sentence of a court-martial, who has not been set free by a person with authority to release the prisoner.

"Escape" means any completed casting off of the restraint of confinement, before release by proper authority. Lack of effectiveness of the restraint imposed is immaterial. An escape is not complete until the prisoner is momentarily free from the restraint. (If the movement toward escape is opposed, or before it is completed, an immediate pursuit follows, there is no escape until opposition is overcome or pursuit is eluded.)

"Allow" means to permit; not to forbid or hinder.

"Proximate result" means a direct result of the accused's neglect, and not the result of an unforeseeable cause not involving the accused.

(After an escape, the fact that a prisoner returns, is captured, killed, or otherwise dies, is not a defense.)

3A–20–3. ALLOWING A PRISONER TO ESCAPE THROUGH DESIGN (ARTICLE 96))

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 _____, through design, allow _____, a prisoner, to escape.

c. ELEMENTS:

(1) That (state the name of the prisoner alleged to have escaped) was a prisoner;

(2) That the design of the accused was to allow 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:

A “prisoner” is a person who is in confinement or custody imposed pursuant to lawful apprehension, pre-trial restraint, or pre-trial confinement, or by the sentence of a court-martial, who has not been set free by a person with authority to release the prisoner.

“Escape” means any completed casting off of the restraint of confinement, before release by proper authority. Lack of effectiveness of the restraint imposed is immaterial. An escape is not complete until the prisoner is momentarily free from the restraint. (If the movement toward escape is opposed, or before it is completed, an immediate pursuit follows, there is no escape until opposition is overcome or pursuit is eluded.)

“Allow” means to permit; not to forbid or hinder.

“Through design” means that the accused intended for the prisoner to escape. Such intent may be inferred from conduct so wantonly devoid of care that the only reasonable inference which may be drawn is that the escape was contemplated as a probable result.

3A–20–4. DRINKING LIQUOR WITH PRISONER (ARTICLE 96)

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

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, unlawfully drink alcohol with _____, a prisoner.

c. ELEMENTS:

(1) That (state the name of the prisoner) was a prisoner; and

(2) That (state the time and place alleged) the accused unlawfully drank (an) alcoholic beverage(s) with (state the name of the prisoner).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “prisoner” is a person who is in confinement or custody imposed pursuant to lawful apprehension, pre-trial restraint, or pre-trial confinement, or by the sentence of a court-martial, who has not been set free by a person with authority to release the prisoner.

“Unlawfully drank” means that the accused drank alcohol with the prisoner without being granted specific authority to do so by a competent authority.

3A–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.

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 1: <u>Lawfulness of apprehension in issue</u>. 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.

NOTE 2: <u>Mistake of fact</u>. The accused's reasonable belief that the detention was lawful is a defense. If the evidence raises such a defense, the judge should give an appropriately tailored instruction using Instruction 5-11-2, IGNORANCE OR MISTAKE – WHEN ONLY GENERAL INTENT IS IN ISSUE.

3A–22–1. MISCONDUCT AS A PRISONER–ACTING WITHOUT AUTHORITY TO THE DETRIMENT OF ANOTHER (ARTICLE 98)

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(s) (was) (were) committed while the accused was in the hands of the enemy in time of war;

(3) That the act(s) (was) (were) done for the purpose 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 organized forces of the enemy in time of war, any 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" includes, but is not limited to, closer confinement, reduced rations, physical punishment, or other harm.

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

3A–22–2. MISCONDUCT AS A PRISONER—MALTREATMENT OF PRISONER (ARTICLE 98)

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 (state the name of the alleged prisoner), 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 (state the name of the alleged prisoner); and

(4) That the act was without justifiable cause.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Enemy” includes organized forces of the enemy in time of war, any 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 material. The authority may arise from the military rank of the accused or -- despite service regulations or customs to the contrary -- designation by the captor authorities or voluntary selection or election of the accused by other prisoners for their own self-government.

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(21). However, if there is a factual dispute involved, it should be resolved by the members in connection with their determination of guilt or innocence.

3A–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 or in the presence of the enemy" is a question of tactical relationship with the enemy rather than distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat, may be "before or in the presence of the enemy" although miles from enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not part of a tactical operation then going on or in

immediate prospect is not “before or in the presence of the enemy.” To determine whether or not the accused was “before or 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 organized opposing forces in time of war, any 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.

3A–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 or 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 or delivered up) except as a result of the utmost necessity or unless directed to do so by competent authority. 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 or in the presence of the enemy” is a question of tactical relationship with the enemy rather than distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat, may be “before or in the presence of the enemy” although miles from enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not part of a tactical operation then going on or in immediate prospect is not “before or in the presence of the enemy. To determine whether or not the accused was “before or 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 organized opposing forces in time of war, any 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.

3A–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) (her) 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, or intentional misconduct;

(4) That the accused thereby 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 or 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" does not include a mere error in judgment.)

"Before or in the presence of the enemy" is a question of tactical relationship with the enemy rather than distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat, may be "before or in the presence of the enemy" although miles from enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not part of a tactical operation then going on or in immediate prospect is not "before or in the presence of the enemy. To determine whether or not the accused was "before or 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 organized opposing forces in time of war, any 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.

3A–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 or 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 or in the presence of the enemy" is a question of tactical relationship with the enemy rather than distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat, may be "before or in the presence of the enemy" although miles from enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not part of a tactical operation then going on or in immediate prospect is not "before or in the presence of the enemy. To determine whether or not the accused was "before or 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 organized opposing forces in time of war, any 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.

3A–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 committed an act of cowardice by (state the alleged act of cowardice);

(2) That this conduct occurred while the accused was before or in the presence of the enemy; and

(3) 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 or in the presence of the enemy” is a question of tactical relationship with the enemy rather than distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat, may be “before or in the presence of the enemy” although miles from enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not part of a tactical operation then going on or in immediate prospect is not “before or in the presence of the enemy. To determine whether or not the accused was “before or 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 organized opposing forces in time of war, any 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.

3A–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 or pillage public or private property.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Plunder" and "pillage" mean to unlawfully seize or appropriate public or private property.

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. It is sufficient that the accused merely quit (his) (her) place of duty with the intent to plunder or pillage, even if the intended misconduct is not done.

"Before or in the presence of the enemy" is a question of tactical relationship with the enemy rather than distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to

move into combat, may be “before or in the presence of the enemy” although miles from enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not part of a tactical operation then going on or in immediate prospect is not “before or in the presence of the enemy.” To determine whether or not the accused was “before or 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 organized opposing forces in time of war, any 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.

3A–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 or 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 or in the presence of the enemy” is a question of tactical relationship with the enemy rather than distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to

move into combat, may be “before or in the presence of the enemy” although miles from enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not part of a tactical operation then going on or in immediate prospect is not “before or in the presence of the enemy.” To determine whether or not the accused was “before or 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 organized opposing forces in time of war, any 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.

3A–23–8. MISBEHAVIOR BEFORE THE ENEMY–WILLFUL 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 or 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 or in the presence of the enemy" is a question of tactical relationship with the enemy rather than distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat, may be "before or in the presence of the enemy" although miles from enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not part of a tactical operation then going on or in immediate prospect is not "before or in the presence of the enemy." To determine whether or not the accused was "before or 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 organized opposing forces in time of war, any 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.

3A–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 or 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 to render relief and assistance to these (troops) (combatants) (vessels) (aircraft), without jeopardy to (his) (her) mission;

(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 or 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 or in the presence of the enemy” is a question of tactical relationship with the enemy rather than distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to

move into combat, may be “before or in the presence of the enemy” although miles from enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not part of a tactical operation then going on or in immediate prospect is not “before or in the presence of the enemy.” To determine whether or not the accused was “before or 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 organized opposing forces in time of war, any 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: 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 and assistance.

3A–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 time and place alleged), the accused, did an overt act, to wit: (state the overt act alleged), which was intended to and did compel that commander to give up to the enemy or 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 or 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 organized opposing forces in time of war, any 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.

3A–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 overt act that is, (state the act(s) alleged or raised by the evidence);

(3) That the act was done with the 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 organized opposing forces in time of war, any 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.

3A–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 or flag to the enemy or in some other manner;

(3) That the accused made or was responsible for the offer; and

(4) That the accused did not have proper authority to make the offer.

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.) (The sending of an emissary charged with making the offer or surrender is an act sufficient to prove the offer, even though the emissary does not reach the enemy.)

“Enemy” includes organized opposing forces in time of war, any 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.

3A–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 or countersign, namely (state the parole or countersign allegedly disclosed) to (state the name or describe the recipient alleged if known; if not known state “an unknown individual”); and

(2) That (state the name or description of the recipient alleged) was not entitled to receive this parole or 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.

3A–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) was 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 give a certain parole or 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 or countersign; and

(3) That (state the time and place alleged), the accused gave to (state the name of the recipient alleged) a parole or countersign namely, (state the parole or countersign actually given), which was different from the parole or 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: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), is ordinarily applicable.

3A–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 or posted for the protection of (state the persons, place, and/or property allegedly protected);

(2) That the accused knew or 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.

Actual knowledge of the safeguard by the accused is not required. It is sufficient if an accused should have known of the existence of the safeguard.

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.

3A–27–1. SPYING (ARTICLE 103)

a. MAXIMUM PUNISHMENT: Death or other lawful punishment.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), was, (at/on board—location), on or about _____, a time of war, found (lurking) (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 the accused was lurking, acting clandestinely or under false pretenses;

(3) That the accused was collecting or attempting to collect information;

(4) That the accused 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 organized opposing forces in time of war, any 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(21). 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: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

3A–27A–1. ESPIONAGE (ARTICLE 103A)

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 (<u>state the time and place alleged</u>), the accused communicated, delivered, or transmitted any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense;

(2) That this matter was communicated, delivered, or transmitted to (<u>state the party allegedly communicated with</u>), any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly; 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: <u>If attempted espionage raised</u>. Use Instruction 3a-27a-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.

"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 2: Capital Instructions and Procedures in Espionage Cases. See RCM 1004, Article 103a, UCMJ, paragraphs (b) and (c), and paragraph 32, MCM. See also Chapter 8.

e. REFERENCES: US v. Richardson, 33 MJ 127 (CMA 1991) Earlier versions of this instruction pertaining to the intent element contained the words "bad faith OR without authority." Instructing as to "without authority" in the alternative to "bad faith" was expressly rejected in US v. Richardson.

3A–27A–2. ATTEMPTED ESPIONAGE (ARTICLE 103A)

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 (<u>state the time and place alleged</u>), the accused committed a certain overt act, to wit: _____;

(2) That the act was done with intent to commit espionage against the United States;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to bring about the offense of espionage.

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: US v. Richardson, 33 MJ 127 (CMA 1991) Earlier versions of this instruction pertaining to the intent element contained the words "bad faith OR without authority." Instructing as to "without authority" in the alternative to "bad faith" was expressly rejected in US v. Richardson.

3A–27B–1. AIDING THE ENEMY–FURNISHING ARMS OR AMMUNITION (ARTICLE 103B)

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 the enemy, namely: (state the name or description of the enemy who purportedly received the aid);

(2) 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 organized opposing forces in time of war, any 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.

3A–27B–2. ATTEMPTING TO AID THE ENEMY (ARTICLE 103B)

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 (state the name or description of the enemy who purportedly was to receive the aid) was an enemy;

(3) That the act was done with the intent to aid the enemy with certain arms, ammunition, supplies, money or other things;

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

(5) That the act apparently tended to bring about the offense of aiding the enemy with certain arms, ammunition, supplies, money or other things; 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 organized opposing forces in time of war, any 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 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable. See Instruction 3-4-1, Attempts, for the standard instruction on the subject.

3A–27B–3. HARBORING OR PROTECTING THE ENEMY (ARTICLE 103B)

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 or 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 the person so protected was 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 organized opposing forces in time of war, any 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.

3A–27B–4. GIVING INTELLIGENCE TO THE ENEMY (ARTICLE 103B)

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 (state the name or description of the enemy alleged to have received the intelligence information) was an enemy; and

(3) That this intelligence information was true, or implied the truth, at least in part.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Intelligence" means any helpful information, given to and received by the enemy, which is true or implies the truth, at least in part.

"Enemy" includes organized opposing forces in time of war, any 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.

Actual knowledge by the accused that he/she gave intelligence to the enemy is required. That knowledge may be proved by circumstantial evidence.

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

3A–27B–5. COMMUNICATING WITH THE ENEMY (ARTICLE 103B)

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 said _____, 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, knowingly communicated, corresponded, or 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, or holding intercourse with an enemy.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Communication, correspondence, or 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 and may be direct or indirect. The offense is complete the moment the communication leaves the accused, whether or not it reaches its destination.

"Enemy" includes organized opposing forces in time of war, any 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.

Actual knowledge by the accused that he/she knowingly communicated, corresponded, or held intercourse with the enemy is required. That knowledge may be proved by circumstantial evidence.

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

3A–28–1. PUBLIC RECORDS OFFENSES (ARTICLE 104)

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)] [take with the intent to (alter) (conceal) (remove) (mutilate) (obliterate) (destroy)] a public record, to wit: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused [altered, concealed, removed, mutilated, obliterated, or destroyed] [took with the intent to alter, conceal, remove, mutilate, obliterate, or destroy] a public record, namely: (state the record alleged); and

(2) That the [(altering) (concealing) (removing) (mutilating) (obliterating) (destroying)] [(taking)] was willful and unlawful.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Willfully" means intentionally or on purpose.

"Public records" include records, reports, statements, or data compilations in any form of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which matters there was a duty to report. (Public records include classified matters.)

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 issue of intent to alter, conceal, etc., may be applicable.

3A–28A–1. FRAUDULENT ENLISTMENT OR APPOINTMENT (ARTICLE 104A)

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 or appointed in the United States (Army) (_____);

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

(3) That the accused's enlistment or appointment was obtained or procured by the knowingly false representation or 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.

3A–28A–2. FRAUDULENT SEPARATION (ARTICLE 104A)

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 or deliberately concealed (a) certain material fact(s) about (his) (her) eligibility for separation, that is, (state the facts allegedly concealed or misrepresented); and

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

3A–28B–1. EFFECTING UNLAWFUL ENLISTMENT, APPOINTMENT, OR SEPARATION (ARTICLE 104B)

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), in that (state the ineligibility as described in the specification); and

(3) That the accused knew of the ineligibility at the time of 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.)

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

3A–29–1. FORGERY–MAKING OR ALTERING (ARTICLE 105)

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: <u>Used to legal harm alleged</u>. 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 (<u>state the time and place alleged</u>), the accused falsely (made) (altered) a certain [(signature to a) (check) (writing) (_____)] [part of a (check) (writing) (_____)], to wit: (<u>describe the signature, part of a writing, or writing allegedly falsely made or altered</u>);

(2) That the (signature) (check) (writing) (_____) was of a nature which would, if genuine, apparently (impose a legal liability on another) (or) (change another's legal rights or liabilities to his/her prejudice) (in that (<u>here, if alleged, set forth the manner in which the legal status of another could be or was allegedly harmed</u>)); and

(3) That the accused (made) (altered) the false (signature) (check) (writing) (_____) 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: 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, duty, 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: No evidence of actual defrauding. 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) (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 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 (here 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.

3A–29–2. FORGERY–UTTERING (ARTICLE 105)

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: <u>Used to legal harm alleged</u>. 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 a certain [signature to a (check) (writing) (_____)] [part of a (check) (writing) (_____)] [(check) (writing) (_____)] was falsely (made) (altered), to wit: (<u>describe the signature, part of a writing, or writing allegedly falsely made or altered</u>);

(2) That the (signature) (check) (writing) (_____) was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice [in that (<u>here, if alleged, set forth the manner in which the legal status of another could be or was allegedly harmed</u>)];

(3) That (<u>state the time and place alleged</u>), the accused (uttered) (offered) (issued) (transferred) this (signature) (check) (writing) (_____);

(4) That, at such time, the accused knew that the (signature) (check) (writing) (_____) had been falsely (made) (altered); and

(5) That the accused (uttered) (offered) (issued) (transferred) the (signature) (check) (writing) (_____) 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.

"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, duty, 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: No evidence of actual defrauding. 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 fifth 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) (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 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 (here 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: 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.

3A–29A–1. FALSE OR UNAUTHORIZED PASS–MAKING, ALTERING, COUNTERFEITING, TAMPERING (ARTICLE 105A)

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 military or official (pass) (permit) (discharge certificate) (identification card), to wit: (state the terms of the instrument as alleged); and

(2) That the accused then knew that the (permit) (pass) (discharge certificate) (identification card) was false.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Wrongfully" means without legal excuse or justification.

Military or official pass, permit, discharge certificate, or identification card includes, as well as more usual forms of these documents, all documents issued by any governmental agency for the purposes of identification, as well as copies thereof.

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

3A–29A–2. FALSE OR UNAUTHORIZED PASS–WRONGFUL SALE, GIFT, OR LOAN (ARTICLE 105A)

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: _____, (he) (she), the said _____, 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) to (state the name of the person alleged)] [disposed of by (state the manner alleged)] a military or official (pass) (permit) (discharge certificate) (identification card), to wit: (state the terms of the instrument alleged);

(2) That the (pass) (permit) (discharge certificate) (identification card) was (false) (or) (unauthorized); and

(3) That the accused then knew that the (pass) (permit) (discharge certificate) (identification card) was (false) (or) (unauthorized).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Wrongfully" means without legal excuse or justification.

Military or official pass, permit, discharge certificate, or identification card includes, as well as more usual forms of these documents, all documents issued by any governmental agency for the purposes of identification, as well as copies thereof.

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

3A–29A–3. WRONGFUL USE OR POSSESSION OF FALSE OR UNAUTHORIZED PASS (ARTICLE 105A)

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) (_____), (he) (she), the said _____, then well knowing the same to be (false) (unauthorized).

c. ELEMENTS:

(1) That (<u>state the time and place alleged</u>), the accused wrongfully (used) (possessed) a military or official (pass) (permit) (discharge certificate) (identification card), to wit: (<u>state the terms of the instrument as alleged</u>);

(2) That the (pass) (permit) (discharge certificate) (identification card) was (false) (or) (unauthorized); (and)

(3) That the accused then knew that the (pass) (permit) (discharge certificate) (identification card) was (false) (or) (unauthorized); [(and)]

NOTE 1: <u>Intent to defraud or deceive alleged</u>. If alleged, add the following element:

[(4)] That the accused (used) (possessed) the (pass) (permit) (discharge certificate) (identification card) with an intent to (defraud) (or) (deceive).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Wrongfully" means without legal excuse or justification.

Military or official pass, permit, discharge certificate, or identification card includes, as well as more usual forms of these documents, all documents issued by any governmental agency for the purposes of identification, as well as copies thereof.

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, through a misrepresentation, an article or thing of value and to apply it to one's own use and benefit or to the use and benefit of another, either permanently or temporarily.

"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.

3A–30–1. IMPERSONATING AN OFFICER, NONCOMMISSIONED OFFICER, OR PETTY OFFICER OR AGENT OR OFFICIAL (ARTICLE 106)

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(n) (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:

(1) That (<u>state the time and place alleged</u>), the accused impersonated (a) (an) [(officer) (noncommissioned officer) (petty officer) (agent of superior authority of the <u>state the armed force alleged</u>)(official of the Government of _____)]; (and)

(2) That this impersonation was wrongful and willful; [and]

NOTE 1: <u>Intent to defraud alleged</u>. If the aggravating factor of intent to defraud is alleged, give element (3) below.

[(3)] 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).

NOTE 2: If the accused is charged with impersonating an official of a certain government without an intent to defraud, give element (3) below:

[(3)] That the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have by _____.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Officer” means a commissioned or warrant officer.

"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.

"Wrongful" means without legal excuse or justification.

NOTE 4: Intent to defraud alleged. Give the following definition if intent to defraud is alleged:

"Intent to defraud" means an intent to obtain, through a misrepresentation, an article or thing of value and to apply it to one's own use and benefit or to the use and benefit of another, either permanently or temporarily.

NOTE 5: 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 (US 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 6: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable when intent to defraud is alleged.

e. REFERENCES: Cases discussing when overt acts, or asserting or exercising the office must be pled and proved: US v. Pasha, 24 MJ 87 (CMA 1987); US v. Yum, 10 MJ 1 (CMA 1980) (concurring opinion); US v. Frisbie, 29 MJ 974 (AFCMR 1990).

3A–30A–1. WEARING UNAUTHORIZED INSIGNIA, DECORATION, BADGE, RIBBON, DEVICE, OR LAPEL BUTTON (ARTICLE 106A)

a. MAXIMUM PUNISHMENT:

(1) Wearing Medal of Honor, Distinguished Service Cross, Navy Cross, Air Force Cross, Silver Star, Purple Heart, or a valor device on any personal award: BCD, TF, 1 year, E-1.

(2) All others: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, wrongfully, without authority, wear upon (his) (her) (uniform) (civilian clothing) (the insignia or 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 (<u>state the time and place alleged</u>), the accused wore upon (his) (her) (uniform) (civilian clothing) the (<u>state the insignia, decoration, or badge alleged</u>);

(2) That the accused was not authorized to wear the (<u>state the insignia, decoration, or badge alleged</u>); and

(3) That the wearing was wrongful.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Conduct is "wrongful" when it is done without legal justification or excuse. The wearing of an item is "wrongful" where it is intentional and the accused knew that (he) (she) was not entitled to wear it. Actual knowledge by the accused that (he) (she) was not authorized to wear the uniform item in question is required. Knowledge may be proved by circumstantial evidence.

(The wearing of an item is not "unauthorized" if the circumstances reveal it to be in jest or for an innocent or legitimate purpose (, for instance, as part of a costume for dramatic or other reasons, or for legitimate law enforcement activities).)

3A–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.

A statement is official when the maker is either acting in the line of duty or the statement bears a clear and direct relationship to the maker’s official military duties, or where the receiver is either a military member carrying out a military duty when the statement is made or a civilian necessarily performing a military function when the statement is made. The rank or status of the person intended to be deceived is immaterial if that person was authorized in the execution of a particular duty to require or receive the statement from the accused. (The Government may be the victim of this offense.)

(A statement may be made orally or in writing.)

("Statements" include records, returns, regulations, orders, or other documents.)

NOTE 1: Civilian investigations. Unless occurring under one of the circumstances above, false statements to civilian law enforcement officials are not "official" and therefore are not punishable under Article 107.

NOTE 2: AAFES employees. If the accused is charged with making a false official statement to an AAFES employee, the military judge may give the following instruction:

AAFES employees who are in the performance of their duties are considered to be performing a military function.

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

e. REFERENCES: "Exculpatory no" doctrine. Brogan v. US, 522 U.S. 398 (1998); US v. Solis, 46 MJ 31 (CAAF 1997); US v. Black, 47 MJ 146 (CAAF 1997); US v. Prater, 32 MJ 433 (CMA 1991); US v. Jackson, 26 M.J 377 (CMA 1988). Defining "official" statement. US v. Spicer, 71 M.J. 470 (CAAF 2013); US v. Capel, 71 M.J. 485 (CAAF 2013); AAFES employees. US v. Passut, 73 M.J. 27 (CAAF 2014).

3A–31–2. FALSE SWEARING (ARTICLE 107)

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 _____), (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 (<u>state the time and place alleged</u>), the accused took an oath;

(2) That the oath was administered to the accused in a matter in which such oath was required or authorized by law;

(3) That the oath was administered by a person having the authority to do so;

(4) That upon the oath the accused (made) (subscribed) a statement, to wit: (<u>set forth the statement as alleged</u>);

(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:

An "oath" is a procedure which appeals to the conscience of the person to whom the oath is administered and which binds that person to speak the truth.

("Subscribe" means to write one's name on a document for the purpose of adopting its words as one's own expressions.)

NOTE 1: <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 fifth 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 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.

3A–31A–1. PAROLE—VIOLATION OF (ARTICLE 107A)

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 the accused had been a prisoner as the result of a court-martial conviction or other criminal proceeding;

(2) That the accused was on parole;

(3) That there were certain conditions of parole that the accused was bound to obey; and

(4) That (state the time and place alleged), the accused violated the conditions of parole by (state the act or failure to act alleged as a violation of parole).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Prisoner" refers only to those in confinement resulting from conviction at a court-martial or other 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.

"Conditions of parole" include the parole plan and other reasonable and appropriate conditions of parole. 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.

3A–32–1. SELLING OR DISPOSING OF MILITARY PROPERTY (ARTICLE 108)

a. MAXIMUM PUNISHMENT:

(1) $1000 or less: BCD, TF, 1 year, E-1.

(2) More than $1000: 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.

c. ELEMENTS:

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

(a) sold (state the property alleged) (, a firearm,) (, an explosive,) to (state the person/entity alleged); or

(b) disposed of (state the property alleged) (, a firearm,) (, an explosive,) by (state the alleged manner of disposal);

NOTE 1: <u>Firearm or explosive alleged</u>. Use the appropriate language in the brackets above only when it is alleged that the property is a firearm or explosive.

(2) That the (sale) (disposition) was without proper authority;

(3) That the property was military property of the United States; and

(4) That the property was of a value of $ _____ (or less).

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. Not all "government property" is "military

property" even if the government agency possessing it is an armed force of the United States.

("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 2: <u>Disposition alleged</u>. When disposition is alleged, the first instruction below must be given. The other instruction may be given. <u>See</u> NOTE 3 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 3: <u>Abandonment as disposition</u>. 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. US 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 US v. Schwabauer, 37 MJ 338 (CMA 1993) (unauthorized relinquishing possession of individual weapon in full view of NCOs in combat zone) with US 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 4: <u>Firearm and explosive defined</u>. If the property is alleged to be a firearm or explosive, definitions may be appropriate. See RCM 103 (11) & (12).

"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, fuzes (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. "Explosive" includes ammunition.

NOTE 5: 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 below.

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 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)."

NOTE 6: "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 $1000.00 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 7: Other instructions. Instruction 7-3, Circumstantial Evidence and Instruction 7-15, Variance, may be applicable. An appropriately tailored "abandoned property" instruction (See Instruction 3a-45-1, Larceny) 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:

Military property: US v. Schelin, 15 MJ 218 (CMA 1983) and US v. Simonds, 20 MJ 279 (CMA 1985). Disposition: US v. Joyce, 22 MJ 942 (AFCMR 1986).

3A–32–2. DAMAGING, DESTROYING, OR LOSING MILITARY PROPERTY (ARTICLE 108)

a. MAXIMUM PUNISHMENT:

(1) Willful damage, destruction or loss:

(a) $1000 or less: BCD, TF, 1 year, E-1.

(b) More than $1000: 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) $1000 or less: 2/3 x 6 months, 6 months, E-1.

(b) More than $1000: 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) (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) $ _____)

c. ELEMENTS:

(1) That (<u>state the time and place alleged</u>), the accused, without proper authority, (damaged) (destroyed) (lost) (<u>state the property alleged</u>) (, a firearm,) (, an explosive,) (by (<u>state the manner alleged</u>));

NOTE 1: <u>Firearm or explosive alleged</u>. Use the appropriate language in the brackets above only when it is alleged that a firearm or explosive was willfully damaged, destroyed, or lost.

(2) That the property was military property of the United States;

(3) That the (damage) (destruction) (loss) was (willfully caused) (the result of neglect) by the accused; and

(4) That the (property was of a value of $_____) (damage amounted to $ _____).

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. Not all "government property" is "military property" even if the government agency possessing it is an armed force of the United States.

NOTE 2: Damage alleged. When damage is alleged, the instruction below should be given. See US v. Ortiz, 24 MJ 164 (CMA 1987) (CMA adopted a definition of damage 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 US 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 3: 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 4: Willfulness alleged. If the accused's act or omission is alleged to have been willful, the following instruction should be given. See also NOTE 9 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 5: 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 9.

(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 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).

"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, fuzes (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. "Explosive" includes ammunition.

NOTE 7: 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 below. If there is an issue whether the loss, damage or destruction was willful, the instructions following NOTE 9, 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)."

NOTE 8: "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 $1000.00 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 9: 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 10: 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 11: 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, Instruction 3-45-1, Larceny) may be applicable if an issue is raised that the property was abandoned by the government.

e. REFERENCES: Military property: US v. Schelin, 15 MJ 218 (CMA 1983); US v. Simonds, 20 MJ 279 (CMA 1985).

3A–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) $1000 or less: BCD, TF, 1 year, E-1.

(b) More than $1000: 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) $1000 or less: 2/3 x 6 months, 6 months, E-1.

(b) More than $1000: 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 $_____).

c. ELEMENTS:

(1) That (<u>state the time and place alleged</u>), (<u>state the property alleged</u>) (, a firearm,) (, an explosive,) was (lost) (damaged by _____) (destroyed by _____) (sold to _____) (wrongfully disposed of by _____);

NOTE 1: <u>Firearm or explosive alleged</u>. Use the appropriate language in the brackets above only when it is alleged that a firearm or explosive was willfully lost, damaged, destroyed, sold, or disposed of.

(2) That the property was military property of the United States;

(3) That the (loss) (damage) (destruction) (sale) (wrongful disposition) was suffered by the accused, without proper authority, through an omission of duty by the accused;

(4) That the omission of duty was (willful) (negligent); and

(5) That the (property was of a value of $_____) (damage amounted to $_____).

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. Not all "government property" is "military property" even if the government agency possessing it is an armed force of the United States.

"Suffered" means to allow or permit.

"Omission of duty" means a failure to do one's duty.

("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 2: Wrongful disposition alleged. When wrongful disposition is alleged, the first instruction below must be given. The other instruction may be given. See NOTE 3 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 3: <u>Abandonment as wrongful disposition</u>. 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. US 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 US v. Schwabauer, 37 MJ 338 (CMA 1993) (unauthorized relinquishing possession of individual weapon in full view of NCOs in combat zone) with US 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 4: <u>Damage alleged</u>. When damage is alleged, the instruction below should be given. See US v. Ortiz, 24 MJ 164 (CMA 1987) (CMA adopted a definition of damage 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 US 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 5: <u>Destruction alleged</u>. 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 6: <u>Willfulness alleged</u>. If the accused's omission is alleged to have been willful, the following instruction should be given. <u>See</u> <u>also</u> NOTE 11

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 7: 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 11.

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 8: 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."

"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, fuzes (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. "Explosive" includes ammunition.

NOTE 9: 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. If there is an issue whether suffering the loss, damage, destruction, sale or wrongful disposition was willful, the instructions following NOTE 11 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)."

NOTE 10: "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 $1000.00 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 11: 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 12: 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 13: 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 Instruction 3-45-1, Larceny), may be applicable if an issue is raised that the property was abandoned by the government.

e. REFERENCES:

(1) Military property: US v. Schelin, 15 MJ 218 (CMA 1983) and US v. Simonds, 20 MJ 279 (CMA 1985).

(2) Disposition: US v. Joyce, 22 MJ 942 (AFCMR 1986).

(3) Negligence in Article 108(3) may be by act or omission: US v. Fuller, 25 MJ 514 (ACMR 1987). This language in Fuller is probably dicta.

3A–32A–1. FAILING TO SECURE PUBLIC PROPERTY TAKEN FROM THE ENEMY (ARTICLE 108A)

a. MAXIMUM PUNISHMENT:

(1) $1000 or less: BCD, TF, 6 months, E-1.

(2) Over $1000 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: _____, of a value of (about) $_____.

c. ELEMENTS:

(1) That certain public property, namely, (describe the property allegedly taken), [(a firearm) (an explosive)], was taken from the enemy;

NOTE 1: Firearm or explosive alleged. Use the appropriate language in the brackets above only when it is alleged that the property is a firearm or explosive.

(2) 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; (and)

(3) That the property was of a value of $ _____ (or some lesser amount, in which case the finding should be in the lesser amount).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

In determining whether the accused failed to do what was reasonable under the circumstances to secure the property for the United States, you are advised that every person subject to military law, to include the accused, has an immediate duty to take such steps as are reasonably within that person's power to secure public property for the service of the United States and to protect it from destruction or loss.

“Enemy” includes organized forces of the enemy in time of war, any 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.

(“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, fuzes (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. “Explosive” includes ammunition.)

NOTE 2: Other instructions. Instruction 7-16, Variance - Value, Damage, or Amount, is ordinarily applicable.

3A–32A–2. FAILURE TO REPORT AND TURN OVER CAPTURED OR ABANDONED PROPERTY (ARTICLE 108A)

a. MAXIMUM PUNISHMENT:

(1) $1000 or less: BCD, TF, 6 months, E-1.

(2) Over $1000 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: _____, of a value of (about) $_____.

c. ELEMENTS:

(1) That certain captured or abandoned public or private property came into the possession, custody, or control of the accused, namely, (describe the property alleged) [(a firearm) (an explosive)];

NOTE 1: Firearm or explosive alleged. Use the appropriate language in the brackets above only when it is alleged that the property is a firearm or explosive.

(2) 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; and

(3) That the property was of a value of $ _____ (or some lesser amount, in which case the finding should be in the lesser amount).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Proper authority” means any authority competent to order disposition of the (captured) (abandoned) property.

(“Abandoned” refers to property which the enemy has relinquished, given up, discarded, or left behind.)

("Enemy" includes organized forces of the enemy in time of war, any 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.)

("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, fuzes (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. "Explosive" includes ammunition.)

NOTE 2: Other instructions. Instruction 7-16, Variance - Value, Damage, or Amount, is ordinarily applicable.

3A–32A–3. DEALING IN CAPTURED OR ABANDONED PROPERTY (ARTICLE 108A)

a. MAXIMUM PUNISHMENT:

(1) $1000 or less: BCD, TF, 6 months, E-1.

(2) Over $1000 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) [(a firearm) (an explosive)];

NOTE 1: Firearm or explosive alleged. Use the appropriate language in the brackets above only when it is alleged that the property is a firearm or explosive.

(2) That, by so doing, the accused (received) (expected) some (profit) (benefit) (advantage) to [(himself) (herself)] [(a) certain person(s) connected either directly or indirectly with (him) (her)], namely, (state the manner alleged); and

(3) That the property was of a value of $ _____ (or some lesser amount, in which case the finding should be in the lesser amount).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Abandoned" refers to property which the enemy has relinquished, given up, discarded, or left behind.)

("Enemy" includes organized forces of the enemy in time of war, any 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.)

(“Disposed of” includes destruction or abandonment.)

(“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, fuzes (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. “Explosive” includes ammunition.)

NOTE 2: Other instructions. Instruction 7-16, Variance - Value, Damage, or Amount, is ordinarily applicable.

3A–32A–4. LOOTING OR PILLAGING (ARTICLE 108A)

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) (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) (pillaging) (looting and pillaging) by unlawfully (seizing) (appropriating) certain (public) (private) property, namely, (describe the property seized or appropriated);

(2) That this property was (located in enemy or occupied territory) (on board a seized or captured vessel); and

(3) That this property was:

(a) left behind by, owned by, or in the custody of the enemy, an occupied state, an inhabitant of an occupied state, or a person under the protection of the enemy or an occupied state, or who, immediately prior to the occupation of the place where the act occurred, was under the protection of the enemy or occupied state; or

(b) part of the equipment of a seized or captured vessel; or

(c) owned by, or in the custody of the officers, crew, or passengers on board a seized or captured vessel.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

(“Looting”) (and) (“pillaging”) means unlawfully seizing or appropriating property which is located in enemy or occupied territory (or on board a seized or captured vessel).

"Unlawfully seized or 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 organized forces of the enemy in time of war, any 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(23) and 1 USC section 3.***

e. REFERENCES: US v. Mello, 36 MJ 1067 (ACMR 1993); US v. Manginell, 32 MJ 891 (AFCMR 1991).

3A–33–1. WASTING OR SPOILING NONMILITARY PROPERTY (ARTICLE 109)

a. MAXIMUM PUNISHMENT:

(1) $1000 or less: BCD, TF, 1 year, E-1.

(2) More than $1000: 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 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) (recklessly) (wasted) (spoiled), certain real property, namely: (describe the property alleged) by (state the manner alleged);

(2) That the property belonged to (state the name of the owner alleged); and

(3) That the property was of a value of $_____ (or some lesser amount, in which case the finding should be in the lesser amount).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Waste") (and) ("Spoil") means to wrongfully and voluntarily destroy or permanently damage real property (, such as burning down buildings, burning piers, tearing down fences, or cutting down 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" 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.

3A–33–2. DESTROYING OR DAMAGING NONMILITARY PROPERTY (ARTICLE 109)

a. MAXIMUM PUNISHMENT:

(1) $1000 or less: BCD, TF, 1 year, E-1.

(2) More than $1000: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

Damaging non-military property

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, willfully and wrongfully damage by (method of damage) (identify property damaged _____) (the amount of said damage being in the sum of (about) $ _____), the property of _____.

Destroying non-military property

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, willfully and wrongfully destroy (identify property destroyed _____), of a value 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 property belonged to (state the name of the owner alleged); and

(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)] [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.

“Wrongfully” means contrary to law, regulation, lawful order, or custom.

NOTE 1: Destruction alleged. If destruction is alleged, define it as follows:

To be "destroyed," the property need not be completely demolished or annihilated, but must be sufficiently injured to be useless for its intended purpose.

NOTE 2: Damage alleged. If damage is alleged, give the following definition:

"Damage" consists of any physical injury to the property.

(As a general rule, the amount of damage is the estimated or actual cost of repair by artisans employed in this work who are available to the community wherein the owner resides, or the replacement cost, whichever is less.)

NOTE 3: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), and Instruction 7-16, Variance - Value, Damage, or Amount, are ordinarily applicable.

3A–33A–1. MAIL–TAKING (ARTICLE 109A)

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 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 mail box 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: (state the mail matter alleged) addressed to (state the name of the addressee);

(2) That such taking was wrongful;

(3) That the accused took the mail matter before it was (delivered to) (received by) (state the name of the addressee); and

(4) That the accused took the mail matter with the intent to (obstruct the correspondence) (pry into the business or secrets of any person or organization).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"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 1: "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 2: <u>Exceptions to wrongfulness</u>. If the evidence presented raises an exception to the element of wrongfulness, such as that the accused's taking of the items was in the performance of his duties, then the burden of proof is upon the prosecution to establish beyond a reasonable doubt that the taking was wrongful. 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) When matter is in the "postal system." US v. Rayfield, 30 CMR 307 (CMA 1961); US v. Manausa, 30 CMR 37 (CMA 1960); US v. McCline, 32 MJ 356 (CMA 1991); US v. Smith, 27 MJ 914 (ACMR 1989); US v. Sullivan, 25 MJ 635 (ACMR 1987); US v. Scioli, 22 CMR 292 (CMA 1957).

(2) Value is not an element. US v. Gaudet, 29 CMR 488 (CMA 1960).

(3) Intent to obstruct correspondence. US v. Rayfield, 30 CMR 307 (CMA 1961); US v. Robinson, 39 MJ 903 (ACMR 1994) pet. denied 41 MJ 122.

3A–33A–2. MAIL–OPENING, SECRETING, OR DESTROYING (ARTICLE 109A)

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 (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: (state the mail matter alleged) addressed to (state the name of the addressee) ;

(2) That such (opening) (secreting) (destroying) was wrongful; and

(3) That the accused (opened) (secreted) (destroyed) the mail matter before it was (delivered to) (received by) (state the name of the addressee).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"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 1: "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 2: <u>Exceptions to wrongfulness</u>. If the evidence presented raises an exception to the element of wrongfulness, such as that the accused's taking of the items was in the performance of his duties, then the burden of proof is upon the prosecution to establish beyond a reasonable doubt that the taking was wrongful. 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) When matter is in the "postal system." US v. Rayfield, 30 CMR 307 (CMA 1961); US v. Manausa, 30 CMR 37 (CMA 1960); US v. McCline, 32 MJ 356 (CMA 1991); US v. Smith, 27 MJ 914 (ACMR 1989); US v. Sullivan, 25 MJ 635 (ACMR 1987); US v. Scioli, 22 CMR 292 (CMA 1957).

(2) Value is not an element. US v. Gaudet, 29 CMR 488 (CMA 1960).

3A–33A–3. MAIL–STEALING (ARTICLE 109A)

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 _____, 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: (state the mail matter alleged), addressed to (state the name of the addressee);

(2) That such stealing was wrongful; and

(3) That the accused stole the mail matter before it was (delivered to) (received by) (state the name of the addressee).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“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.

“Wrongful” means without legal justification or excuse.

NOTE 1: "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 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 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), is ordinarily applicable.

e. REFERENCES: When matter is in the "postal system." US v. Rayfield, 30 CMR 307 (CMA 1961); US v. Manausa, 30 CMR 37 (CMA 1960); US v. McCline, 32 MJ 356

(CMA 1991); US v. Smith, 27 MJ 914 (ACMR 1989); US v. Sullivan, 25 MJ 635 (ACMR 1987); US v. Scioli, 22 CMR 292 (CMA 1957).

3A–34–1. HAZARDING OF VESSEL OR AIRCRAFT–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) (on) the _____ in the vicinity of _____, willfully and wrongfully (hazard the said (vessel) (aircraft)) (suffer the said (vessel) (aircraft)) to be hazarded) by (causing the said (vessel) (aircraft) to collide with _____) (allowing the said vessel to run aground) (allowing said aircraft to _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the (state the said vessel or aircraft), a (vessel) (aircraft) of the armed forces, was hazarded by (state the manner of hazarding alleged); and

(2) That the accused by (his) (her) acts or omissions willfully and wrongfully caused or suffered the (vessel) (aircraft) to be hazarded.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Hazard" means to put a (vessel) (aircraft) in danger of loss or injury. Actual damage to, or loss of, the (vessel) (aircraft), though not required, is conclusive evidence that the (vessel) (aircraft) was hazarded but not of the fact of culpability on the part of any particular person.

"Willfully" means intentionally or on purpose.

"Wrongfully" means contrary to law, regulation, lawful order, or custom.

("Vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.)

("Aircraft" means a civil, military, or public contrivance invented, used, or designed to navigate, fly, or travel in air. ("Aircraft" also includes remotely piloted aircraft and unmanned aerial vehicles.)

"Suffered" means allowed or permitted. (A ship or aircraft is willfully suffered to be hazarded by one who, although not in direct control of the ship or aircraft, knows a danger to be imminent but takes no steps to prevent it.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), should be used when appropriate.

3A–34–2. HAZARDING OF VESSEL OR AIRCRAFT—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 _____) (as a pilot of _____), (making entrance to (Boston Harbor)) (approaching (_____ Air Force Base) (_____ Air Field)) did negligently hazard the said (vessel) (aircraft) by failing and neglecting to maintain or cause to be maintained an accurate (running plot of the true position) (location) of said (vessel) (aircraft) 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) (_____ runway) (_____).

NOTE: <u>Other sample specifications</u>. Paragraph 47e, Part IV, MCM includes four other examples of proper form specifications based on different fact patterns.

c. ELEMENTS:

(1) That (state the time and place alleged) the (state the name of the vessel or aircraft), a (vessel) (aircraft) of the armed forces, was hazarded by (state the manner of hazarding); and

(2) That the accused by (his) (her) acts or omissions negligently caused or suffered the (vessel) (aircraft) to be hazarded.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Hazard” means to put a (vessel) (aircraft) in danger of loss or injury. Actual damage to or loss of the (vessel) (aircraft), though not required, is conclusive evidence that the (vessel) (aircraft) was hazarded but not of the fact of culpability on the part of any particular person.

“Negligence” means the failure to exercise the care, prudence, or attention to duties, which the interests of the government require a prudent and reasonable person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something which such a person would not have done under the circumstances. No

person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the service for the safety and protection of (vessels) (aircraft) of the armed forces, simply because these duties are not specifically enumerated in a regulation or order. However, a mere error in judgment that a reasonably able person might have committed under the same circumstances does not constitute an offense under this article.

("Vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.)

("Aircraft" means a civil, military, or public contrivance invented, used, or designed to navigate, fly, or travel in air. ("Aircraft" also includes remotely piloted aircraft and unmanned aerial vehicles.)

"Suffered" means allowed or permitted. (A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a foreseeable danger.)

3A–35–1. LEAVING THE SCENE OF A VEHICLE ACCIDENT–DRIVER OR PASSENGER CHARGED AS A PRINCIPAL (ARTICLE 111)

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

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), [the driver of)] [a passenger in]a vehicle at the time of an accident in which said vehicle was involved, and having knowledge of said accident, did, at _____, on or about _____, [wrongfully leave] [by _____, assist the driver of the said vehicle in wrongfully leaving] the scene of the accident without (providing assistance to _____, who had been struck (and injured) by the said vehicle) (making (his) (her) 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 3a-35-2) 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;

(2) That while the accused was driving, the vehicle was involved in an accident that resulted in personal injury or property damage;

(3) That the accused knew the vehicle had been in an accident;

(4) That the accused left the scene of the accident without [providing assistance to (state the name of the alleged victim), who had been struck and injured by the vehicle] [providing personal identification to others involved in the accident or to appropriate authorities]; and

(5) That the accused's leaving was wrongful.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Actual knowledge that an accident has occurred is an essential element of this offense. Actual knowledge may be proved by circumstantial evidence.

("Accident" includes those situations where there is damage to property other than the driver's vehicle or injury to someone other than the driver or a passenger in the accused's vehicle. It also covers accidents caused by the accused, even if the accused's vehicle does not contact other people, vehicles, or property.)

"Wrongful" means without legal justification or excuse.

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), modified as appropriate, may be given.

3A–35–2. LEAVING THE SCENE OF A VEHICLE ACCIDENT–SENIOR PASSENGER (ARTICLE 111)

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

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), [the senior officer/noncommissioned officer in] (_____ in) a vehicle at the time of an accident 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 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 which was involved in an accident resulting in personal injury or property damage;

(2) That the accused knew that the vehicle had been in an accident; and

(3) That the accused was the [superior (commissioned) (noncommissioned) officer of the driver] [commander of the vehicle] and wrongfully and unlawfully ordered, caused, or permitted the driver to leave the scene of the accident without [providing assistance to (state the name of the alleged victim), who had been struck and injured by the vehicle] [providing personal identification to others involved in the accident or to appropriate authorities].

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Actual knowledge that an accident has occurred is an essential element of this offense. Actual knowledge may be proved by circumstantial evidence.

("Accident" includes those situations where there is damage to property other than the driver's vehicle or injury to someone other than the driver or a passenger in the driver's vehicle. It also covers accidents caused by the accused, even if the accused's vehicle does not contact other people, vehicles, or property.)

"Wrongful" means without legal justification or excuse.

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), may be given as appropriate.

3A–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 the accused was drunk while on this duty.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Drunk" means the state intoxication by alcohol that is sufficient to impair the rational and full exercise of mental or physical faculties, or the state of meeting or exceeding a blood alcohol content limit with respect to alcohol concentration in a person's blood of 0.08 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person's breath of 0.08 grams of alcohol per 210 liters of breath, as shown by chemical analysis.

"Duty" means military duty. Every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty.

"On duty" means duties or routine or detail, in garrison, at a station, or in the field. It does not relate to those periods when the person is considered ("off duty") (or) ("on liberty"). (In a region of active hostilities, the circumstances are often such that all members of a command may properly be considered as being continuously on duty.)

(Commanders, while in the field or on board a ship, are constantly on duty when in the actual exercise of command.)

(An officer of the day and members of the guard, or of the watch, are on duty during their entire tour.)

NOTE: If there is evidence that the accused used both alcohol and other drugs, the following instruction on proximate cause may be appropriate:

You have heard evidence that the accused used both alcohol and other drugs. The term "drunk" relates only to intoxication by alcohol. To find the accused guilty of the offense of being drunk on duty, you must be convinced beyond a reasonable doubt that the accused's intoxication by alcohol was a proximate cause of the impairment of the rational and full exercise of the accused's mental or physical faculties. This means that the impairment of the rational and full exercise of the accused's mental or physical faculties must have been the natural and probable result of the accused's intoxication by alcohol. 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 impairment.

It is possible for the use of both alcohol and other drugs to each contribute as a proximate cause to the impairment of the rational and full exercise of the accused's mental or physical faculties. If the accused's intoxication by alcohol was a proximate cause of the impairment, the accused will not be relieved of criminal responsibility because his use of other drugs was also a proximate cause of the impairment.

In determining whether the accused's intoxication by alcohol was a proximate cause of the impairment of the rational and full exercise of his/her mental or physical faculties, and the role, if any, of the use of other drugs, 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).

3A–36–2. INCAPACITATION FOR DUTY FROM DRUNKENNESS OR DRUG USE (ARTICLE 112)

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 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; and

(3) That such incapacitation was the result of previous indulgence in intoxicating liquor or any drug.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Duty" means military duty. Every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty.

"Incapacitated" means unfit or unable to properly perform duties as a result of previous alcohol consumption or drug use. Illness resulting from previous indulgence is an example of being "unable" to perform duties.

NOTE1: Mistake of Fact. The accused's lack of knowledge of the duties assigned is an affirmative defense to this offense. If there is evidence raising such a defense, the following instruction should be given.

The evidence has raised the issue of ignorance on the part of the accused concerning the (duty) (duties) he/she was required to perform in relation to the offense of Incapacitation for Duty from Drunkenness or Drug Use.

If the accused, at the time of the offense, did not know that he was required to perform the (duty) (duties) alleged, then he/she cannot be found guilty of the offense of Incapacitation for Duty from Drunkenness or Drug Use.

The ignorance, no matter how unreasonable it might have been, is a defense. In deciding whether the accused did not know that he was required to perform the (duty) (duties) alleged, 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 knew that he was required to perform the (duty) (duties) alleged, then the defense of ignorance does not exist.

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

3A–36–3. DRUNK PRISONER (ARTICLE 112)

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; and

(2) That (state the time and place alleged), while a prisoner, the accused was drunk.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “prisoner” is a person who is in confinement or custody imposed pursuant to lawful apprehension, pre-trial restraint, or pre-trial confinement, or by the sentence of a court-martial, who has not been set free by a person with authority to release the prisoner.

“Drunk” means the state of intoxication by alcohol that is sufficient to impair the rational and full exercise of mental or physical faculties or the state of meeting or exceeding a blood alcohol content limit with respect to alcohol concentration in a person's blood of 0.08 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person's breath of 0.08 grams of alcohol per 210 liters of breath, as shown by chemical analysis.

3A–36A–1. DRUGS–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 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), 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 §310) (during time of war).

c. ELEMENTS:

(1) That (<u>state the time and place alleged</u>), 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: <u>Intent to distribute alleged</u>. Give the 5th element below if intent to distribute was alleged:

[(5)] That the possession was with the intent to distribute [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) 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.

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: <u>Knowledge of presence of the substance in issue</u>. 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: <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 possess.)

However, a person who possesses (cocaine) (_____), but actually believes it to be (sugar) (_____), is not guilty of wrongful possession of (cocaine) (_____).

NOTE 5: <u>Missile launch facility</u>. 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: <u>Intent to distribute alleged</u>. 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: <u>"Deliberate avoidance" raised</u>. The following instruction should be given when the issue of "deliberate avoidance" as discussed in US 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: <u>Exceptions to wrongfulness</u>. 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 US 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: <u>Judicial notice as to nature of the substance</u>. 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 202 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 US 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: <u>Other scheduled drugs</u>. 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: <u>Quantity in issue</u>. 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 US 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 (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Newman, 14 MJ 474 (CMA 1983); US v. Ratleff, 34 MJ 80 (CMA 1992); US v. Mance, 26 MJ 244 (CMA 1988), cert. denied, 488 U.S. 942 (1988); US v. Pitt, 35 MJ 478 (CMA 1992).

3A–36A–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. §310) (during time of war).

c. ELEMENTS:

(1) That (<u>state the time and place alleged</u>), 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: <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 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 to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance. "Use" includes such acts as smoking, sniffing, eating, drinking, or injecting.

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: <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 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: <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 use.)

However, a person who uses (cocaine) (_____), but actually believes it to be (sugar) (_____), is not guilty of wrongful use of (cocaine) (_____).

NOTE 4: <u>Missile launch facility</u>. 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: <u>"Deliberate avoidance" raised</u>. The following instruction should be given when the issue of "deliberate avoidance" as discussed in US 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: <u>Exceptions to wrongfulness</u>. 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 US 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: <u>Judicial notice as to nature of the substance</u>. 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 202 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 US 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: <u>Regulatory defects in collection of urinalysis samples</u>. 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. US 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 US 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 establish that the accused used a controlled substance beyond a reasonable doubt.

NOTE 9: <u>Other scheduled drugs</u>. 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. <u>See</u> 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 3a-36a-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 (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Harper, 22 MJ 157, 161 (CMA 1986); compare US v. Murphy, 23 MJ 310, 312 (CMA 1987) (distinguishing Harper) with US v. Mance, 26 MJ 244 (CMA 1988), cert. denied 488 U.S. 942 (1988); US v. Newman, 14 MJ 474 (CMA 1983); US v. Pollard, 27 MJ 376 (CMA 1989); US v. Strozier, 31 MJ 283 (CMA 1990).

3A–36A–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 §310) (during time of war).

c. ELEMENTS:

(1) That (<u>state the time and place alleged</u>), 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: <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 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.

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: <u>Missile launch facility</u>. 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: <u>"Deliberate avoidance" raised</u>. The following instruction should be given when the issue of "deliberate avoidance" as discussed in US 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: <u>Exceptions to wrongfulness</u>. 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 US 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 202 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 US 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. (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Mance, 26 MJ 244 (CMA 1988), cert. denied 488 U.S. 942 (1988); US v. Crumley, 31 MJ 21 (CMA 1990); US v. Newman, 14 MJ 474 (CMA 1983); US v. Ratleff, 34 MJ 80 (CMA 1992).

3A–36A–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 §310) (during a time of war).

c. ELEMENTS:

(1) That (<u>state the time and place alleged</u>), the accused introduced _____ (grams) (ounces) (pounds) (_____), more or less, of (_____) (a Schedule ___ controlled substance) onto (<u>state the place or property alleged</u>), [(an aircraft) (a vessel) (a vehicle) (an installation)] used by the armed forces or under the control of the armed forces;

(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 1: <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 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 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).

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 3: <u>Knowledge of the presence of the substance in issue</u>. 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 4: <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 introduce.)

However, a person who introduces (cocaine) (_____), but actually believes it to be (sugar) (_____), is not guilty of wrongful introduction of (cocaine) (_____).

NOTE 5: <u>Missile launch facility</u>. 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: <u>Intent to distribute alleged</u>. 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 7: "Deliberate avoidance" raised. The following instruction should be given when the issue of "deliberate avoidance" as discussed in US 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 8: <u>Exceptions to wrongfulness</u>. 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 US 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 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 202 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 US 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: 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 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 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 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. 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 (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Mance, 26 MJ 244 (CMA 1988), cert. denied, 488 U.S. 942 (1988); US v. Ratleff, 34 MJ 80 (CMA 1992); US v. Pitt, 35 MJ 478 (CMA 1992); US v. Newman, 14 MJ 474 (CMA 1983); US 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).

3A–36A–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 §310) (during time of war).

c. ELEMENTS:

(1) That (<u>state the time and place alleged</u>), 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: <u>Intent to distribute alleged</u>. 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.

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: <u>Knowledge of presence of the substance in issue</u>. 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: <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 manufacture.)

However, a person who manufactures (cocaine) (_____), but actually believes it to be (sugar) (_____), is not guilty of wrongful manufacture of (cocaine) (_____).

NOTE 5: <u>Missile launch facility</u>. 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: <u>Intent to distribute alleged</u>. 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 US 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 US 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 202 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 US 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. (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Newman, 14 MJ 474 (CMA

1983); US v. Mance, 26 MJ 244 (CMA 1983), cert. denied, 488 U.S. (1988); US v. Pitt, 35 MJ 478 (CMA 1992).

3A–36A–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).

c. ELEMENTS:

(1) That (<u>state the time and place alleged</u>), 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 1: <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.)

(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 2: <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 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 (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 4: <u>Missile launch facility</u>. 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 5: <u>"Deliberate avoidance" raised</u>. The following instruction should be given when the issue of "deliberate avoidance" as discussed in US 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 6: <u>Exceptions to wrongfulness</u>. 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 US 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 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 202 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 US 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 (1 April 2000).

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 (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 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 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. (Caution: This CFR changes frequently.); MRE 201 and 201A; US v. Mance, 26 MJ 244 (CMA 1988), cert. denied, 488 U.S. 942 (1988); US v. Newman, 14 MJ 474 (CMA 1983).

3A–37–1. DRUNKEN OR RECKLESS OPERATION OF A VEHICLE, AIRCRAFT, OR VESSEL (ARTICLE 113)

a. MAXIMUM PUNISHMENT:

(1) If resulting in personal injury: DD, TF, 18 months, E-1.

(2) No personal injury: BCD, TF, 6 months, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did (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) physically control [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 or breath) equaled or exceeded the applicable limit under subsection (b) of the text of the statute in paragraph 50 as shown by chemical analysis] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (ordering that the aircraft be flown below the authorized altitude)] [and did thereby cause said (vehicle) (aircraft) (vessel) to (strike and) injure _____)].

c. ELEMENTS:

(1) That (<u>state the time and place alleged</u>), the accused was (operating) (in physical control of) a (vehicle) (aircraft) (vessel), to wit: _____; (and)

(2) That the accused (operated) (physical controlled) the (vehicle) (aircraft) (vessel)

(a) in a (reckless) (and) (wanton) manner by (<u>state the alleged manner</u>);

(b) while (drunk) (and) (impaired by (<u>state the drug alleged</u>));

(c) when the alcohol concentration in (his) (her) (blood) (breath) was equal to or greater than (0.08 grams) (___ grams) or more of alcohol per (100 milliliters of blood) (210 liters of breath)), as shown by chemical analysis; [and]

NOTE 1: <u>Injury alleged</u>. If an injury is alleged, add the following element:

[(3)] That the accused thereby caused the (vehicle) (aircraft) (vessel) to (strike and) injure (state the name of the alleged victim).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 2: Vehicle, aircraft, and vessel defined. The following definitions should be given, as applicable.

("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 a civil, military, or public contrivance invented, used, or designed to navigate, fly, or travel 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 3: 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 4: 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), either 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 or her pocket would not be deemed in actual physical control.))

NOTE 5: <u>Reckless or wanton</u>. If it is alleged that the accused operated or physically controlled the vehicle, aircraft, or vessel in a reckless or wanton manner, give the instructions below, as applicable.

"Reckless" 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," on the other hand, is a negligent (act) (failure to act) combined with a culpable disregard for the foreseeable consequences 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). (Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, although all these factors may be relevant as bearing upon the question of recklessness.)

"Wanton" includes reckless, but in describing the operation or physical control of a (vehicle) (vessel) (aircraft), wanton may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(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 6: 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 50, Part IV, MCM to ensure that the substance alleged is one prohibited. See NOTE 7 below.

("Drunk") (and) ("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 7: 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 US 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 8: 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 US 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 US 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 9: Sufficiency of evidence when blood or breath alcohol levels alleged. When a violation based upon 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 (0.08 grams) (___ 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 10: 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 US 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 US 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 11: 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.

3A–38–1. RECKLESS ENDANGERMENT (ARTICLE 114)

a. MAXIMUM PUNISHMENT: DD, 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:_____, conduct likely to cause death or grievous bodily harm to _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused engaged in conduct, to wit: (describe the conduct alleged);

(2) That the conduct was wrongful and (reckless) (wanton); and

(3) That the conduct was likely to produce death or grievous bodily harm to another person.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“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.)

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 a bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

NOTE 1: 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 deathThe following instruction should be given in reckless endangerment cases when the evidence raises the consent issue.

A victim may not lawfully consent to conduct which is likely to produce death or grievous bodily harm. Consent is not a defense.

NOTE 2: Other instructions. Instruction 5-4, Accident, may be raised by the evidence.

e. REFERENCES: Likelihood of death or grievous bodily harm: US v. Weatherspoon, 49 MJ 209 (CAAF 1998); US v. Gutierrez, 74 MJ 61 (CAAF 2015).

3A–38–2. DUELING (ARTICLE 114)

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

b. MODEL SPECIFICATION:

In that _____ (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.

3A–38–3. 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 (<u>state the manner alleged</u>).

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 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.

"Promote" means to further or actively contribute to the fighting of a duel. (Urging or taunting another to challenge or to accept a challenge to duel, acting as a second or as carrier of a challenge or acceptance, or otherwise furthering or contributing to the fighting of a duel are examples of promoting a duel.)

3A–38–4. CONNIVING AT FIGHTING A DUEL (ARTICLE 114)

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

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), having knowledge that _____ and _____ were about to engage in a duel, did (at/on board—location), on or about _____, connive at the fighting of said duel by (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;

(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 take reasonable preventive action thereby connives at the fighting of a duel.

"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.

3A–38–5. 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" 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.

3A–38–6. FIREARM–WILLFUL DISCHARGE UNDER CIRCUMSTANCES TO ENDANGER HUMAN LIFE (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 _____, 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: (state the firearm alleged);

(2) That the discharge was willful and wrongful; and

(3) That the discharge was under circumstances such as to endanger human life.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act is done “willfully” if it is done intentionally or on purpose.

“Wrongful” means without legal justification or excuse.

“Under circumstances such as to endanger human life” means that there must be a reasonable potentiality for harm to human beings in general. The test is not whether the life was in fact endangered but whether, considering the circumstances surrounding the wrongful discharge of the weapon, the act was unsafe to human life in general.

3A–38–7. WEAPON–CARRYING CONCEALED (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 _____, 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 (a) (an) (state the weapon alleged) concealed on or about (his) (her) person;

(2) That the carrying was unlawful; and

(3) That the (state the weapon alleged) was a dangerous weapon.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A weapon is “concealed” when it is carried by a person and intentionally covered or kept from sight.

“On or about” means the weapon was carried on the accused's person or was within the immediate reach of the accused.

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.

“Grievous bodily harm” means a bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

NOTE: 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) (_____).

e. REFERENCES: US v. Lyons, 33 MJ 88 (CMA 1991).

3A–39–1. THREAT–COMMUNICATING (ARTICLE 115)

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 _____) (to 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, expressing a present determination or intent to injure the person, property, or reputation of (state the name of the person alleged), presently or in the future;

(2) That the communication was made known to (state the name of the person threatened, or a third person, as alleged); and

(3) That the communication was wrongful.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “threat” means an expressed present determination or intent to kill or injure a person or to damage or destroy certain property presently or in the future. The communication must be one that a reasonable person would understand as expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future. Proof that the accused actually intended to kill, injure, damage or destroy is not required.

A communication is “wrongful” if the accused transmitted it for the purpose of issuing a threat or with the knowledge that it would be viewed as a threat.

A communication is not “wrongful” if it is made under circumstances that reveal it to be in jest or for an innocent or legitimate purpose that contradicts the expressed intent to commit the act.

NOTE 1: In general. This offense requires both an objective expression of intent (that is, the first element) and a subjective intent by the accused (contained in the element of wrongfulness). Thus, the offense is not committed by only the objective expression of intent to commit an unlawful act involving injury to another. Additionally, even if accompanied by the required subjective intent, the offense is not committed by the objective expression of intent to commit an unlawful act not involving injury to another.

NOTE 2: Wrongfulness. "Wrongfulness" is properly understood to reference the accused's subjective intent. If the evidence raises a "legitimate purpose" for the statement (which would negate "wrongfulness"), the military judge must, sua sponte, instruct carefully and comprehensively on the issue. For example, if the evidence reasonably raises that the accused made the communication in self-defense or in defense of property, the military judge must, sua sponte, give the appropriately tailored self-defense or defense of property instructions.

e. REFERENCES:

(1) Defense of property and self-defense negate wrongfulness: See US v Viers, 75 MJ 554 (ACCA 2015).

(2) Mens rea: See US v. Elonis, 135 S.Ct. 2001 (2015) and US v. Rapert, 75 MJ 164 (CAAF 2016).

3A–39–2. THREAT TO USE EXPLOSIVE (ARTICLE 115)

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 information, to wit: _____, which language constituted a threat to harm a person or property by means of a(n) [explosive; weapon of mass destruction; biological agent, substance, or weapon; chemical agent, substance, or weapon; and/or (a) hazardous material(s)].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused communicated certain language, to wit: (state the language of the threat alleged);

(2) That the information 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 or chemical agent(s), substance(s), or weapon(s)) (and) ((a) hazardous material(s)); and

(4) That the communication was wrongful.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “threat” means an expressed present determination or intent to kill or injure a person or to damage or destroy certain property presently or in the future. The communication must be one that a reasonable person would understand as expressing a present determination or intent to wrongfully injure the person or property of another person, presently or in the future. Proof that the accused actually intended to kill, injure, damage or destroy is not required.

A communication is “wrongful” if the accused transmitted it for the purpose of issuing a threat or with the knowledge that it would be viewed as a threat.

A communication is not “wrongful” if it is made under circumstances that reveal it to be in jest or for an innocent or legitimate purpose that contradicts the expressed intent to commit the act.

(“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 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.)

3A–39–3. FALSE THREATS CONCERNING THE USE OF EXPLOSIVES, ETC. (ARTICLE 115)

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 a(n) [explosive; weapon of mass destruction; biological agent, substance, or weapon; chemical agent, substance, or weapon; and/or (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 constituting a threat, to wit: (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 or chemical agent(s), substance(s), or weapon(s)] (and) [(a) hazardous material(s)] to unlawfully [(kill) (injure) (state name of the person or people alleged)] [damage or 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; and

(4) That the communication of the information by the accused was malicious.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “threat” means an expressed present determination or intent to kill or injure a person or to damage or destroy certain property presently or in the future. The communication must be one that a reasonable person would understand as expressing a present determination or intent to wrongfully injure the person or property of another person,

presently or in the future. Proof that the accused actually intended to kill, injure, damage or destroy is not required.

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 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.)

3A–40–1. 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 intended to cause public alarm or terror.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A riot is a tumultuous disturbance of the peace by three or more persons assembled together in furtherance of a common purpose to execute some enterprise of a private nature by concerted action against anyone who might oppose them, committed in such a violent and turbulent manner as to cause or be calculated to cause public terror. The gravamen of the offense of riot is terrorization of the public. It is immaterial whether the act intended was lawful. Furthermore, it is not necessary that the common purpose be

determined before the assembly. It is sufficient if the assembly begins to execute in a tumultuous manner a common purpose formed after it assembled.

“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.

3A–40–2. 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 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 an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. It consists of acts or conduct that disturb the public tranquility or impinge upon the peace and good order to which the community is entitled. (Engaging in an affray and unlawful discharge of firearms in a public street are examples of conduct which may constitute a breach of the peace.) (Loud speech and unruly conduct may also constitute a breach of the peace by the speaker. A speaker may also be guilty of causing a breach of the peace if the speaker uses language which can reasonably be expected to produce a violent or turbulent response and a breach of the peace results.)

The word "community" includes within its meaning a (military organization) (post) (camp) (ship) (aircraft) (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.

3A–41–1. 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:

"Wrongfully" means without legal justification or excuse.

"Provoking" and "reproachful" describe those (words) (and) (gestures) which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances. Proof that a breach of the peace actually occurred is not required.

It is not necessary that the accused have knowledge that the person toward whom the (words) (and) (gestures) are directed is a person subject to the Uniform Code of Military Justice.

(Provoking and reproachful (words) (and) (gestures) do not include reprimands, censures, reproofs and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces.)

NOTE: <u>Wrongfulness</u>. Words and gestures are not wrongful if made in jest or for an innocent or legitimate purpose. If the evidence raises a legitimate purpose for the words or gestures which would negate wrongfulness (for example, if the evidence reasonably raises that the accused used the words or gestures in self-defense or in defense of property), the military judge must, sua sponte, instruct carefully and comprehensively on the issue.

3A–41A–1. WRONGFUL BROADCAST OR DISTRIBUTION OF INTIMATE VISUAL IMAGES (ARTICLE 117A)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 12 December 2017.

a. MAXIMUM PUNISHMENT: The President has not yet established any limits on the punishment which a court-martial may direct for this offense. *See* Article 56(a). The offense is also not yet listed in Part IV of the MCM. Under these circumstances, the maximum punishment should be calculated as prescribed in RCM 1003(c)(1)(B).

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, knowingly, wrongfully, and without the explicit consent of (state the name of the person depicted) (broadcast) (distribute) [(an) intimate visual image(s) of (state the name of the person depicted)] [(a) visual image(s) of sexually explicit conduct involving (state the name of the person depicted)], who was at least 18 years of age when the visual image(s) (was) (were) created and is identifiable from the visual image(s) or from information displayed in connection with the visual image(s), when he/she knew or reasonably should have known that the visual image(s) (was) (were) made under circumstances in which (state the name of the person depicted) retained a reasonable expectation of privacy regarding any (broadcast) (distribution) of the visual image(s), and when he/she knew or reasonably should have known that the (broadcast) (distribution) of the visual image(s) was likely to cause harm, harassment, intimidation, emotional distress, or financial loss for (state the name of the person depicted), or to harm substantially (state the name of the person depicted) with respect to his/her health, safety, business, calling, career, financial condition, reputation, or personal relationships, which conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.

c. ELEMENTS: The President has not yet established the elements of the offense. Below are suggested elements

(1) That (state the time and place alleged), the accused knowingly and wrongfully (broadcast) (distributed) [(an) intimate visual image(s) of (state the name of the person depicted)] [(a) visual image(s) of sexually explicit conduct involving (state the name of the person depicted)];

(2) That (state the name of the person depicted) was at least 18 years of age when the visual image(s) (was) (were) created;

(3) That (state the name of the person depicted) is identifiable from the visual image(s) or from information displayed in connection with the visual image(s);

(4) That (state the name of the person depicted) did not explicitly consent to the (broadcast) (distribution) of the visual image(s);

(5) That the accused knew or reasonably should have known that the visual image(s) (was) (were) made under circumstances in which (state the name of the person depicted) retained a reasonable expectation of privacy regarding any broadcast or distribution of the visual image(s);

(6) That the accused knew or reasonably should have known that the (broadcast) (distribution) of the visual image(s) was likely to cause harm, harassment, intimidation, emotional distress, or financial loss for (state the name of the person depicted), or to harm substantially (state the name of the person depicted) with respect to (his) (her) health, safety, business, calling, career, financial condition, reputation, or personal relationships; and

(7) That the accused's conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An act is done "knowingly" when it is done intentionally and on purpose. An act done as the result of a mistake or accident is not done "knowingly."

"Wrongfully" means without legal excuse or justification.

(The term "broadcast" means to electronically transmit a visual image with the intent that it be viewed by a person or persons.)

(The term "distribute" means to deliver to the actual or constructive possession of another person, including transmission by mail or electronic means.)

The term "visual image" means the following:

(A) Any developed or undeveloped photograph, picture, film, or video;

(B) Any digital or computer image, picture, film, or video made by any means, including those transmitted by any means, including streaming media, even if not stored in a permanent format; or

(C) Any digital or electronic data capable of conversion into a visual image.

The term “intimate visual image” means a visual image that depicts a private area of a person.

The term “private area” means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.

The term “sexually explicit conduct” means actual or simulated genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex, bestiality, masturbation, or sadistic or masochistic abuse.

The term “reasonable expectation of privacy” means circumstances in which a reasonable person would believe that a private area of the person, or sexually explicit conduct involving the person, would not be visible to the public.

> ***NOTE 2: Voluntary intoxication and “knew or reasonably should have known.” If there is evidence that the accused was intoxicated at the time of the broadcast/distribution, the following instruction may be appropriate with respect to whether the accused “knew or reasonably should have known” (1) the visual image was made under circumstances in which the person depicted retained a reasonable expectation of privacy regarding any broadcast/distribution, or (2) the broadcast/distribution was likely to cause harm, harassment, intimidation, etc.***

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). With respect to (that) (those) offense(s), I advised you earlier that the government is required to prove that the accused knew or reasonably should have known that the visual image(s) (was) (were) made under circumstances in which (state the name of the person depicted) retained a reasonable expectation of privacy regarding any broadcast or distribution of the visual image(s). I also advised you earlier that the government is required to prove that the accused knew or reasonably should have known that the (broadcast) (distribution) of the visual image(s)

was likely to cause harm, harassment, intimidation, emotional distress, or financial loss for (state the name of the person depicted), or to harm substantially (state the name of the person depicted) with respect to (his) (her) health, safety, business, calling, career, financial condition, reputation, or personal relationships. In deciding whether the accused had such knowledge, 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 had the required knowledge.

On the other hand, the fact that the accused may have been intoxicated at the time of the offense(s) does not necessarily indicate that (he) (she) was unable to have the required knowledge 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 had the required knowledge, you should consider the effect of intoxication, if any, as well as the other evidence in the case.

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 had the required knowledge, the accused will not avoid criminal responsibility because of voluntary intoxication.

However, on the question of whether the accused "reasonably should have known" something, you may not consider the accused's intoxication, if any, because what a person reasonably should have known refers to what an ordinary, prudent, sober adult would have reasonably known under the circumstances of this case.

In summary, voluntary intoxication should be considered in determining whether the accused had actual knowledge. Voluntary intoxication should not be considered in determining whether the accused "reasonably should have known" something.

NOTE 3: Other instructions. If a mistake of fact concerning the depicted person's explicit consent to the broadcast/distribution is raised, Instruction 5-11-2, Ignorance or Mistake – When Only General Intent is in Issue, should be given.

3A–42–1. 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) (omission) 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.

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

3a-42-2) 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 3a-43-2) 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 murder, 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) (omission) of the accused in (state the act or omission 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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US 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.

3A–42–2. 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) (omission) 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 a person.

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. The intent need not be directed toward the person killed, or exist for any particular time before commission of the act, or have previously existed at all. It is sufficient that the intent to kill existed at the time of the act or omission.

“Great bodily harm” means serious 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 members 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 3a-43-1 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) (omission) of the accused in (state the act or omission 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) (omission) which causes the death. All that is required is that it exist at the time of the (act) (omission) 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 US v. Gomez, 15 MJ 954

(ACMR 1983) and US v. Jefferson, 22 MJ 315 (CMA 1986). Instruction 7-24, Brain Death, may be adapted for this circumstance.

3A–42–3. 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 intentional 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 and showed 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 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 shows a wanton disregard for human life when it is characterized by heedlessness of the probable consequences of the act, or 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.

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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US 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: US v. Stokes, 19 CMR 191(CMA 1955), US v. Berg, 31 MJ 38 (CMA 1990); US v. McMonagle, 34 MJ 852 (ACMR 1992), *rev'd in part*, 38 MJ 53 (CMA 1993).

3A–42–4. 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) (omission) 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 engaged in the (attempted) perpetration of (burglary) (rape) (rape of a child) (sexual assault) (sexual assault of a child) (aggravated sexual contact) (sexual abuse of 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) (rape) (rape of a child) (sexual assault) (sexual assault of a child) (aggravated sexual contact) (sexual abuse of a child) (robbery) (aggravated arson), you must be satisfied beyond a reasonable doubt:

NOTE 1: <u>Elements of the felony offense</u>. 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 3a-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 engaged in the (burglary) (rape) (rape of a child) (sexual assault) (sexual assault of a child) (aggravated sexual contact) (sexual abuse of 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 (burglary) (rape) (rape of a child) (sexual assault) (sexual assault of a child) (aggravated sexual contact) (sexual abuse of 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 (burglary) (rape) (rape of a child) (sexual assault) (sexual assault of a child) (aggravated sexual contact) (sexual abuse of a child) (robbery) (aggravated arson) and the act which caused the victim's death.

NOTE 3: Specific intent as an element of the felony offense. While felony murder, as such, does not involve premeditation or specific intent, some of the crimes of (burglary) (rape) (rape of a child) (sexual assault) (sexual assault of a child) (aggravated sexual contact) (sexual abuse of a child) (robbery) (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 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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US v. Taylor, 44 MJ 254 (CAAF 1996). Instruction 7-24 Brain Death, may be adapted for this circumstance.

NOTE 5: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), may also be applicable.

3A–43–1. 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 3a-42-2.

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) (omission) of the accused in (state the act or omission 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); [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.

Heat of passion may result from fear or rage. 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) (five) 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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US 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.

3A–43–2. INVOLUNTARY MANSLAUGHTER—CULPABLE NEGLIGENCE (ARTICLE 119)

a. MAXIMUM PUNISHMENT:

(1) When committed upon a child under 16 years of age: DD, TF, 15 years, 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) (omission) of the accused in (state the act or omission 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 this (act) (omission) constituted culpable negligence; [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) (omission) of the accused which caused the death amounted to "culpable negligence."

NOTE 1: <u>Proximate cause in issue</u>. In an appropriate case, the following instruction relating to proximate cause should be given:

The (act) (omission) 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) (omission). 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: <u>Contributory negligence of victim</u>. 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) (omission) 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) (omission) is not a proximate cause of the death if some other force independent of the accused's (act) (omission) 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: 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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US v. Taylor, 44 MJ 254 (CAAF 1996). Instruction 7-24, Brain Death, may be adapted for this circumstance.

3A–43–3. 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 years, 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) (omission) of the accused in (state the act or omission 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 perpetrating 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 3a-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, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of 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 US v. Gomez, 15 MJ 954 (ACMR 1983); US v. Jefferson, 22 MJ 315 (CMA 1986); and US v. Taylor, 44 MJ 254 (CAAF 1996). Instruction 7-24, Brain Death, may be adapted for this circumstance.

3A–43A–1. INJURING AN UNBORN CHILD (ARTICLE 119A)

a. MAXIMUM PUNISHMENT: Such punishment, other than death, as the court-martial may direct and consistent with the maximum punishment had the offense been committed upon the unborn child's mother.

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 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)] [burning or setting afire, as arson, of (a dwelling inhabited by) (a structure or property known to be occupied by) (a structure or property belonging to)) (state the name of the alleged pregnant woman)];

(2) That (state the name of the alleged pregnant woman) was then pregnant; 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.)

3A–43A–2. KILLING AN UNBORN CHILD (ARTICLE 119A)

a. MAXIMUM PUNISHMENT: Such punishment, other than death, as the court-martial may direct and consistent with the maximum punishment had the offense been committed upon the unborn child's mother.

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 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 name of the alleged pregnant woman)] [burning or setting afire, as arson, of (a dwelling inhabited by) (a structure or property known to be occupied by) (a structure or property belonging to) (state the name of the alleged pregnant woman)];

(2) That (state the name of the alleged pregnant woman) was then pregnant; 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 pregnant at the time 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.)

3A–44A–3. ATTEMPTED KILLING OF AN UNBORN CHILD (ARTICLE 119A)

a. MAXIMUM PUNISHMENT: Such punishment, other than death, as the court-martial may direct and consistent with the maximum punishment had the offense been committed upon the unborn child's mother..

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 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)] [burning or setting afire, as arson, of (a dwelling inhabited by) (a structure or property known to be occupied by) (a structure or property belonging to) (state the name of the alleged pregnant woman)];

(2) That (state the name of the alleged pregnant woman) was then pregnant;

(3) That the accused thereby intended and 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 a) (they were) substantial step(s) and a direct movement toward the unlawful killing of the unborn child; and

(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.

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.

3A–43A–4. INTENTIONALLY KILLING AN UNBORN CHILD (ARTICLE 119A)

a. MAXIMUM PUNISHMENT: Such punishment, other than death, as the court-martial may direct and consistent with the maximum punishment had the offense been committed upon the unborn child's mother.

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 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)] [burning or setting afire, as arson, of (a dwelling inhabited by) (a structure or property known to be occupied by) (a structure or property belonging to) (state the name of the alleged pregnant woman)];

(2) That (state the name of the alleged pregnant woman) was then pregnant; 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.

3A–43B–1. CHILD ENDANGERMENT (ARTICLE 119B)

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:

Resulting in grievous bodily harm:

In that_____(personal jurisdiction data), (at/on board—location), on or about ____ 20 __, 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 (leaving the said _____ unattended in (his) (her) quarters for over _____ (hours) (days) with no adult present in the home) (by failing to obtain medical care for the said_____'s diabetic condition) (_____), and that such conduct (was by design) (constituted culpable negligence) (which resulted in grievous bodily harm, to wit:_____) (broken leg) (deep cut) (fractured skull)).

Resulting in harm:

In that _____ (personal jurisdiction data), (at/on board—location), on or about _____ 20 __, 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 (leaving the said _____unattended in (his) (her) quarters for over _____ (hours) (days) with no adult present in the home) (by failing to obtain medical care for the said _____'s diabetic condition) (_____), and that such conduct (was by design) (constituted culpable negligence) (which resulted in (harm, to wit:_____) (a black eye) (bloody nose) (minor cut)).

Other cases:

In that _____(personal jurisdiction data), (at/on board—location), on or about _____ 20 __, was responsible 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 (leaving the said _____ unattended in (his) (her) quarters for over _____ (hours) (days) with no adult present in the home) (by failing to

obtain medical care for the said _____'s diabetic condition) (_____), and that such conduct (was by design) (constituted culpable negligence).

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 then under the age of 16 years; (and)

(3) That (state the time and place alleged), the accused endangered (state the name of the alleged victim)'s (mental health) (physical health) (safety) (welfare) through (design) (culpable negligence) by _____; [and]

[(4)] That the accused's conduct resulted in (harm) (grievous bodily harm) to (state the name of the alleged victim), to wit: _____.

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. 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.))

NOTE 1: <u>If actual harm not alleged</u>. 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 2: <u>If harm is alleged</u>. 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 3: <u>If grievous bodily harm is alleged</u>. If the endangerment is alleged to have resulted in grievous bodily harm, give the following instruction:

"Grievous bodily harm" means bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

NOTE 4: <u>Other Instructions</u>. If "by design" is alleged, Instruction 7-3, <u>Circumstantial Evidence</u> (Intent), is normally applicable; Instruction 5-12, <u>Voluntary Intoxication</u>, may be raised by the evidence.

3A–44–1. RAPE (ARTICLE 120)

a. MAXIMUM PUNISHMENT: DD, TF, life without eligibility for parole, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for this offense.

b. MODEL SPECIFICATION:

By Force:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit a sexual act upon _____, by [penetrating _____’s (vulva) (anus) (mouth) with _____’s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by using unlawful force.

By Force Likely to Cause Death or Grievous Bodily Harm:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit a sexual act upon _____, by [penetrating _____’s (vulva) (anus) (mouth) with _____’s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by using force likely to cause death or grievous bodily harm to _____, to wit: _____.

By Threatening or Placing in Fear:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit a sexual act upon _____, by [penetrating _____’s (vulva) (anus) (mouth) with _____’s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by (threatening _____) (by placing _____ in fear) that _____ would be subjected to (death) (grievous bodily harm) (kidnapping).

By First Rendering Unconscious:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit a sexual act upon _____, by [penetrating _____’s (vulva) (anus) (mouth) with _____’s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse)

(humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by first rendering _____ unconscious by _____.

By Administering Drug/Intoxicant/Other Similar Substance:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit a sexual act upon _____, by [penetrating _____’s (vulva) (anus) (mouth) with _____’s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by administering to _____ (by force) (by threat of force) (without the knowledge or permission of _____) a (drug) (intoxicant) (list other similar substance), to wit: _____, thereby substantially impairing the ability of _____ to appraise or control (his) (her) conduct.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state name of the alleged victim) by (state the alleged sexual act); and

(2) That the accused did so by

(a) using unlawful force against (state the name of the alleged victim).

(b) using force causing or likely to cause death or grievous bodily harm to (state the name of the person alleged), to wit: (state the alleged force).

(c) threatening or 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, or kidnapping.

(d) first rendering (state the name of the alleged victim) unconscious.

(e) administering to (state the name of the alleged victim) a drug, intoxicant, or other similar substance (by force or threat of force) (without the knowledge or consent of (state the name of the alleged victim)), thereby substantially impairing the ability of (state the name of the alleged victim) to appraise or control his/her conduct.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Sexual act" means:

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(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.")

NOTE 1: By unlawful force. When the sexual act is alleged by unlawful force, include the following instruction:

"Unlawful force" means an act of force done without legal justification or excuse.

"Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the victim.

NOTE 2: By force causing or likely to cause death or grievous bodily harm. When the sexual act is alleged by force causing or likely to cause death or grievous bodily harm, include the following instruction:

"Force" means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the victim.

"Grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(The force causing or likely to cause death or grievous bodily harm which caused the victim to engage in the sexual act need not have been applied by the accused to the victim. It is sufficient if the accused applied such force to any person, which thereby caused the victim to engage in the sexual act.)

NOTE 3: By threat or placing in fear. 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 victim or another person being subjected to the wrongful action contemplated by the communication or action.

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

("Grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.)

("Kidnapping" means the wrongful seizure or confinement and holding of a person against their will. "Wrongful" means without legal justification or excuse. "Holding" means detention. The detention must be more than a momentary or incidental detention. "Against their will" means that the person 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 person 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 person's parents or legal guardian.))

(The person to be (killed) (subjected to grievous bodily harm) (kidnapped) need not be the victim. It is sufficient if the accused threatened or placed the victim in fear that any person would be (killed) (subjected to grievous bodily harm) (kidnapped), which thereby caused the victim to engage in the sexual act.)

NOTE 4: Marriage. Marriage is not a defense to any offense in violation of Article 120. If necessary, include the following instruction:

Marriage is not a defense to this offense.

NOTE 5: Instructing on consent. The issue of "consent" may arise in two ways. First, lack of consent is an element when the accused is charged with rape by administering a drug, intoxicant, or similar substance without the consent of the alleged victim. Lack of consent is not an element when the accused is charged with rape by any other method (to include when the accused is charged with administering a drug, intoxicant, or similar substance by force or by threat of force). See US v. Neal, 68 MJ 289, 302-304 (CAAF 2010) (statutory definition of "force" does not imply an element of lack of consent). Second, evidence of the alleged victim's consent to the sexual conduct might be introduced with respect to any rape allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(a) offense require the accused to have committed sexual conduct "by" a certain method. Stated another way, "by" means the sexual conduct occurred because of that method. Consent to the sexual conduct logically precludes that causal link; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. If consent evidence has been introduced to negate other elements of the charged offense, give the second parenthetical below, along with the appropriately tailored definitions of consent. If lack of consent to the administration of a drug, intoxicant, or similar substance is an element of the charged offense, give the first parenthetical below, along with the appropriately tailored definitions of consent.

IF LACK OF CONSENT TO THE ADMINISTRATION OF A DRUG, INTOXICANT, OR SIMILAR SUBSTANCE IS AN ELEMENT, GIVE THE FOLLOWING INSTRUCTION:

(As I previously advised you, in (The) Specification(s) (_____) of (The) (Additional) Charge (___), the accused is charged with the offense of rape by administering a drug, intoxicant, or other similar substance to (state the name of the alleged victim) without his/her knowledge or consent, thereby substantially impairing the ability of (state the name of the alleged victim) to appraise or control his/her conduct. For this offense, lack of consent to the administration of the drug, intoxicant, or other similar substance is an element of the offense.)

IF CONSENT EVIDENCE HAS BEEN INTRODUCED TO NEGATE OTHER ELEMENTS OF THE CHARGED OFFENSE, GIVE THE FOLLOWING INSTRUCTION: (The evidence has (also) raised the issue of whether (state the name of the alleged victim) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by state the applicable element). Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by state the applicable element).

"Consent" means a freely given agreement to the conduct at issue 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 does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to being rendered unconscious.)

(A person cannot consent while under threat or in fear.)

(A "competent person" is a person who possesses the physical and mental ability to consent.)

(An “incompetent person” is a person who is incapable of appraising the nature of the conduct at issue, or physically incapable of declining participation in or communicating unwillingness to engage in the sexual act at issue.)

All the surrounding circumstances are to be considered in determining whether a person gave consent.

NOTE 6. Mistake of Fact. The military judge must determine whether a mistake of fact has been raised by the evidence. See RCM 916(j). When the evidence has reasonably raised mistake of fact (e.g., mistake of fact as to consent to the sexual conduct or as to knowledge of or consent to the administration of a drug, intoxicant, or other substance), include the following instruction on honest and reasonable mistake of fact. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction. If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction.

The evidence has raised the issue of mistake of fact in relation to the offense(s) of (state the alleged offense(s)), as alleged in (the) specification(s) (___) of (the) (additional) Charge (___).

There has been (evidence) (testimony) tending to show that, at the time of the alleged offense(s), the accused mistakenly believed that [(state the name of the victim) consented to the sexual conduct alleged] [(state the name of the victim) (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] [_____] concerning (this) (these) offense(s).

Mistake of fact is a defense to (that) (those) charged offense(s). “Mistake of fact” means the accused held, as a result of ignorance or mistake, an incorrect belief that [the other person consented to the sexual conduct] [the other person (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] [_____].

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 to the sexual conduct] [the other

person (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] [_____]. (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.)

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 prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused did not believe that [the alleged victim consented to the sexual conduct] [the alleged victim (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] [_____], the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that [the alleged victim consented to the sexual conduct] [the alleged victim (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] [_____], 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 7: Voluntary intoxication and mistake of fact. If the above mistake of fact instruction is given, and there is evidence of the accused’s voluntary intoxication, the following instruction is appropriate.

There has been some evidence concerning the accused’s state of intoxication at the time of the alleged offense(s). 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.

e. REFERENCES: Definition of “vulva.” *See US v Williams*, 25 MJ 854 (AFCMR 1988) *pet. denied*, 27 MJ 166 (CMA 1988) and *US v. Tu*, 30 MJ 587 (ACMR 1990); Definition of “competent person.” *See US v. Pease,* 75 MJ 180 (CAAF 2016).

3A–44–2. SEXUAL ASSAULT (ARTICLE 120)

a. MAXIMUM PUNISHMENT: DD, TF, 30 years, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for this offense.

b. MODEL SPECIFICATION:

By Threatening or Placing That Other Person in Fear:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by (threatening _____) (placing_____ in fear).

By Fraudulent Representation:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by making a fraudulent representation that the sexual act served a professional purpose, to wit:_____.

By False Pretense:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by inducing a belief by (artifice) (pretense) (concealment) that the said accused was another person.

Without Consent:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus),] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], without the consent of _____.

Of a Person Who is Asleep, Unconscious, or Otherwise Unaware the Act is Occurring:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____20__, commit a sexual act upon_____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], when (he) (she) knew or reasonably should have known that _____ was (asleep) (unconscious) (unaware the sexual act was occurring due to _____).

When the Other Person Is Incapable of Consenting:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], when _____was incapable of consenting to the sexual act because (he) (she) [was impaired by (a drug, to wit: _____) (an intoxicant, to wit:_____) (_____)] [had a (mental disease, to wit:_____) (mental defect, to wit:_____) (physical disability, to wit:_____)], and the accused (knew) (reasonably should have known) of that condition.

c. ELEMENTS:

Sexual Assault by Threat/Fear, Fraudulent Representation, or Artifice:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim) by (state the alleged sexual act); and

(2) That the accused did so by

(a) threatening or placing (state the name of the alleged victim) in fear;

(b) making a fraudulent representation that the sexual act served a professional purpose;

(c) inducing a belief by artifice, pretense, or concealment that the accused was another person.

Sexual Assault Without Consent:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim) by (state the alleged sexual act); and

(2) That the accused did so without the consent of (state the name of the alleged victim).

Sexual Assault When Victim is Asleep, Unconscious, or Otherwise Unaware:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim) by (state the alleged sexual act);

(2) That the accused did so when (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and

(3) That the accused knew or reasonably should have known that (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual act was occurring.

Sexual Assault When the Victim is Incapable of Consenting:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim) by (state the alleged sexual act);

(2) That the accused did so when (state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability); and

(3) That the accused knew or reasonably should have known (state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Sexual act” means:

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(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.”)

NOTE 1: Threat or placing in fear. 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 victim or another person being subjected to the wrongful action contemplated by the communication or action.

(“Wrongful action,” as used here, includes an abuse of military rank, position, or authority in order to engage in a sexual act with a victim. This includes, but is not limited to, threats to initiate an adverse personnel action or withhold a favorable personnel action unless the victim submits to the accused's requested sexual act. Superiority in rank is a factor in, but not dispositive of, whether a reasonable person in the position of the victim would fear that his or her noncompliance with the accused's desired sexual act would result in the threatened wrongful action contemplated by the communication or action.)

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

The threat or fear in this case must be that the alleged victim or another person would be subjected to the wrongful action.

NOTE 2: Fraudulent representation. When the sexual act is alleged by making a fraudulent representation that it serves a professional purpose, the following may be appropriate:

A "fraudulent representation" is a representation of fact, which the accused knows to be untrue, which is intended to deceive, which does in fact deceive, and which causes the other person to engage in the sexual act(s).

(The fraudulent representation that the sexual act served a professional purpose need not have been made by the accused to (state the name of the alleged victim). It is sufficient if the accused made such a fraudulent representation to any person, which thereby caused (state the name of the alleged victim) to engage in the sexual act.)

NOTE 3: Incapable of consenting. When the offense alleges the victim was incapable of consenting, include the following instruction:

"Incapable of consenting" means the person is incapable of appraising the nature of the conduct at issue or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue.

NOTE 4: Marriage. Marriage is not a defense to any offense in violation of Article 120. If necessary, include the following instruction:

Marriage is not a defense to this offense.

NOTE 5: Without consent. When the sexual act is alleged to be without consent, include the following instruction.

"Consent" means a freely given agreement to the conduct at issue 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 does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious.)

(A person cannot consent while under threat or in fear.)

(A person cannot consent when believing, due to a fraudulent representation, that the sexual act served a professional purpose, or when believing, due to artifice, pretense, or concealment that the accused was another person.)

All the surrounding circumstances are to be considered in determining whether a person gave consent.

> ***NOTE 6: Evidence of consent. Evidence of the alleged victim's consent to the sexual conduct may be relevant, even for offenses that do not include "lack of consent" as an element. Evidence of the alleged victim's consent to the sexual conduct might be introduced with respect to any sexual assault allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(b) offense require the accused to have committed sexual conduct "by" a certain method or "when" the alleged victim was in a certain state. Stated another way, "by" means the sexual conduct occurred because of that method, and "when" means the sexual conduct occurred while the alleged victim was in a state that precluded consent. Consent to the sexual conduct logically precludes these causal links; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. In such situations the following instruction, properly tailored, would be appropriate.***

The evidence has raised the issue of whether (state the alleged victim's name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by _____) (state the element(s) to which the evidence concerning consent relates) beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every

element of the offense) (that the sexual conduct was done by _____) (state the element(s) to which the evidence concerning consent relates).

"Consent" means a freely given agreement to the conduct at issue 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 does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious.)

(A person cannot consent while under threat or in fear.)

(A person cannot consent when believing, due to a fraudulent representation, that the sexual act served a professional purpose, or when believing, due to artifice, pretense, or concealment that the accused was another person.)

(A "competent person" is a person who possesses the physical and mental ability to consent.)

(An "incompetent person" is a person who is incapable of appraising the nature of the conduct at issue, or physically incapable of declining participation in or communicating unwillingness to engage in the sexual act at issue.)

All the surrounding circumstances are to be considered in determining whether a person gave consent.

NOTE 7: Mistake of fact. The military judge must determine whether a mistake of fact has been raised by the evidence. See RCM 916(j). When the evidence has reasonably raised mistake of fact (e.g., mistake of fact as to consent to the sexual conduct), include the following instruction on

honest and reasonable mistake of fact. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction. If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction.

The evidence has raised the issue of mistake of fact in relation to the offense(s) of (state the alleged offense(s)), as alleged in (the) specification(s) (___) of (the) (additional) Charge (___).

There has been (evidence) (testimony) tending to show that, at the time of the alleged offense(s), the accused mistakenly believed that [(state the name of the victim) consented to the sexual conduct alleged] [_____] concerning (this) (these) offense(s).

Mistake of fact is a defense to (that) (those) charged offense(s). “Mistake of fact” means the accused held, as a result of ignorance or mistake, an incorrect belief that [the other person consented to the sexual conduct] [_____].

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 to the sexual conduct] [_____]. (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.)

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 prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at

the time of the charged offense(s), the accused did not believe that [the alleged victim consented to the sexual conduct] [_____], the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that [the alleged victim consented to the sexual conduct] [_____], 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 8: Voluntary intoxication and mistake of fact. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate in conjunction with a mistake of fact instruction:

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.

NOTE 9: Voluntary intoxication and "knew or reasonably should have known." When the accused is charged with sexual assault of a person who was asleep, unconscious, or otherwise unaware that the sexual act was occurring, or a person who was incapable of consenting to the sexual act, and there is evidence that the accused was intoxicated, the following instruction may be appropriate with respect to whether the accused "knew or reasonably should have known" the alleged victim's state.

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). With respect to (that) (those) offense(s), I advised you earlier that the government is required to prove that the accused knew or reasonably should have known that (state the name of the alleged victim) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)].

In deciding whether the accused had such knowledge, you should consider the evidence of voluntary intoxication.

The law recognizes that a person's ordinary thought process may be materially affected when 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 had the required knowledge.

On the other hand, the fact that the accused may have been intoxicated at the time of the offense(s) does not necessarily indicate that he/she was unable to have the required knowledge 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 had the required knowledge, you should consider the effect of intoxication, if any, as well as the other evidence in the case.

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 had the required knowledge, the accused will not avoid criminal responsibility because of voluntary intoxication.

However, on the question of whether the accused "reasonably should have known" that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)], you may not consider the accused's intoxication, if any, because what a person reasonably should have known refers to what an ordinary, prudent, sober adult would have reasonably known under the circumstances of this case.

In summary, voluntary intoxication should be considered in determining whether the accused had actual knowledge that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)]. Voluntary intoxication should not be considered in determining whether the accused "reasonably should have

known" that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)].

e. REFERENCES: Definition of "vulva." See US v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) and US v. Tu, 30 MJ 587 (ACMR 1990) ; Definition of "competent person." See US v. Pease, 75 MJ 180 (CAAF 2016).

3A–44–3. AGGRAVATED SEXUAL CONTACT (ARTICLE 120)

a. MAXIMUM PUNISHMENT: DD, TF, 20 years, E-1.

b. MODEL SPECIFICATION:

By Force:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20____, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of_____] by using unlawful force.

By Force Likely to Cause Death or Grievous Bodily Harm:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of_____], by using force likely to cause death or grievous bodily harm to_____, to wit:_____.

By Threatening or Placing That Other Person in Fear That Any Person Would Be Subjected to Death, Grievous Bodily Harm, or Kidnapping:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by (threatening _____) (placing _____ in fear) that _____ would be subjected to (death) (grievous bodily harm) (kidnapping).

By First Rendering That Other Person Unconscious:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____20____, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of_____], by rendering _____unconscious by_____.

By Administering a Drug, Intoxicant, or Other Similar Substance:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____20___, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part)

(an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of_____], by administering to_____(by force) (by threat of force) (without the knowledge or permission of _____) a (drug) (intoxicant) (_____) thereby substantially impairing the ability of _____ to appraise or control (his) (her) conduct.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused a sexual contact to be committed upon] (state name of the alleged victim), by (state the alleged sexual contact); and

(2) That the accused did so by

(a) using unlawful force against (state the name of the alleged victim).

(b) using force causing or likely to cause death or grievous bodily harm to (state the name of the person alleged), to wit: (state the alleged force).

(c) threatening or 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, or kidnapping.

(d) first rendering (state the name of the alleged victim) unconscious.

(e) administering to (state the name of the alleged victim) a drug, intoxicant, or other similar substance (by force or threat of force) (without the knowledge or consent of (state the name of the alleged victim)), thereby substantially impairing the ability of (state the name of the alleged victim) to appraise or control his/her conduct.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Sexual contact” means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.

(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.”)

NOTE 1: By unlawful force. When the sexual contact is alleged by unlawful force, include the following instruction:

“Unlawful force” means an act of force done without legal justification or excuse.

“Force” means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the victim.

NOTE 2: By force causing or likely to cause death or grievous bodily harm. When the sexual contact is alleged by force causing or likely to cause death or grievous bodily harm, include the following instruction:

“Force” means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or inflicting physical harm sufficient to coerce or compel submission by the victim.

“Grievous bodily harm” means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(The force causing or likely to cause death or grievous bodily harm which caused the alleged victim to engage in the sexual contact need not have been applied by the accused to the alleged victim. It is sufficient if the accused applied such force to any person, which thereby caused the alleged victim to engage in the sexual contact.)

NOTE 3: By threat or placing in fear. 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 victim or another person being subjected to the wrongful action contemplated by the communication or action.

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

("Grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.)

("Kidnapping" means the wrongful seizure or confinement and holding of a person against their will. "Wrongful" means without legal justification or excuse. "Holding" means detention. The detention must be more than a momentary or incidental detention. "Against their will" means that the person 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 person 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 person's parents or legal guardian.))

(The person to be (killed) (subjected to grievous bodily harm) (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) (subjected to grievous bodily harm) (kidnapped), which thereby caused the alleged victim to engage in the sexual contact.)

NOTE 4: <u>Marriage</u>. Marriage is not a defense to any offense in violation of Article 120. If necessary, include the following instruction:

Marriage is not a defense to this offense.

NOTE 5: <u>Instructing on consent</u>. The issue of "consent" may arise in two ways. First, lack of consent is an element when the accused is charged with aggravated sexual contact by administering a drug, intoxicant, or similar substance without the consent of the alleged victim. Lack of consent is not an element when the accused is charged with aggravated sexual contact by any other method (to include when the accused is charged with administering a drug, intoxicant, or similar substance by force or by threat of force). See US v. Neal, 68 MJ 289, 302-304 (CAAF 2010) (statutory definition of "force" does not imply an element of lack of consent). Second, evidence of the alleged victim's consent to the sexual conduct might be introduced with respect to any aggravated sexual contact

allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(c) offense require the accused to have committed sexual conduct "by" a certain method. Stated another way, "by" means the sexual conduct occurred because of that method. Consent to the sexual conduct logically precludes that causal link; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. If consent evidence has been introduced to negate other elements of the charged offense, give the second parenthetical below, along with the appropriately tailored definitions of consent. If lack of consent to the administration of a drug, intoxicant, or similar substance is an element of the charged offense, give the first parenthetical below, along with the appropriately tailored definition of consent.

IF LACK OF CONSENT TO THE ADMINISTRATION OF A DRUG, INTOXICANT, OR SIMILAR SUBSTANCE IS AN ELEMENT, GIVE THE FOLLOWING INSTRUCTION:

(As I previously advised you, in (The) Specification(s) (_____) of (The) (Additional) Charge (___), the accused is charged with the offense of aggravated sexual contact by administering a drug, intoxicant, or other similar substance to (state the name of the alleged victim) without his/her knowledge or consent, thereby substantially impairing the ability of (state the name of the alleged victim) to appraise or control his/her conduct. For this offense, lack of consent to the administration of the drug, intoxicant, or other similar substance is an element of the offense.)

IF CONSENT EVIDENCE HAS BEEN INTRODUCED TO NEGATE OTHER ELEMENTS OF THE CHARGED OFFENSE, GIVE THE FOLLOWING INSTRUCTION:

(The evidence has (also) raised the issue of whether (state the name of the alleged victim) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by state the applicable element). Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every

element of the offense) (that the sexual conduct was done by state the applicable element).

"Consent" means a freely given agreement to the conduct at issue 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 does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to being rendered unconscious.)

(A person cannot consent while under threat or in fear.)

(A "competent person" is a person who possesses the physical and mental ability to consent.)

(An "incompetent person" is a person who is incapable of appraising the nature of the conduct at issue, or physically incapable of declining participation in or communicating unwillingness to engage in the sexual act at issue.)

All the surrounding circumstances are to be considered in determining whether a person gave consent.

NOTE 6: Mistake of Fact. The military judge must determine whether a mistake of fact has been raised by the evidence. See RCM 916(j). When the evidence has reasonably raised mistake of fact (e.g., mistake of fact as to consent to the sexual conduct or as to knowledge of or consent to the administration of a drug, intoxicant, or other substance), include the following instruction on honest and reasonable mistake of fact. The judge must carefully evaluate the evidence presented by both sides in such

cases to determine the applicability of the following instruction. If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction.

The evidence has raised the issue of mistake of fact in relation to the offense(s) of (state the alleged offense(s)), as alleged in (the) specification(s) (___) of (the) (additional) Charge (___).

There has been (evidence) (testimony) tending to show that, at the time of the alleged offense(s), the accused mistakenly believed that [(state the name of the alleged victim) consented to the sexual conduct alleged] [(state the name of the alleged victim) (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] [_____] concerning (this) (these) offense(s).

Mistake of fact is a defense to (that) (those) charged offense(s). “Mistake of fact” means the accused held, as a result of ignorance or mistake, an incorrect belief that [the other person consented to the sexual conduct] [the other person (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] [_____].

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 to the sexual conduct] [the other person (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] [_____]. (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.)

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 prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused did not believe that [the alleged victim consented to the sexual conduct] [the alleged victim (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] [_____], the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that [the alleged victim consented to the sexual conduct] [the alleged victim (knew of) (consented to) the administration of the drug, intoxicant, or other similar substance] [_____], 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 7: Voluntary intoxication and mistake of fact. If the above mistake of fact instruction is given, and there is evidence of the accused's voluntary intoxication, the following instruction is appropriate.

There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense(s). 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.

e. REFERENCES: Definition of "vulva." See US v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) and US v. Tu, 30 MJ 587 (ACMR 1990) ; Definition of "competent person." See US v. Pease, 75 MJ 180 (CAAF 2016).

3A–44–4. ABUSIVE SEXUAL CONTACT (ARTICLE 120)

a. MAXIMUM PUNISHMENT: DD, TF, 7 years, E-1.

b. MODEL SPECIFICATION:

By Threatening or Placing That Other Person in Fear:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about_____20__, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of_____], by (threatening _____) (placing _____ in fear).

By Fraudulent Representation:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____20__, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by making a fraudulent representation that the sexual contact served a professional purpose, to wit: _____.

By False Pretense:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by inducing a belief by (artifice) (pretense) (concealment) that the said accused was another person.

Without Consent:

In that _____(person jurisdiction data), did (at/on board—location), on or about _____ 20___, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____] without the consent of _____.

Of a Person Who Is Asleep, Unconscious, or Otherwise Unaware the Act is Occurring:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____20____, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of_____, with [(_____'s body part)

(an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], when (he) (she) (knew) (reasonably should have known) that _____ was (asleep) (unconscious) (unaware the sexual contact was occurring due to _____).

When that Person is Incapable of Consenting:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20_____, (touch) (cause _____to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], when _____ was incapable of consenting to the sexual contact because (he) (she) [was impaired by (a drug, to wit:_____) (an intoxicant, to wit:_____) (_____)] [had a (mental disease, to wit:_____) (mental defect, to wit:_____) (physical disability, to wit:_____)] and the accused (knew) (reasonably should have known) of that condition.

c. ELEMENTS:

Abusive Sexual Contact by Threat/Fear, Fraudulent Representation, or Artifice:

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused _____ to commit sexual contact upon] (state the name of the alleged victim) by (state the alleged sexual contact); and

(2) That the accused did so by

(a) threatening or placing (state the name of the alleged victim) in fear;

(b) making a fraudulent representation that the sexual contact served a professional purpose;

(c) inducing a belief by artifice, pretense, or concealment that the accused was another person.

Abusive Sexual Contact Without Consent:

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused _____ to commit sexual contact upon] (state the name of the alleged victim) by (state the alleged sexual contact); and

(2) That the accused did so without the consent of (state the name of the alleged victim).

Abusive Sexual Contact When Victim is Asleep, Unconscious, or Otherwise Unaware:

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused _____ to commit sexual contact upon] (state the name of the alleged victim) by (state the alleged sexual contact);

(2) That the accused did so when (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual contact was occurring; and

(3) That the accused knew or reasonably should have known that (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual contact was occurring.

Abusive Sexual Contact When Victim is Incapable of Consenting:

(1) That (state the time and place alleged), the accused [committed sexual contact upon] [caused _____ to commit sexual contact upon] (state the name of the alleged victim) by (state the alleged sexual contact);

(2) That the accused did so when (state the name of the alleged victim) was incapable of consenting to the sexual contact due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability); and

(3) That the accused knew or reasonably should have known (state the name of the alleged victim) was incapable of consenting to the sexual contact due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Sexual contact” means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or

buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.

NOTE 1: Threat or placing in fear. 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 victim or another person being subjected to the wrongful action contemplated by the communication or action.

("Wrongful action," as used here, includes an abuse of military rank, position, or authority in order to engage in a sexual contact with a victim. This includes, but is not limited to, threats to initiate an adverse personnel action or withhold a favorable personnel action unless the victim submits to the accused's requested sexual contact. Superiority in rank is a factor in, but not dispositive of, whether a reasonable person in the position of the victim would fear that his or her noncompliance with the accused's desired sexual contact would result in the threatened wrongful action contemplated by the communication or action.)

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

The threat or fear in this case must be that the alleged victim or another person would be subjected to the wrongful action.

NOTE 2: Fraudulent representation. When the sexual contact is alleged by making a fraudulent representation that it serves a professional purpose, the following may be appropriate:

A "fraudulent representation" is a representation of fact, which the accused knows to be untrue, which is intended to deceive, which does in fact deceive, and which causes the other person to engage in the sexual contact.

The fraudulent representation that the sexual contact served a professional purpose need not have been made by the accused to (state the name of the alleged victim). It is sufficient if the accused made such a fraudulent representation to any person, which thereby caused (state the name of the alleged victim) to engage in the sexual contact.

NOTE 3: Incapable of consenting. When the offense alleges the victim was incapable of consenting, include the following instruction:

"Incapable of consenting" means the person is incapable of appraising the nature of the conduct at issue or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual contact at issue.

NOTE 4: Marriage. Marriage is not a defense to any offense in violation of Article 120. If necessary, include the following instruction:

Marriage is not a defense to this offense.

NOTE 5: Without consent. When the sexual contact is alleged to be without consent, include the following instruction.

"Consent" means a freely given agreement to the conduct at issue 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 does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious.)

(A person cannot consent while under threat or in fear.)

(A person cannot consent when believing, due to a fraudulent representation, that the sexual contact served a professional purpose, or when believing, due to artifice, pretense, or concealment that the accused was another person.)

All the surrounding circumstances are to be considered in determining whether a person gave consent.

> ***NOTE 6: Evidence of consent. Evidence of the alleged victim's consent to the sexual conduct may be relevant, even for offenses that do not include "lack of consent" as an element. Evidence of the alleged victim's consent to the sexual conduct might be introduced with respect to any abusive sexual contact allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(d) offense require the accused to have committed sexual conduct "by" a certain method, or "when" the alleged victim was in a certain state. Stated another way, "by" means the sexual conduct occurred because of that method, and "when" means the sexual conduct occurred while the alleged victim was in a state that precluded consent. Consent to the sexual conduct logically precludes these causal links; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. In such situations the following instruction, properly tailored, would be appropriate.***

The evidence has raised the issue of whether (state the alleged victim's name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by state the element(s) to which the evidence concerning consent relates) beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by state the element(s) to which the evidence concerning consent relates).

"Consent" means a freely given agreement to the conduct at issue 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 does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious.)

(A person cannot consent while under threat or in fear.)

(A person cannot consent when believing, due to a fraudulent representation, that the sexual contact served a professional purpose, or when believing, due to artifice, pretense, or concealment that the accused was another person.)

(A "competent person" is a person who possesses the physical and mental ability to consent.)

(An "incompetent person" is a person who is incapable of appraising the nature of the conduct at issue, or physically incapable of declining participation in or communicating unwillingness to engage in the sexual act at issue.)

All the surrounding circumstances are to be considered in determining whether a person gave consent.

NOTE 7: <u>Mistake of fact</u>. The military judge must determine whether a mistake of fact has been raised by the evidence. See RCM 916(j). When the evidence has reasonably raised mistake of fact (e.g., mistake of fact as to consent to the sexual conduct), include the following instruction on honest and reasonable mistake of fact. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction. If instructing on an attempted

offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction.

The evidence has raised the issue of mistake of fact in relation to the offense(s) of (state the alleged offense(s)), as alleged in (the) specification(s) (___) of (the) (additional) Charge (___).

There has been (evidence) (testimony) tending to show that, at the time of the alleged offense(s), the accused mistakenly believed that [(state the name of the victim) consented to the sexual conduct alleged] [_____] concerning (this) (these) offense(s).

Mistake of fact is a defense to (that) (those) charged offense(s). “Mistake of fact” means the accused held, as a result of ignorance or mistake, an incorrect belief that [the other person consented to the sexual conduct] [_____].

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 to the sexual conduct] [_____]. (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.)

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 prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused did not believe that [the alleged victim consented to the sexual conduct] [_____], the defense does not exist.

Furthermore, even if you conclude the accused was under a mistaken belief that [the alleged victim consented to the sexual conduct] [_____], 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 8: Voluntary intoxication and mistake of fact. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate in conjunction with a mistake of fact instruction:

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.

NOTE 9: Voluntary intoxication and "knew or reasonably should have known." When the accused is charged with abusive sexual contact of a person who was asleep, unconscious, or otherwise unaware that the sexual contact was occurring, or a person who was incapable of consenting to the sexual contact, and there is evidence that the accused was intoxicated, the following instruction may be appropriate with respect to whether the accused "knew or reasonably should have known" the alleged victim's state.

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). With respect to (that) (those) offense(s), I advised you earlier that the government is required to prove that the accused knew or reasonably should have known that (state the name of the alleged victim) was [asleep, unconscious, or otherwise unaware that the sexual contact was occurring] [incapable of consenting to the sexual contact(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)].

In deciding whether the accused had such knowledge, you should consider the evidence of voluntary intoxication.

The law recognizes that a person's ordinary thought process may be materially affected when 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 had the required knowledge.

On the other hand, the fact that the accused may have been intoxicated at the time of the offense(s) does not necessarily indicate that he/she was unable to have the required knowledge 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 had the required knowledge, you should consider the effect of intoxication, if any, as well as the other evidence in the case.

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 had the required knowledge, the accused will not avoid criminal responsibility because of voluntary intoxication.

However, on the question of whether the accused "reasonably should have known" that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual contact was occurring] [incapable of consenting to the sexual contact(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)], you may not consider the accused's intoxication, if any, because what a person reasonably should have known refers to what an ordinary, prudent, sober adult would have reasonably known under the circumstances of this case.

In summary, voluntary intoxication should be considered in determining whether the accused had actual knowledge that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual contact was occurring] [incapable of consenting to the sexual contact(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)]. Voluntary intoxication should not be considered in determining whether the accused "reasonably

should have known" that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual contact was occurring] [incapable of consenting to the sexual contact(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)].

e. REFERENCES: Definition of "vulva." *See US v Williams*, 25 MJ 854 (AFCMR 1988) *pet. denied*, 27 MJ 166 (CMA 1988) and *US v. Tu*, 30 MJ 587 (ACMR 1990) ; Definition of "competent person." *See US v. Pease,* 75 MJ 180 (CAAF 2016).

3A–44A–1. MAIL–DEPOSIT OF OBSCENE MATTER (ARTICLE 120A)

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 knowingly (deposit) (cause to be deposited) in the (United States) (_____) mails, for mailing and delivery 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, a (letter) (picture) (_____) (containing) (portraying) (suggesting) (_____) certain matter, to wit: (state the matter alleged);

(2) That the act was done wrongfully and knowingly; and

(3) That the matter deposited was obscene.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Obscene" 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. 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.

"Knowingly" means the accused deposited the material with knowledge of its nature.

Knowingly depositing obscene matter in the mails is "wrongful" if it is done without legal justification or authorization.

e. **REFERENCE**: Miller v. US, 413 U.S. 15 (1973), obscenity defined; US v. Negron, 60 MJ 136 (CAAF 2004).

3A–44B–1. RAPE OF A CHILD (ARTICLE 120B)

a. MAXIMUM PUNISHMENT: DD, TF, life without eligibility for parole, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for rape of a child conviction under this statute.

b. MODEL SPECIFICATION:

Rape of a Child Who Has Not Attained the Age of 12 Years:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about_____ , commit a sexual act upon _____, a child who had not attained the age of 12 years, by [penetrating _____’s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire _____]].

Rape by Force of a Child Who Has Attained the Age of 12 Years:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about_____ , commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____’s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] by [using force against _____, to wit: _____]

Rape by Threatening or Placing in Fear a Child Who Has Attained the Age of 12 Years:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____’s (vulva) (anus) (mouth) with _____’s penis] [causing contact between _____’s mouth and _____’s (penis) (vulva) (scrotum) (anus)] [penetrating _____’s (vulva) (penis) (anus) with (_____’s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by (threatening _____) (placing _____ in fear).

Rape by Rendering Unconscious a Child Who Has Attained the Ager of 12 Years:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by rendering _____ unconscious by _____.

Rape by Administering a Drug, Intoxicant, or Other Similar Substance to a Child Who Has Attained the Age of 12 Years:

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and_____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by administering to _____ a (drug) (intoxicant) (____), to wit: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state name of the alleged victim) by (state the alleged sexual act); and

NOTE 1: <u>Child under the age of 12 alleged</u>. If it is alleged that the victim was under the age of 12, give the following element:

[(2)] That at the time of the sexual act (<u>state the name of the alleged victim</u>) had not attained the age of 12 years.

NOTE 2: <u>Child who had attained the age of 12, but had not attained the age of 16 alleged</u>. 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:

[(2)] That the accused did so by

(a) using force against (state the name of the alleged victim or other person against whom force was allegedly used), to wit: (state the force alleged);

(b) threatening (state the name of the alleged person threatened) or placing (state the name of the alleged victim) in fear;

(c) rendering (state the name of the alleged victim) unconscious;

(d) administering to (state the name of the alleged victim) a drug, intoxicant, or other similar substance; [and]

[(3)] That at the time of the sexual act (state the name of the alleged victim) had attained the age of 12 years but had not attained the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Sexual act” means:

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus;

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

“Child” means any person who has not attained the age of 16 years.

The prosecution is not required to prove the accused knew the age of (<u>state the name of the alleged victim</u>) at the time the alleged sexual act(s) occurred.

(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.”)

NOTE 3: By force. When the sexual act is alleged by force, include the following instruction:

“Force” means the use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain or injure a child; or inflicting physical harm.

(In the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force.)

(The force which caused the victim to engage in the sexual act need not have been applied by the accused to the victim. It is sufficient if the accused applied such force to any person, which thereby caused the victim to engage in the sexual act.)

NOTE 4: By threat. When the sexual act is alleged by threat or by placing in fear, include the following instruction:

“Threatening or placing a child in fear” means a communication or action that is of sufficient consequence to cause the child to fear that non-compliance will result in the child or another person being subjected to the action contemplated by the communication or action.

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(The person subject to the action contemplated by the threat need not be the victim. It is sufficient if the accused threatened or placed the victim in fear that any person would subject to the action contemplated by the threat, which thereby caused the victim to engage in the sexual act.)

NOTE 5: Marriage. Marriage is not a defense for rape of a child under Article 120b.

Marriage is not a defense to this offense.

NOTE 6: Evidence of consent. Generally, the elements of an Article 120b(a)(2) offense require the accused to have committed sexual conduct "by" a certain method. Stated another way, "by" means the sexual conduct occurred because of that method. Consent logically precludes that causal link; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, if the alleged offense is rape of a child who has attained the age of 12 years by using force or threatening or placing the child in fear, evidence that the alleged victim consented to the sexual conduct at issue may be relevant to negate an element, even though lack of consent may not be a separate element. In such situations the following instruction, properly tailored, would be appropriate. This instruction is not applicable where the alleged offense is rape of a child who has attained the age of 12 years by rendering the child unconscious or administering a drug to the child. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction.

The evidence has raised the issue of whether (state the alleged victim's name) consented to the sexual conduct listed in (The) Specification(s) (_____) of (The) (Additional) Charge (___). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by _____) (state the element(s) to which the evidence concerning consent relates) beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every element of the offense) (that the sexual conduct was done by _____) (state the element(s) to which the evidence concerning consent relates).

3A–44B–2. SEXUAL ASSAULT OF A CHILD (ARTICLE 120B)

a. MAXIMUM PUNISHMENT: DD, TF, 30 years, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for sexual assault of a child convicted under this statute.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____’s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with _____'s body part) (an object) to wit: _____ with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), by (state the alleged sexual act); and

(2) That at the time of the sexual act (state the name of the alleged victim) had attained the age of 12 years, but had not attained the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Sexual act” means:

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus;

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

"Child" means any person who has not attained the age of 16 years.

The prosecution is not required to prove the accused knew that (state the name of the alleged victim) had not attained the age of 16 years at the time the alleged sexual act(s) occurred.

(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.")

> ***NOTE 1: Mistake of fact as to age. Mistake of fact as to age is an affirmative defense to sexual assault of a child. If raised by some evidence, the military judge must advise the members that the defense has the burden of proving by a preponderance of the evidence that mistake existed. When mistake of fact as to age has been raised, include the following instruction. The burden of proof in the instruction below is as provided in the statute.***

The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of 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) had not attained 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 defense to establish the accused was under this mistaken belief, by a preponderance of the evidence. A "preponderance" means more likely than not. If you are not convinced by a preponderance of the evidence that, at the time of the charged sexual assault of a child, the accused was 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 not convinced by preponderance of the evidence that, at the time of the charged sexual assault of a child, the accused's mistake was reasonable, the defense does not exist.

NOTE 2: 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 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) was at least 16 years of age 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: Marriage. It is a defense that the persons engaging in the sexual act were at that time married to each other, except where the accused commits a sexual act upon the person when the accused knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring or when the other person is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused. If raised by some evidence, the military judge must advise the members that the defense has the burden of proving by a preponderance of the evidence that a marriage existed. When marriage between the accused and the alleged

victim of the sexual assault of a child 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 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 defense of marriage does not exist where the accused commits the alleged sexual act(s) upon (state the name of the alleged victim) when the accused knows or reasonably should know that she/he is asleep, unconscious or otherwise unaware that the sexual act(s) (is) (are) occurring or when she / he is incapable of consenting to the sexual act(s) due to impairment by any drug, intoxicant or other similar substance, and that condition was known or reasonably should have been known by the accused.)

The defense has the burden of proving by a preponderance of the evidence that the defense of marriage exists. The term "preponderance" means more likely than not. Therefore, unless you are convinced by a preponderance of the evidence that at the time of the sexual act(s) alleged, the accused and (state the name of the alleged victim) were married to each other, the defense of marriage does not exist.

(Even if you are convinced by a preponderance of the evidence that at the time of the sexual act(s) alleged, the accused and (state the name of the alleged victim) were married to each other, if you are not also convinced by a preponderance of the evidence that (state the name of the alleged victim) was not (asleep, unconscious or otherwise unaware of the sexual act(s) occurring) (incapable of consenting to the sexual act(s) due to impairment by any drug, intoxicant or other similar substance) or that the

accused was not aware of and should not have been aware of such condition, the defense of marriage does not exist.)

3A–44B–3. SEXUAL ABUSE OF A CHILD (ARTICLE 120B)

a. MAXIMUM PUNISHMENT:

(1) Cases involving sexual contact: DD, TF, 20 years, E-1.

(2) Other cases: DD, TF, 15 years, E-1.

b. MODEL SPECIFICATION:

Sexual Abuse of a Child Involving Sexual Contact:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit a lewd act upon _____, a child who had not attained the age of 16 years, by (touching) (causing _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit: _____], with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____].

Sexual Abuse of a Child Involving Indecent Exposure:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about ____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by intentionally exposing [his (genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)] to _____, with an intent to [(abuse) (humiliate) (degrade) _____] [(arouse) (gratify) the sexual desire of _____].

Sexual Abuse of a Child Involving Indecent Communication:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by intentionally communicating to _____ indecent language to wit: _____, with an intent to [(abuse) (humiliate) (degrade)_____] [(arouse) (gratify) the sexual desire of _____].

Sexual Abuse of a Child Involving Indecent Conduct:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit a lewd act upon _____, a child who had not attained the age of 16 years, by engaging in indecent conduct, to wit: _____, intentionally done (with) (in the presence of) _____, which conduct amounted to a 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.

c. ELEMENTS:

By Sexual Contact:

(1) That (state the time and place alleged), the accused committed a lewd act upon (state the name of the alleged victim), by (state the alleged sexual contact); and

(2) That at the time of the lewd act (state the name of the alleged victim) had not attained the age of 16 years.

By Indecent Exposure or Communication:

(1) That (state the time and place alleged), the accused committed a lewd act upon (state the name of the alleged victim), by intentionally (state the alleged exposure or communication); and

(2) That at the time of the lewd act (state the name of the alleged victim) had not attained the age of 16 years.

By Indecent Conduct:

(1) That (state the time and place alleged), the accused committed a lewd act upon (state the name of the alleged victim), by engaging in indecent conduct, to wit: (state the alleged indecent conduct); and

(2) That at the time of the lewd act (state the name of the alleged victim) had not attained the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Lewd act” means:

(A) any sexual contact with a child;

(B) intentionally exposing one’s genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person;

(C) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(D) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a 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.

("Sexual contact" means touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.)

"Child" means any person who has not attained the age of 16 years.

The prosecution is not required to prove the accused knew the age of (state the name of the alleged victim) at the time the alleged sexual act(s) occurred.

> ***NOTE 1: Mistake of fact as to age. Mistake of fact as to age is an affirmative defense to sexual abuse of a child, if the child had in fact attained the age of 12 years. If raised by some evidence, the military judge must advise the members that the defense has the burden of proving by a preponderance of the evidence that mistake existed. When mistake of fact as to age has been raised, include the following instruction. The burden of proof in the instruction below is as provided in the statute.***

The evidence has raised the issue of mistake on the part of the accused concerning the offense(s) of 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 lewd act(s) occurred.

(First, if you find beyond a reasonable doubt that (state the name of the alleged victim) had not attained the age of 12 years, the defense of mistake of fact does not exist. The

defense of mistake of fact can only be considered, as described below, if you find beyond a reasonable doubt that (state the name of the alleged victim) had attained the age of 12 but had not attained the age of 16.)

The prosecution is not required to prove the accused knew that (state the name of the alleged victim) had not attained the age of 16 years at the time the alleged lewd 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 defense to establish the accused was under this mistaken belief, by a preponderance of the evidence. A "preponderance" means more likely than not. If you are not convinced by a preponderance of the evidence that, at the time of the charged sexual abuse of a child, the accused was 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 not convinced by preponderance of the evidence that, at the time of the charged sexual abuse of a child, the accused's mistake was reasonable, the defense does not exist.

NOTE 2: 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 sexual abuse 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) was at least 16 years of age 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 3: Marriage. Marriage is an affirmative defense to sexual abuse of a child. If raised by some evidence, the military judge must advise the members that the defense has the burden of proving by a preponderance of the evidence that a marriage existed. When marriage between the accused and the alleged victim of the sexual abuse of a child 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 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 lewd 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 defense of marriage does not exist where the accused commits the alleged lewd act(s) upon (state the name of the alleged victim) when the accused knows or reasonably should know that she / he is asleep, unconscious or otherwise unaware that the lewd act(s) (is) (are) occurring or when she / he is incapable of consenting to the lewd act(s) due to impairment by any drug, intoxicant or other similar substance, and that condition was known or reasonably should have been known by the accused.)

The defense has the burden of proving by a preponderance of the evidence that the defense of marriage exists. The term “preponderance” means more likely than not. Therefore, unless you are convinced by a preponderance of the evidence that at the time of the lewd act(s) alleged, the accused and (state the name of the alleged victim) were married to each other, the defense of marriage does not exist.

(Even if you are convinced by a preponderance of the evidence that at the time of the lewd act(s) alleged, the accused and (state the name of the alleged victim) were married to each other, if you are not also convinced by a preponderance of the evidence that (state the name of the alleged victim) was not (asleep, unconscious or otherwise unaware of the lewd act(s) occurring) (incapable of consenting to the lewd act(s) due to impairment by any drug, intoxicant or other similar substance) or that the accused was not aware of and should not have been aware of such condition, the defense of marriage does not exist.)

NOTE 4: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, if the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.

3A–44C–1. INDECENT VIEWING, VISUAL RECORDING, OR BROADCASTING (ARTICLE 120C)

a. MAXIMUM PUNISHMENT:

(1) Indecent viewing: DD, TF, 1 year, E-1.

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

(3) Broadcasting or distribution of an indecent recording: DD, TF, 7 years, E-1.

b. MODEL SPECIFICATION:

Indecent Viewing:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, without legal justification or lawful authorization, knowingly (and wrongfully) view the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

Indecent Recording:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, without legal justification or lawful authorization, knowingly (photograph) (videotape) (film) (make a recording of) the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

Broadcasting or Distributing an Indecent Recording:

In that _____ (personal jurisdiction data), did (at/on board—location), on or about _____ 20__, without legal justification or lawful authorization knowingly (broadcast) (distribute) a recording of the private area of _____, when the said accused knew or reasonably should have known that the said recording was made without the consent of _____ and under circumstances in which (he) (she) had a reasonable expectation of privacy.

c. ELEMENTS:

Viewing:

(1) That (state the time and place alleged), the accused, without legal justification or lawful authorization, knowingly (and wrongfully) viewed the private area of (state the name of the alleged victim);

(2) That the accused did so without the consent of (state the name of the alleged victim); and

(3) That said viewing took place under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy.

Recording:

(1) That (state the time and place alleged), the accused, without legal justification or lawful authorization, knowingly (photographed) (videotaped) (filmed) (made a recording of) the private area of (state the name of the alleged victim);

(2) That the accused did so without the consent of (state the name of the alleged victim); and

(3) That said recording was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy.

Broadcasting or Distributing of an Indecent Recording:

(1) That (state the time and place alleged), the accused, without legal justification or lawful authorization, knowingly (broadcast) (distributed) a recording of the private area of (state the name of the alleged victim);

(2) That the recording was made without the consent of (state the name of the alleged victim);

(3) That the accused knew or reasonably should have known that the recording was made without the consent of (state the name of the alleged victim);

(4) That the recording was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy; and

(5) That the accused knew or reasonably should have known that the recording was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Wrongful" means without legal justification or lawful authorization.)

An act is done "knowingly" when it is done intentionally and on purpose. An act done as the result of a mistake or accident is not done "knowingly."

"Private area" means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.

"Under circumstances in which that other person has a reasonable expectation of privacy" or "reasonable expectation of privacy" means:

(A) circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured; or

(B) circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.

("Broadcast" means to electronically transmit a visual image with the intent that it be viewed by a person or persons.)

("Distribute" means delivering to the actual or constructive possession of another, including transmission by electronic means.)

("Recording" means a still or moving visual image captured or recorded by any means.)

NOTE 1: <u>Mistake of fact as to consent</u>. When the accused is charged with indecent viewing or recording, and the evidence has reasonably raised mistake of fact as to consent, include the following instruction on honest and reasonable mistake of fact as to consent. If instructing on an attempted offense, only the honest mistake of fact instruction should be given.

The evidence has raised the issue of mistake on the part of the accused whether (<u>state the name of the alleged victim</u>) consented to the conduct concerning the offense(s) of

indecent (viewing) (visual recording), 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 consented to the (viewing) (photographing) (videotaping) (filming) (visual recording). 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 (viewing) (photographing) (videotaping) (filming) (visual recording), the defense does not exist. Even if you conclude the accused was under a mistaken belief that the alleged victim consented to the (viewing) (photographing) (videotaping) (filming) (visual recording), 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 2: <u>Voluntary intoxication and mistake of fact as to consent</u>. If there is evidence of the accused's voluntary intoxication, the following instruction is appropriate:

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 mistaken belief, if any, was reasonable, you may not consider the accused's intoxication because 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 3: Voluntary intoxication and "knew or reasonably should have known." When the accused is charged with broadcasting or distributing an indecent visual recording, and there is evidence that the accused was intoxicated, the following instruction may be appropriate with respect to whether the accused "knew or reasonably should have known" the circumstances under which the recording was made.***

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). With respect to (that) (those) offense(s), I advised you earlier that the government is required to prove that the accused knew or reasonably should have known that the recording was made without the consent of (state the name of the alleged victim), and that the accused knew or reasonably should have known that the recording was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy.

In deciding whether the accused had such knowledge, 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 had the required knowledge.

On the other hand, the fact that the accused may have been intoxicated at the time of the offense(s) does not necessarily indicate that (he) (she) was unable to have the required knowledge 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 had the required knowledge, you should consider the effect of intoxication, if any, as well as the other evidence in the case.

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 had the required

knowledge, the accused will not avoid criminal responsibility because of voluntary intoxication.

However, on the question of whether the accused “reasonably should have known” that the recording was made without the consent of (state the name of the alleged victim), and the question of whether the accused “reasonably should have known” that the recording was made under circumstances in which (state the name of the alleged victim) had a reasonable expectation of privacy, you may not consider the accused’s intoxication, if any, because what a person reasonably should have known refers to what an ordinary, prudent, sober adult would have reasonably known under the circumstances of this case.

In summary, voluntary intoxication should be considered in determining whether the accused had actual knowledge that the recording was made without the consent of (state the name of the alleged victim), and under circumstances in which (state the name of alleged victim) had a reasonable expectation of privacy. Voluntary intoxication should not be considered in determining whether the accused “reasonably should have known” that the recording was made without the consent of (state the name of the alleged victim), and under circumstances in which (state the name of alleged victim) had a reasonable expectation of privacy.

3A–44C–2. FORCIBLE PANDERING (ARTICLE 120C)

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 _____, wrongfully compel _____ to engage in (a sexual act) (sexual contact) with _____, to wit: _____, for the purpose of receiving (money) (other compensation) (_____).

c. ELEMENT:

That (state the time and place alleged), the accused wrongfully compelled (state the name of the alleged victim) to engage in (an act) (acts) of prostitution with (state the name of the person alleged), to wit: (state the sexual act/contact alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Wrongfully” means without legal justification or excuse.

“Compel” means causing another to do something against his/her will by force, threats, or overwhelming pressure.

“Act of prostitution” means a sexual act or sexual contact on account of which anything of value is given to, or received by, any person.

(“Sexual act” means:

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or 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 touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any

person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.)

(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.”)

> ***NOTE: <u>Pandering as requiring three persons</u>. Pandering requires three persons. If only two persons are involved, the evidence may raise the offense of solicitation to commit prostitution. US v. Miller, 47 MJ 352 (CAAF 1997).***

3A–44C–3. INDECENT EXPOSURE (ARTICLE 120C)

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 [his (genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)], in an indecent manner, to wit: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused exposed (his) (her) [(genitalia) (anus) (buttocks) (female areola) (female nipple)];

(2) That such exposure was done in an indecent manner; and

(3) That such exposure was intentional.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Indecent manner" means conduct that amounts to a 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.

"Intentional" means willful or on purpose. An act done as the result of a mistake or accident is not done "intentionally."

NOTE 1: On the issue of whether the exposure was indecent, if raised by the evidence, the Military Judge should give the following instruction, specifically tailored to the evidence in the case:

In determining whether an intentional exposure was indecent, you should consider all the facts and circumstances surrounding the exposure. Specifically, factors you should consider include but are not limited to: (whether the person witnessing the exposure consented to the exposure); (the age of the accused and the person(s) witnessing the exposure); (whether the exposure was made in a public or private setting); (proximity of age between the accused and the alleged victim); (and) (prior relationship between the accused and the alleged victim).

NOTE 2: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent.

3A–45–1. LARCENY (ARTICLE 121)

a. MAXIMUM PUNISHMENT:

(1) Any property—$1,000 or less: BCD, TF, 1 year, E-1.

(2) Military property—more than $1,000, or of any military motor vehicle, aircraft, vessel, firearm, or explosive: DD, TF, 10 years, E-1.

(3) Other than military property—more than $1,000, 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) (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 value); (and)

(4) That the (taking) (obtaining) (withholding) 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 for 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 [(a) military (property) (motor vehicle) (aircraft) (vessel) (firearm) (explosive)] [(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 superior right to possession of the property 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.)

("Withheld" means a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property. Withheld can also mean devoting property to a use not authorized by its owner.)

> ***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 false pretense may be made by means of any act, word, symbol, or token and may relate to a past or existing fact. The misrepresentation must be an effective and intentional 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 US v. Kastner, 17 MJ 11 (CMA 1983) (overruling the "innocent purpose defense" of US v. Roark, 31 CMR 64 (CMA 1961)), and US 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: <u>Lost, mislaid, or abandoned property</u>. 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, <u>Mistake of Fact</u>, 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: <u>Bailment and withholding by conversion—other than pay and allowances erroneously paid</u>. 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 US v. Hale, 28 MJ 310 (CMA 1989) and US 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: <u>Withholding of pay and/or allowances</u>. 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 US 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 US 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 US 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: <u>Custodian of a fund</u>. 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: <u>Military property</u>. For a definition of military property, See US v. Schelin, 15 MJ 218 (CMA 1983), and US 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: <u>"Money" as military property</u>. In US 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 previously addressed the issue, such as US 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); US v. Newsome, 35 MJ 749 (NMCMR 1992) (treasury checks are military property); US v. Field, 36 MJ 697 (AFCMR 1992)

(appropriated funds for PCS and TDY travel are military property); or US 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: <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 invented, used or designed to navigate, fly, or travel 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 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. "Explosive" includes ammunition.)

NOTE 12: <u>Other definitions of explosive</u>. The above definition of explosive (except the last sentence regarding ammunition, which is derived from U.S. v. Murphy, 74 MJ 302 (2015)) 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 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 13: <u>Military or specified property, variance</u>. 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 14: <u>Value alleged as $1000.00 or less and property in evidence</u>. Under these circumstances, the following instruction may be given:

When property is alleged to have a value of $1000.00 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 15: Value alleged in excess of $1000.00. If value in excess of $1000.00 is alleged, Instruction 7-16, Value, Damage, or Amount, may be appropriate.

NOTE 16: 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 17: 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 US v. Escobar, 7 MJ 197 (CMA 1979).

NOTE 18: 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 US v. Jones, 33 CMR 167 (CMA 1963).

NOTE 19: Taking and stealing of mail. See Article 109a, Part IV, MCM and Instructions 3a-33a-1, Mail—Taking, 3a-33a-2, Mail—Opening, Secreting, or Destroying, and 3a-33a-3, Mail--Stealing.

NOTE 20: 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 US v. Roane, 43 MJ 93 (CMA 1995), US v. Abeyta, 12 MJ 507 (ACMR 1981) and US v. Mervine, 26 MJ 482 (CMA 1988). (Theft of intangibles may be charged under Article 121b as obtaining services under false pretenses.)

NOTE 21: 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 22: 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 value); (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 for 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) (military property of a value more than $1000).

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 for (his) (her) own use or the use of anyone other than the lawful owner.

NOTE 23: 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.

e. REFERENCES: Abandoned, lost, mislaid property: US v. Wiederkehr, 33 MJ 539 (AFCMR 1991); Pay and allowances: US v. Helms, 47 MJ 1 (CAAF 1997).

3A–45–2. 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 3a-45-1.

a. MAXIMUM PUNISHMENT:

(1) $1,000 or less: 2/3 x 3 months, 3 months, E-1.

(2) More than $1,000: BCD, TF, 1 year, E-1.

(3) Of motor vehicle, aircraft, vessel, firearm, explosive or military property of a value of more than $1,000: 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) (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 value); (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]

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) (military property of a value of more than $1000.00).

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 superior right to possession of the property 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.)

("Withheld" means a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property. Withheld can also mean devoting property to a use not authorized by its owner.)

> ***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 false pretense may be made by means of any act, word, symbol, or token and may relate to a past or existing fact. The misrepresentation must be an effective and intentional 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: <u>Bailment and withholding by conversion — other than pay and allowances erroneously paid</u>. 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 US v. Hale, 28 MJ 310 (CMA 1989) and US 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: <u>Withholding of pay and/or allowances</u>. 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 US 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 US 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 US 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: 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 invented, used, or designed for to navigate, fly, or travel 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 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. "Explosive" includes ammunition.)

NOTE 11: <u>Other definitions of explosive</u>. The above definition of explosive (except the last sentence regarding ammunition, which is derived from U.S. v. Murphy, 74 MJ 302 (2015)) 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 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 12: Specified property, variance. 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 13: Value alleged as $1000.00 or less and property in evidence. Under these circumstances, the following instruction may be given:

When property is alleged to have a value of $1000.00 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 $1000. If value in excess of $500 is alleged, Instruction 7-16, Variance - Value, Damage, or Amount, may be appropriate.

NOTE 15: 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 16: 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 US v. Escobar, 7 MJ 197 (CMA 1979).

NOTE 17: Taking of mail. See Article 109a, Part IV, MCM and Instruction 3a-33a-1, Mail—Taking.

NOTE 18: 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 US v. Roane, 43 MJ 93 (CMA 1995), US v. Abeyta, 12 MJ 507 (ACMR 1981) and US v. Mervine, 26 MJ 482 (CMA 1988). (Wrongful appropriation of intangibles may be charged under Article 121b as obtaining services under false pretenses).

NOTE 19: 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: US v. Wederkehr, 33 MJ 539 (AFCMR 1991). Pay and allowances: US v. Helms, 47 MJ 1 (CAAF 1997).

3A–45A–1. FRAUDULENT USE OF CREDIT CARD, DEBIT CARD OR OTHER ACCESS DEVICE (ARTICLE 121A)

a. MAXIMUM PUNISHMENT:

(1) $1,000 or less: BCD, TF, 10 years, E-1.

(2) During any 1year period where aggregate value is more than $1,000: DD, TF, 15 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, knowingly and with the intent to defraud, use a (debit card) (credit card) (access device, to wit: _____) (that was stolen) (that was revoked, canceled, or otherwise invalid) (without the authorization of _____, a person whose authorization was required for such use), to obtain (money) (property) (services) (_____) (of a value of about $_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused knowingly used a [stolen (credit card) (debit card) (access device, to wit: _____)] [revoked, cancelled, or otherwise invalid (credit card) (debit card)] [(credit card) (debit card) (access device, to wit: _____)] [(credit card) (debit card) (access device, to wit: _____) without the authorization of a person whose authorization was required for such use];

(2) That by such use, the accused obtained (money) (property) (services) (_____), (of some value) (of a value of _____) (of an aggregate value for any one-year period of more than $1000); and

(3) That such use by the accused was with the intent to defraud.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Intent to defraud” means an intent to obtain, through a misrepresentation, an article or thing of value and to apply it to one’s own use and benefit or to the use and benefit of another, either temporarily or permanently.

An intent to defraud may be proved by circumstantial evidence.

An act is done “knowingly” when it is done intentionally and on purpose. An act done as the result of a mistake or accident is not done “knowingly.”

(“Access device” means any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument)).

(The use of a (credit card) (debit card) (access device) “without the authorization of a person whose authorization was required for such use” includes situations where an accused has no authorization to use the (credit card) (debit card) (access device) from a person whose authorization is required for such use, as well as situations where an accused exceeds the authorization of a person whose authorization is required for such use.)

NOTE 1: Defining “stolen.” If necessary, the judge may instruct the members on the meaning of “stolen” by tailoring an instruction using definitions provided in Instruction 3a-45-1, Larceny.

NOTE 2: 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.

3A–45B–1. FALSE PRETENSES TO OBTAIN SERVICES (ARTICLE 121B)

a. MAXIMUM PUNISHMENT:

(1) $1,000 or less: BCD, TF, 1 year, E-1.

(2) Over $1,000: 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 obtained certain services, to wit: (describe the services alleged) from (state the name of the alleged victim);

(2) That the accused obtained the services by using false pretenses, to wit: (state the alleged false pretense);

(3) That the accused then knew of the falsity of the pretenses;

(4) That the obtaining was with the intent to defraud; and

(5) That the services were of a value of (state the value alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

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, through a misrepresentation, a service of value 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 provides 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 3a-45-1, Larceny, in tailoring instructions to this offense. For elements tailored to theft of telephone service, see US 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.

3A–46–1. ROBBERY (ARTICLE 122)

a. MAXIMUM PUNISHMENT:

(1) With a dangerous weapon: 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 dangerous weapon, to wit:_____] seize 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 (immediate) (future) injury to:

(a) (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) (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 alleged); (and)

(5) That the property was of a value of $_____ (or of some value); [and]

NOTE 1: Use of dangerous weapon alleged. If the specification alleges that the robbery was committed with a dangerous weapon, add the sixth element below:

[(6)] That the means of force or violence or putting in fear was a dangerous weapon, to wit: (state the dangerous weapon alleged).

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) (_____).)

(A "dangerous weapon" refers to something that is used in a manner capable of inflicting death or grievous bodily harm. What constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to kill or inflict grievous bodily harm. "Grievous bodily harm" means a bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of function of a bodily member, organ, or mental faculty.)

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:

For a robbery to be committed by putting the victim in fear, there need be no actual force or violence, but there must be a demonstration of force or menace by which the victim is placed in such fear that the victim is warranted in making no resistance. The fear must be a reasonable apprehension of present or future injury, and the taking must occur while the apprehension exists. The fear required for this offense must be sufficient to justify (state the name of the alleged victim) giving up the property.

NOTE 4: Other instructions. Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea. Instruction 7-16, Variance - Value, Damage, or Amount, and Instruction 7-15, Variance, may be applicable.

3A–46A–1. RECEIVING STOLEN PROPERTY (ARTICLE 122A)

a. MAXIMUM PUNISHMENT:

(1) $1,000 or less: BCD, TF, 1 year, E-1.

(2) Over $1,000: 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, as (he) (she), the said _____, then knew, had been stolen.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully (received) (bought) (concealed) (state the property alleged), of a value of $ _____ (or some value);

(2) That the property belonged to (state the name of the person alleged);

(3) That the property had been stolen by some person other than the accused; and

(4) That, at the time the accused (received) (bought) (concealed) the property, (he) (she) knew it was stolen.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Wrongful" means without legal justification or excuse.

NOTE 1: Elements of larceny. The military judge should list here the elements of larceny, including pertinent definitions and supplemental instructions. See Instruction 3a-45-1.

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.

3A–47–1. OFFENSES CONCERNING GOVERNMENT COMPUTERS (ARTICLE 123)

a. MAXIMUM PUNISHMENT:

(1) Unauthorized distribution of classified information obtained from Government computer: DD, TF, 10 years, E-1.

(2) Unauthorized access of Government computer and obtaining classified or other protected information: DD, TF, 5 years, E-1.

(3) Causing damage to Government computer: DD, TF, 10 years, E-1.

b. MODEL SPECIFICATIONS:

Unauthorized Distribution of Classified Information Obtained from a Government Computer:

In that _____ (personal jurisdiction data), did, (at/on board—location), (on or about _____) (from about _____ to about ____), knowingly access a government computer with an unauthorized purpose and obtained classified information, to wit: _____, with reason to believe the information could be used to injure the United States or benefit a foreign nation, and intentionally (communicated) (delivered) (transmitted) (caused to be communicated/delivered/transmitted) such information to _____, a person not entitled to receive it.

Accessing a Computer and Obtaining Information:

In that _____ (personal jurisdiction data), did, (at/on board—location), (on or about _____) (from about ____ to about ____), intentionally access a government computer with an unauthorized purpose and thereby knowingly obtained (classified) (protected) information, to wit: _____, from such government computer.

Causing Damage by a Computer Contaminate:

In that _____ (personal jurisdiction data), did, (at/on board—location), (on or about _____) (from about _____ to about _____), knowingly cause the transmission of a program, information, code, or command, and as a result, intentionally and without authorization caused damage to a government computer.

c. ELEMENTS:

Unauthorized Distribution of Classified Information Obtained from a Government Computer:

(1) That (state the time and place alleged), the accused knowingly accessed a Government computer with an unauthorized purpose;

(2) That the accused, thereby, obtained classified information, to wit: (here describe the classified information generally, in an unclassified manner);

(3) That the accused had reason to believe the information could be used to the injury of the United States or to the advantage of any foreign nation; and

(4) That the accused intentionally (communicated) (delivered) (transmitted) (caused to be communicated/delivered/transmitted) such information to _____, a person not entitled to receive it.

Unauthorized Distribution of Classified Information Obtained from a Government Computer:

(1) That (state the time and place alleged), the accused intentionally accessed a Government computer with an unauthorized purpose; and

(2) That the accused thereby obtained classified or other protected information, to wit: (here describe the classified or other protected information generally, in an unclassified manner), from any such Government computer.

Causing Damage to a Government Computer:

(1) That (state the time and place alleged), the accused knowingly caused the transmission of a program, information, code, or command; and;

(2) That the accused, as a result, intentionally and without authorization, caused damage to a Government computer.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Government computer” means a computer owned or operated by or on behalf of the United States Government.

“Computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device. A portable computer, including a smart

phone, is a computer under this definition. However, such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

("Access" means to gain entry to, instruct, cause input to, cause output from, cause data processing with, or communicate with, the logical, arithmetical, or memory function resources of a computer.)

("With an unauthorized purpose" may refer to more than one unauthorized purpose, or an unauthorized purpose in conjunction with an authorized purpose. The phrase covers persons accessing government computers without any authorization, that is. "outsiders," as well as persons with authorization who access government computers for an improper purpose or who exceed their authorization, that is, "insiders." The key criterion to determine "unauthorized purpose" is whether the person intentionally used the computer for a purpose that was clearly contrary to the interests or intent of the authorizing party.)

("Classified information" means any information or material that has been determined by an official of the United States pursuant to law, an Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security (and any restricted data, which means, all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to applicable law).

"National security" means the national defense and foreign relations of the United States.)

("Protected information" includes non-classified Personally Identifiable Information (PII), as well as information designated as Controlled Unclassified Information (CUI) by the Secretary of Defense, and information designated as For Official Use Only (FOUO), Law Enforcement Sensitive (LES), Unclassified Nuclear Information (UCNI), and Limited Distribution.)

("Damage" means any impairment to the integrity or availability of data, a program, a system, or information.)

NOTE: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge) (Intent), is ordinarily applicable. Instruction 5-11, Ignorance or Mistake of Fact may be applicable.

3A–47A–1. CHECK, WORTHLESS, WITH INTENT TO DEFRAUD (ARTICLE 123A)

NOTE 1: Using this specification. This is a different offense from Instruction 3a-47a-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 US v. Wade, 34 CMR 287 (CMA 1964).

a. MAXIMUM PUNISHMENT: (If "mega-spec" alleged, see US v. Mincey, 42 MJ 376 (CAAF 1995)).

(1) $1,000 or less: BCD, TF, 6 months, and E-1.

(2) More than $1,000: 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 (check) (draft) (money order) drawn upon the _____ (Bank) (_____), to wit: (describe the check, draft, money order, or, if set forth in the specification, make reference to it);

(2) That the accused did so for the purpose of procuring an article or thing of value, to wit: (state the article/thing alleged);

(3) That the accused committed the act with intent to defraud; and

(4). That, at the time of the (making) (drawing) (uttering) (delivering) of the instrument, the accused knew that (he/she) (the maker/drawer) did not or would not

have sufficient (funds in) (credit with) the (bank) (depository) for the payment thereof in full upon its presentment.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

((“Making”) (“Drawing”) refers to the act of writing and signing the instrument.)

(“Uttering” means transferring, or offering to transfer, the instrument to another.)

(“Delivering” means transferring the instrument to another.)

“For the purpose of procuring” means for the purpose of obtaining any article or thing value. It is not necessary that an article or thing of value actually be obtained.

“Intent to defraud” means an intent to obtain, through a misrepresentation, an article or thing of value and to apply it to one’s own use and benefit or to the use and benefit of another, either temporarily or permanently.

(“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 been rendered unavailable for payment by garnishment, attachment, or other legal procedures.)

(“Credit” means an arrangement or understanding, express or implied, with the (bank) (depository) for the payment of a check, draft, or money order.)

(“Upon its presentment” refers to the time the demand for payment is made upon presentation of the instrument to the (bank) (depository) on which it was drawn.)

((“Bank”) (“Depository”) means any business regularly but not necessarily exclusively engaged in public banking activities.”)

NOTE 2: <u>Inference of guilty intent or knowledge</u>. 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 US 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 US v. Wallace, 36 CMR 148 (CMA 1966), US v. Allberry, 44 MJ 226 (CAAF 1996); US 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 US v. Walter, 23 CMR 275 (CMA 1957), and US 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: 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.

3A–47A–2. CHECK, WORTHLESS, WITH INTENT TO DECEIVE (ARTICLE 123A)

NOTE 1: Using this specification. This is a different offense from Instruction 3a-47a-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 US v. Wade, 34 CMR 287 (CMA 1964); US 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 US 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 (check) (draft) (money order) drawn upon the _____ (Bank) (_____), to wit: (describe the check, draft, money order, or, if set forth in the specification, make reference to it);

(2) That the accused did so for the purpose of (effecting the payment of a past due obligation) (_____);

(3) That the accused committed the act with intent to deceive; and

(4) That, at the time of the (making) (drawing) (uttering) (delivering) of the instrument, the accused knew that (he) (she) (the maker/drawer) did not or would not

have sufficient (funds in) (credit with) the (bank) (depository) for the payment thereof in full upon its presentment.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

((“Making”) (“Drawing”) refers to the act of writing and signing the instrument.)

(“Uttering” means transferring, or offering to transfer, the instrument to another.)

(“Delivering” means transferring the instrument to another.)

(“For the payment of any past due obligation” means for the purpose of satisfying in whole or in part any past due obligation. A “past due obligation” is an obligation to pay money, which obligation has legally matured before (making) (drawing) (uttering) (delivering) the instrument.)

“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.

(“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 been rendered unavailable for payment by garnishment, attachment, or other legal procedures.)

(“Credit” means an arrangement or understanding, express or implied, with the (bank) (depository) for the payment of a check, draft, or money order.)

(“Upon its presentment” refers to the time the demand for payment is made upon presentation of the instrument to the (bank) (depository) on which it was drawn.)

NOTE 2: Gambling debts and checks for gambling funds. In US 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 US v. Wallace, 36 CMR 148 (CMA 1966), US v. Allberry, 44 MJ 226 (CAAF 1996); US 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 US v. Walter, 23 CMR 275 (CMA 1957), and US 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: 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.

3A–48–1. MAKING FALSE CLAIM (ARTICLE 124)

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 claim was (false) (fraudulent) (false and fraudulent) in that (state the particulars alleged); and

(3) That, at the time the accused made the claim, (he) (she) knew it was (false) (fraudulent) (false and fraudulent) in that (state the particulars alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “claim” is a demand for a transfer of ownership of money or property. (A claim does not include requisitions for the mere use of 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.

3A–48–2. PRESENTING FALSE CLAIM (ARTICLE 124)

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 said _____ 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) to a person in the (civil) (military) service of the United States having authority to (approve) (pay) (approve and pay) a certain claim against (the United States) (_____, an officer of the United States), such a claim for (state the nature and amount of the alleged claim);

(2) That the claim was (false) (fraudulent) (false and fraudulent) in that (state the particulars alleged); and

(3) That, at the time the accused presented the claim, (he) (she) knew it was (false) (fraudulent) (false and fraudulent) in that (state the particulars alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “claim” is a demand for a transfer of ownership of money or property. (A claim does not include requisitions for the mere use of 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.

3A–48–3. MAKING OR USING FALSE WRITING IN CONNECTION WITH A CLAIM (ARTICLE 124)

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), as (he) (she), the said _____, then knew, contained a statement that _____, which statement was (false) (fraudulent) (false and fraudulent) 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) (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), to wit: (state the contents of the statement(s) alleged), which (was) (were) (false) (fraudulent) (false and fraudulent) in that (state the particulars alleged);

(3) That, at the time the accused (made) (used) (made and used) the (writing) (paper), (he) (she) knew that (this) (such) (a) statement(s) (was) (were) (false) (fraudulent) (false and fraudulent); and

(4) 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. (A claim does not include requisitions for the mere use of property.)

(The offense of making a writing or other paper known to contain a false or fraudulent statement for the purpose of obtaining the approval, allowance, or payment of a claim is complete when the writing or paper is made for that purpose, whether or not any use of the paper has been attempted and whether or not the claim has been presented.)

("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.

("Material" means it must have a tendency to mislead governmental officials in their consideration or investigation of 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.

3A–48–4. MAKING FALSE OATH IN CONNECTION WITH A CLAIM (ARTICLE 124)

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 said _____ 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. (A claim does not include requisitions for the mere use of property.)

“False” means a deliberate misrepresentation of a material fact that is made with the intent to defraud another.

“Material” means it must have a tendency to mislead government officials in their consideration or investigation of the claim.

"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 pledge that binds the person to speak the truth.

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: <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 (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: <u>Proving that the accused did not believe the statement to be true</u>. 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: <u>Other instructions</u>. Instruction 5-11, <u>Ignorance or Mistake of Fact or Law</u>, may be applicable. Instruction 7-3, <u>Circumstantial Evidence</u> (Knowledge), is ordinarily applicable.

3A–48–5. FORGING OR COUNTERFEITING SIGNATURE IN CONNECTION WITH A CLAIM (ARTICLE 124)

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 claim does not include requisitions for the mere use of 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.

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

3A–48–6. USING FORGED SIGNATURE IN CONNECTION WITH A CLAIM (ARTICLE 124)

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: _____, then knowing such signature to be (forged) (counterfeited) (forged and counterfeited).

c. ELEMENTS:

(1) That the accused used the (forged) (counterfeited) (forged and counterfeited) signature of (state the name of the person alleged), on a certain (writing) (paper), namely, (state the writing or paper alleged);

(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 claim does not include requisitions for the mere use of property.

A ("forged") ("counterfeited") ("forged and counterfeited") signature is any fraudulently made signature of another whether or not an attempt was made to imitate the handwriting of the other person.

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

3A–48–7. DELIVERING AMOUNT LESS THAN CALLED FOR BY RECEIPT (ARTICLE 124)

a. MAXIMUM PUNISHMENT:

(1) $1000.00 or less: BCD, TF, 6 months, E-1.

(2) Over $1000.00: 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 (state the money/property alleged), (money) (property) of the United States (furnished) (intended) (furnished and intended) for the armed forces;

(2) That the accused obtained 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), a person who had authority to receive it, (an amount) (a quantity) of this (money) (property) which (he) (she) knew was less than the (amount) (quantity) specified in the (receipt) (certificate); and

(4) That the undelivered (money) (property) was of the value of (state the value alleged).

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.

3A–48–8. MAKING OR DELIVERING RECEIPT WITHOUT KNOWLEDGE IT IS TRUE (ARTICLE 124)

a. MAXIMUM PUNISHMENT:

(1) $1000.00 or less: BCD, TF, 6 months, E-1.

(2) Over $1000.00: 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 the 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 the accused was authorized to (make) (deliver) (make 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;

(2) That (state the time and place alleged) the accused (made) (delivered) (made 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);

(3) That, at the time the accused (made) (delivered) (made 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 (made) (delivered) (made 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).

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.

3A–48A–1. BRIBERY–ASKING, ACCEPTING, OR RECEIVING (ARTICLE 124A)

a. MAXIMUM PUNISHMENT: DD, TF, 5 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)) service (rendered) (to be rendered).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully (asked for) (accepted) (received) (state the thing of value alleged), a thing of value, 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 thing of value with the intent to have (his) (her) (decision) (action) influenced with respect to (state the matter alleged); and

(4) That (state the matter alleged) was an official matter in which the United States was interested.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Wrongfully” means without legal justification or excuse.

NOTE: <u>Other instructions</u>. Instruction 7-3, <u>Circumstantial Evidence</u> (Intent), may be applicable.

3A–48A–2. BRIBERY–PROMISING, OFFERING, OR GIVING (ARTICLE 124A)

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 (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).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully (promised) (offered) (gave) (state the thing of value alleged), a thing of value, 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 thing of value was (promised) (offered) (given) with the intent to influence the (decision) (action) of (state the name of the person alleged) with respect to (state the matter alleged); and

(4) That (state the matter alleged) was an official matter in which the United States was interested.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Wrongfully” means without legal justification or excuse.

NOTE: <u>Other instructions</u>. Instruction 7-3, <u>Circumstantial Evidence</u> (Intent), may be applicable.

3A–48B–1. GRAFT–ASKING, ACCEPTING, OR RECEIVING (ARTICLE 124B)

a. MAXIMUM PUNISHMENT: 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) $_____) (_____), (rendered or to be rendered) by (him) (her) the said _____ in relation to) an official matter in which the United States was 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 (asked for) (accepted) (received) (state the thing of value alleged), a thing of value, 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 thing of value (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); and

(4) That (state the matter alleged) was an official matter in which the United States was interested.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Wrongfully” means without legal justification or excuse.

NOTE: <u>Other instructions</u>. Instruction 7-3, <u>Circumstantial Evidence</u> (Intent), may be applicable.

3A–48B–2. GRAFT–PROMISING, OFFERING, OR GIVING (ARTICLE 124B)

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 (promise) (offer) (give) to _____, ((his) (her) commanding officer) (the claims officer of _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____, (rendered or to be rendered) by the said _____ in relation to) an official matter in which the United States was 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 (promised) (offered) (gave) (state the thing of value alleged), a thing of value, 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 thing of value was (promised) (offered) (given) (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); and

(4) That (state the matter alleged) was an official matter in which the United States was interested.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Wrongfully” means without legal justification or excuse.

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

3A–49–1. KIDNAPPING (ARTICLE 125)

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 _____, 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 (his) (her) will; and

(3) That the accused did so wrongfully.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("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 destination 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.)

"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 holding need not have been for financial or personal gain or for any other particular purpose.)

“Wrongfully” means without justification or excuse. (For example, a law enforcement official may justifiably apprehend and detain, by force if reasonably necessary, a person reasonably believed to have committed an offense.)

3A–50–1. ARSON–AGGRAVATED–INHABITED DWELLING (ARTICLE 126)

a. MAXIMUM PUNISHMENT: DD, TF, 25 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: (a house) (an apartment) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (burned) (set on fire) an inhabited dwelling, that is: (state the inhabited dwelling alleged); and

(2) 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 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 the structure must be used for habitation, not that a human being must be present therein at the time the dwelling is burned or set on fire. It includes the outbuildings that form part of the cluster of buildings used as a residence. (A shop or store is not an inhabited dwelling unless occupied as such, nor is a house that has never been occupied or which has been temporarily abandoned.)

(A person may be found guilty of burning their own dwelling, whether they are an owner or tenant of said dwelling).

(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.)

e. REFERENCES: US v. Acevedo-Velez, 17 MJ 1 (CMA 1983); US v. Caldwell, 17 MJ 8 (CMA 1983); US v. DeSha, 23 MJ 66 (CMA 1986); US v. Banta, 26 MJ 109 (CMA 1988); US v. Crutcher, 49 MJ 236 (CAAF 1998).

3A–50–2. ARSON–AGGRAVATED–STRUCTURE (ARTICLE 126)

a. MAXIMUM PUNISHMENT: DD, TF, 25 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), knowing that a human being was therein at the time, (the Post Theater) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (burned) (set on fire) a certain structure, that is: (state the structure alleged);

(2) That the act was willful and malicious;

(3) That there was a human being in the structure at the time; and

(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.

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.

A "structure" is any structure, other than an "inhabited dwelling," movable or immovable, such as a theater, church, boat, trailer, tent, auditorium, or any other sort of shelter or edifice, whether public or private.

(Knowledge that a human being is inside the structure may be proved by circumstantial evidence. For example, evidence that a department store or theatre was set on fire during hours of business may be circumstantial evidence from which you may infer that

the person who set the fire knew a human being was inside the structure. The drawing of this inference is not required.)

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

e. REFERENCES: US v. Acevedo-Velez, 17 MJ 1 (CMA 1983); US v. Caldwell, 17 MJ 8 (CMA 1983); US v. DeSha, 23 MJ 66 (CMA 1986); US v. Banta, 26 MJ 109 (CMA 1988); US v. Crutcher, 49 MJ 236 (CAAF 1998).

3A–50–3. ARSON–SIMPLE (ARTICLE 126)

a. MAXIMUM PUNISHMENT:

(1) $1000 or less: DD, TF, 5 years, E-1.

(2) Over $1000: 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) (an automobile) (_____), (of some value) (of a value of more than $1000) the property of another.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (burned) (set fire to) certain property, that is: (state the property alleged), the property of another; (and)

(2) That the act was willful and malicious; [and]

[(3)] That the property was of a value of more than $1000.

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.

“Property” means real or personal property of someone other than the accused.

There is no requirement that the accused specifically intend to set fire to or burn the property 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 property of another alleged.

(Proof that the property 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.)

e. REFERENCES: US v. Acevedo-Velez, 17 MJ 1 (CMA 1983); US v. Caldwell, 17 MJ 8 (CMA 1983); US v. DeSha, 23 MJ 66 (CMA 1986); US v. Banta, 26 MJ 109 (CMA 1988); US v. Crutcher, 49 MJ 236 (CAAF 1998).

3A–50–4. BURNING WITH INTENT TO DEFRAUD (ARTICLE 126)

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) (_____), with intent to defraud (the insurer thereof, to wit: _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (burned) (set fire to) certain property, that is: (state the property alleged);

(2) That the act was willful and malicious; and

(3) That such (burning) (setting on fire) was with the intent to defraud (state the name of the person or organization alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

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.

3A–51–1. 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, to wit: ____) (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 threat to (state the name of the person to whom the threat was allegedly communicated), to wit: (state the language alleged), or words to that effect; and

(2) That the accused thereby intended to unlawfully obtain (something of value, to wit: ____) (an acquittance) (an advantage, to wit: _____) (an immunity, to wit: _____).

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) (_____). The actual or probable success of the extortion need not be proved.

A threat may be communicated by any means but must 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 impute any deformity or disgrace 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 make a person do an act against his/her will is not, by itself, sufficient to constitute extortion.)

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. Refer to instructions and NOTES accompanying Communicating a Threat, 3a-39-1 and US v. Rapert, 75 MJ 164 (CAAF 2016).

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.

3A–52–1. SIMPLE ASSAULT (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:

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) by (state the manner alleged);

(2) That the (attempt) (offer) was done unlawfully; (and)

(3) That the (attempt) (offer) was done with force or violence; [and]

NOTE 2: <u>Unloaded firearm</u>. If the specification alleges an assault with an unloaded firearm, add the following element:

(4) That the (attempt) (offer) was done with an unloaded firearm.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 3: <u>Assault by attempt</u>. If the specification alleges an attempt to do bodily harm, give the following instruction:

An “assault” is an unlawful attempt, made with force or violence, to do bodily harm to another, whether or not the attempt is consummated. The accused must have committed an overt act with the specific intent to inflict bodily harm. An “overt act” is an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. It is not necessary that bodily harm be actually inflicted.

“Bodily harm” means an offensive touching of another, however slight.

An attempt to do bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 4: Assault by offer. If the specification alleges an offer to do bodily harm, give the following instruction:

An "assault" is an unlawful offer, made with force or violence, to do bodily harm to another, whether or not the offer is consummated. The accused must have made a demonstration of violence, either by an intentional or by a culpably negligent act or omission, which created in the mind of the victim a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required. It is not necessary that bodily harm be actually inflicted.

"Bodily harm" means an offensive touching of another, however slight.

An offer to do bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

("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.)

(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, if the combination constitutes a demonstration of violence.)

NOTE 5: Unloaded firearm alleged. If a unloaded 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.

3A–52–2. 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) by (state the manner alleged);

(2) That the bodily harm was done unlawfully; and

(3) That the bodily harm was done with force or violence.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An assault in which bodily harm is inflicted is called a “battery.” A “battery” is an unlawful infliction of bodily harm to another, made with force or violence, by an intentional (or a culpably negligent) act or omission.

“Bodily harm” means an offensive touching of another, however slight.

An infliction of bodily harm is “unlawful” if done without legal justification or excuse and without the lawful consent of the victim.

(“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.)

3A–52–3. 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) by (state the alleged manner of the assault or battery);

(2) That the (attempt) (offer) (bodily harm) was done unlawfully;

(3) That the (attempt) (offer) (bodily harm) was done with 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:

NOTE 1: <u>Assault by attempt</u>. If the specification alleges an attempt to do bodily harm, give the following instruction:

An "assault" is an unlawful attempt, made with force or violence, to do bodily harm to another, whether or not the attempt is consummated. The accused must have committed an overt act with the specific intent to inflict bodily harm. An "overt act" is an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. It is not necessary that bodily harm be actually inflicted.

"Bodily harm" means an offensive touching of another, however slight.

An attempt to do bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 2: <u>Assault by offer</u>. If the specification alleges an offer to do bodily harm, give the following instruction:

An "assault" is an unlawful offer, made with force or violence, to do bodily harm to another, whether or not the offer is consummated. The accused must have made a demonstration of violence, either by an intentional or by a culpably negligent act or omission, which created in the mind of the victim a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required. It is not necessary that bodily harm be actually inflicted.

"Bodily harm" means an offensive touching of another, however slight.

An offer to do bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

("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.)

(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, if the combination constitutes a demonstration of violence.)

NOTE 3: <u>Assault by battery</u>. If the specification alleges an assault by battery, give the following instruction:

An assault in which bodily harm is inflicted is called a "battery." A "battery" is an unlawful infliction of bodily harm to another, made with force or violence, by an intentional (or a culpably negligent) act or omission.

"Bodily harm" means an offensive touching of another, however slight.

An infliction of bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

("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: Superior status/execution of office. The following instructions may be provided, if necessary.

(It is not necessary that the victim be superior in rank or command to the accused, or in the same armed force as the accused.)

(It is not necessary that the victim be in the execution of office at the time of assault.)

NOTE 5: 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 that 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.

3A–52–4. 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) by (state the alleged manner of the assault or battery);

(2) That the (attempt) (offer) (bodily harm) was done unlawfully;

(3) That the (attempt) (offer) (bodily harm) was done with 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) (Navy) (Marine Corps) (Air Force) (Coast Guard); 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) (Navy) (Marine Corps) (Air Force) (Coast Guard).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 1: <u>Assault by attempt</u>. If the specification alleges an attempt to do bodily harm, give the following instruction:

An “assault” is an unlawful attempt, made with force or violence, to do bodily harm to another, whether or not the attempt is consummated. The accused must have

committed an overt act with the specific intent to inflict bodily harm. An "overt act" is an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. It is not necessary that bodily harm be actually inflicted.

"Bodily harm" means an offensive touching of another, however slight.

An attempt to do bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 2: <u>Assault by offer</u>. If the specification alleges an offer to do bodily harm, give the following instruction:

An "assault" is an unlawful offer, made with force or violence, to do bodily harm to another, whether or not the offer is consummated. The accused must have made a demonstration of violence, either by an intentional or by a culpably negligent act or omission, which created in the mind of the victim a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required. It is not necessary that bodily harm be actually inflicted.

"Bodily harm" means an offensive touching of another, however slight.

An offer to do bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

("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.)

(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, if the combination constitutes a demonstration of violence.)

NOTE 3: Assault by battery. If the specification alleges an assault by battery, give the following instruction:

An assault in which bodily harm is inflicted is called a "battery." A "battery" is an unlawful infliction of bodily harm to another, made with force or violence, by an intentional (or a culpably negligent) act or omission.

"Bodily harm" means an offensive touching of another, however slight.

An infliction of bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

("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: Superior status/execution of office. The following instructions may be provided, if necessary.

(It is not necessary that the victim be superior in rank or command to the accused, or in the same armed force as the accused.)

(It is not necessary that the victim be in the execution of office at the time of assault.)

NOTE 5: 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 that 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.

3A–52–5. 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 _____) 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) by (state the manner alleged);

(2) That the (attempt) (offer) (bodily harm) was done unlawfully;

(3) That the (attempt) (offer) (bodily harm) was done with 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.

NOTE 1: <u>Assault by attempt</u>. If the specification alleges an attempt to do bodily harm, give the following instruction:

An “assault” is an unlawful attempt, made with force or violence, to do bodily harm to another, whether or not the attempt is consummated. The accused must have committed an overt act with the specific intent to inflict bodily harm. An “overt act” is an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. It is not necessary that bodily harm be actually inflicted.

“Bodily harm” means an offensive touching of another, however slight.

An attempt to do bodily harm is “unlawful” if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 2: <u>Assault by offer</u>. If the specification alleges an offer to do bodily harm, give the following instruction:

An “assault” is an unlawful offer, made with force or violence, to do bodily harm to another, whether or not the offer is consummated. The accused must have made a demonstration of violence, either by an intentional or by a culpably negligent act or omission, which created in the mind of the victim a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required. It is not necessary that bodily harm be actually inflicted.

“Bodily harm” means an offensive touching of another, however slight.

An offer to do bodily harm is “unlawful” if done without legal justification or excuse and without the lawful consent of the victim.

(“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.)

(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, if the combination constitutes a demonstration of violence.)

NOTE 3: Assault by battery. If the specification alleges an assault by battery, give the following instruction:

An assault in which bodily harm is inflicted is called a "battery." A "battery" is an unlawful infliction of bodily harm to another, made with force or violence, by an intentional (or a culpably negligent) act or omission.

"Bodily harm" means an offensive touching of another, however slight.

An infliction of bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

("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: Divestiture of status. When the issue has arisen as to whether the lookout or sentinel has conducted himself or herself in a manner that 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 that 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.

3A–52–6. 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) by (state the manner alleged);

(2) That the (attempt) (offer) (bodily harm) was done unlawfully;

(3) That the (attempt) (offer) (bodily harm) was done with 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 (military police) (law enforcement) (_____) 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.

NOTE 1: <u>Assault by attempt</u>. If the specification alleges an attempt to do bodily harm, give the following instruction:

An “assault” is an unlawful attempt, made with force or violence, to do bodily harm to another, whether or not the attempt is consummated. The accused must have committed an overt act with the specific intent to inflict bodily harm. An “overt act” is an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. It is not necessary that bodily harm be actually inflicted.

“Bodily harm” means an offensive touching of another, however slight.

An attempt to do bodily harm is “unlawful” if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 2: <u>Assault by offer</u>. If the specification alleges an offer to do bodily harm, give the following instruction:

An “assault” is an unlawful offer, made with force or violence, to do bodily harm to another, whether or not the offer is consummated. The accused must have made a demonstration of violence, either by an intentional or by a culpably negligent act or omission, which created in the mind of the victim a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required. It is not necessary that bodily harm be actually inflicted.

“Bodily harm” means an offensive touching of another, however slight.

An offer to do bodily harm is “unlawful” if done without legal justification or excuse and without the lawful consent of the victim.

(“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.)

(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, if the combination constitutes a demonstration of violence.)

NOTE 3: Assault by battery. If the specification alleges an assault by battery, give the following instruction:

An assault in which bodily harm is inflicted is called a "battery." A "battery" is an unlawful infliction of bodily harm to another, made with force or violence, by an intentional (or a culpably negligent) act or omission.

"Bodily harm" means an offensive touching of another, however slight.

An infliction of bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

("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: 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 that 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.

3A–52–7. BATTERY UPON A CHILD UNDER THE AGE OF 16, SPOUSE, INTIMATE PARTNER, OR IMMEDIATE FAMILY MEMBER (ARTICLE 128)

NOTE 1: The offenses of Battery upon a Spouse, Intimate Partner, or Immediate Family Member, new to the MCM after FY17 NDAA, applies to offenses allegedly committed on or after 1 January 2019.

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) (the spouse of the accused) (the intimate partner of the accused) (an immediate family member of the accused), (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) by (state the manner alleged);

(2) That the bodily harm was done unlawfully;

(3) That the bodily harm was done with force or violence; and

(4) That (state the name of the alleged victim) was then (a child under the age of 16 years) (the spouse of the accused) (the intimate partner of the accused) (an immediate family member of the accused).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An assault in which bodily harm is inflicted is called a “battery.” A “battery” is an unlawful infliction of bodily harm to another, made with force or violence, by an intentional (or a culpably negligent) act or omission.

“Bodily harm” means an offensive touching of another, however slight.

An infliction of bodily harm is “unlawful” if done without legal justification or excuse and without the lawful consent of the victim.

("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.)

("Immediate family member" means the accused's spouse, parent, brother or sister, child, or other person to whom the accused stands in loco parentis; or any other person living in the accused's household and related to the accused by blood or marriage.)

("Intimate partner" includes the following: a former spouse of the accused, a person who shares a child in common with the accused, or a person who cohabitates with or has cohabitated as a spouse with the accused; or a person who has been in a social relationship of a romantic or intimate nature with the accused, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the person and the accused.)

NOTE 2: Accused's knowledge of child's age. When the alleged victim is a child under the age of 16 years, the following instruction may be appropriate.

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 battery upon a child even if the accused reasonably believed that (state the name of the alleged victim) was at least 16 years old.

3A–52–8. AGGRAVATED ASSAULT–DANGEROUS WEAPON (ARTICLE 128)

a. MAXIMUM PUNISHMENT:

(1) With a loaded firearm: DD, TF, 8 years, E-1.

(2) Committed upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member of accused: DD, TF, 5 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 _____, with the intent to inflict bodily harm, commit an assault upon _____ [(a child under the age of 16 years) (spouse of the accused) (intimate partner of the accused) (an immediate family member of the accused)] by (shooting) (pointing) (striking) (cutting) (_____) (at (him) (her)) with a dangerous weapon, to wit: a (loaded firearm) (pickax) (bayonet) (club) (_____).

c. ELEMENTS:

(1) That, (state the time and place alleged), the accused assaulted (state the name of the alleged victim) by offering to do bodily harm to him/her;

(2) That the accused did so by (state the manner alleged) with a certain weapon, to wit: (state the weapon alleged).

(3) That the accused intended to do bodily harm; (and)

(4) That the weapon was a dangerous weapon; [and]

NOTE 1: Loaded firearm alleged. When a loaded firearm is alleged, add the following element.

[(5)] That the weapon was a loaded firearm; [and]

NOTE 2: Protected person alleged. When the alleged victim is a protected person, add the following element.

[(5) or (6)] That, at the time, (state the name of the alleged victim) was (a child under the age of 16 years) (the spouse of the accused) (the intimate partner of the accused) (an immediate family member of the accused).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An “assault” is an unlawful offer, made with force or violence, to do bodily harm to another, whether or not the offer is consummated.

An “offer to do bodily harm” is an unlawful demonstration of violence, by an intentional act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. (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.)

“Bodily harm” means an offensive touching of another, however slight.

It is not necessary that bodily harm be actually inflicted. However, the accused must have intended to do bodily harm.

Intent to do bodily harm may be proved by circumstantial evidence. When bodily harm has been inflicted by means of intentionally using force in a manner capable of achieving that result, it may be inferred that the bodily harm was intended.

An offer to do bodily harm is “unlawful” if done without legal justification or excuse and without the lawful consent of the victim.

A weapon is a “dangerous weapon” when used in a manner capable of inflicting death or grievous bodily harm. What constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to kill or inflict grievous bodily harm.

“Grievous bodily harm” means a bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

("Immediate family member" means the accused's spouse, parent, brother or sister, child, or other person to whom the accused stands in loco parentis; or any other person living in the accused's household and related to the accused by blood or marriage.)

("Intimate partner" includes the following: a former spouse of the accused, a person who shares a child in common with the accused, or a person who cohabitates with or has cohabitated as a spouse with the accused; or a person who has been in a social relationship of a romantic or intimate nature with the accused, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the person and the accused.)

NOTE 3: 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 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 4: 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 16 years of age is not an element of this offense. [The accused's belief that (state the name of the alleged victim) was (____ years old) (16 years or older) is not a defense to this offense.]

NOTE 5: Consent as a defense. Under certain circumstances, consent may be a defense to simple assault or assault consummated by a battery. See US v. Arab, 55 M.J. 508 (A. Ct. Crim. App. 2001). Consent is not generally a defense to aggravated assault. See US v. Bygrave, 46 M.J. 491 (CAAF 1997). However, even in aggravated assault cases, military judges must carefully examine the facts and law to determine whether consent is a possible defense. If the judge determines that consent is not a defense, the following instruction may be given, if necessary.

A victim may not lawfully consent to an assault with a dangerous weapon. Consent is not a defense to this offense.

3A–52–9. AGGRAVATED ASSAULT–SUBSTANTIAL BODILY HARM (ARTICLE 128)

NOTE 1: This offense, new to the MCM after FY17 NDAA, applies to offenses allegedly committed on or after 1 January 2019.

a. MAXIMUM PUNISHMENT:

(1) With a loaded firearm: DD, TF, 8 years, E-1.

(2) Committed upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member of the accused: DD, TF, 6 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) (spouse of the accused) (intimate partner of the accused) (an immediate family member of the accused)] by (shooting) (striking) (cutting) (_____) (him) (her) (on) the _____ with a (loaded firearm) (club) (rock) (brick) (_____) and did thereby inflict substantial bodily harm upon (him) (her), to wit: (severe bruising of the face) (head concussion) (temporary blindness) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused assaulted (state the name of the alleged victim) by (state the manner alleged); (and)

(2) That substantial bodily harm was thereby inflicted upon (state the name of the alleged victim), to wit: (_____); [and]

NOTE 2: <u>Loaded firearm alleged</u>. When a loaded firearm is alleged, add the following element:

[(3)] That the injury was inflicted with a loaded firearm; [and]

NOTE 3: <u>Protected person alleged</u>. When the alleged victim is a protected person, add the following element.

[(3) or (4)] That, at the time, (<u>state the name of the alleged victim</u>) was (a child under the age of 16 years) (the spouse of the accused) (the intimate partner of the accused) (an immediate family member of the accused).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An assault in which bodily harm is inflicted is called a “battery.” A “battery” is an unlawful infliction of bodily harm to another, made with force or violence, by an intentional (or a culpably negligent) act or omission.

(“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.)

An infliction of bodily harm is “unlawful” if done without legal justification or excuse and without the lawful consent of the victim.

“Bodily harm” means an offensive touching of another, however slight.

“Substantial bodily harm” means a bodily injury that involves a temporary but substantial disfigurement, or a temporary but substantial loss or impairment of function of any bodily member, organ, or mental faculty.

(“Immediate family member” means the accused’s spouse, parent, brother or sister, child, or other person to whom the accused stands in loco parentis; or any other person living in the accused’s household and related to the accused by blood or marriage.)

(“Intimate partner” includes the following: a former spouse of the accused, a person who shares a child in common with the accused, or a person who cohabitates with or has cohabitated as a spouse with the accused; or a person who has been in a social relationship of a romantic or intimate nature with the accused, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the person and the accused.)

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 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: 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 16 years of age is not an element of this offense. [The accused's belief that (state the name of the alleged victim) was (____ years old) (16 years or older) is not a defense to this offense.]

NOTE 6: Consent as a defense. Under certain circumstances, consent may be a defense to simple assault or assault consummated by a battery. See US v. Arab, 55 M.J. 508 (A. Ct. Crim. App. 2001). Consent is not generally a defense to aggravated assault. See US v. Bygrave, 46 M.J. 491 (CAAF 1997). However, even in aggravated assault cases, military judges must carefully examine the facts and law to determine whether consent is a possible defense. If the judge determines that consent is not a defense, the following instruction may be given, if necessary.

A victim may not lawfully consent to an assault in which substantial bodily harm is inflicted. Consent is not a defense to this offense.

3A–52–10. AGGRAVATED ASSAULT–INFLICTING GRIEVOUS BODILY HARM (ARTICLE 128)

a. MAXIMUM PUNISHMENT:

(1) With a loaded firearm: DD, TF, 10 years, E-1.

(2) Committed upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member of the accused: DD, TF, 8 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) (spouse of the accused) (intimate partner of the accused) (an immediate family member of the accused)] by (shooting) (striking) (cutting) (_____) (him) (her) (on) the _____ with a (loaded firearm) (club) (rock) (brick) (_____) and did thereby 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 assaulted (state the name of the alleged victim) by (state the manner alleged); (and)

(2) That grievous bodily harm was thereby inflicted upon (state the name of the alleged victim), to wit: (_____); [and]

NOTE 1: <u>Loaded firearm alleged</u>. When a loaded firearm is alleged, add the following element:

[(3)] That the injury was inflicted with a loaded firearm; [and]

NOTE 2: <u>Protected person alleged</u>. When the alleged victim is a protected person, add the following element.

[(3) or (4)] That, at the time, (<u>state the name of the alleged victim</u>) was (a child under the age of 16 years) (the spouse of he accused) (the intimate partner of the accused) (an immediate family member of the accused).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An assault in which bodily harm is inflicted is called a “battery.” A “battery” is an unlawful infliction of bodily harm to another, made with force or violence, by an intentional (or a culpably negligent) act or omission.

(“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.)

An infliction of bodily harm is “unlawful” if done without legal justification or excuse and without the lawful consent of the victim.

“Bodily harm” means an offensive touching of another, however slight.

“Grievous bodily harm” means a bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(“Immediate family member” means the accused’s spouse, parent, brother or sister, child, or other person to whom the accused stands in loco parentis; or any other person living in the accused’s household and related to the accused by blood or marriage.)

(“Intimate partner” includes the following: a former spouse of the accused, a person who shares a child in common with the accused, or a person who cohabitates with or has cohabitated as a spouse with the accused; or a person who has been in a social relationship of a romantic or intimate nature with the accused, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the person and the accused.)

NOTE 3: <u>Loaded firearm alleged</u>. 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 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 4: <u>Accused's knowledge of child's age</u>. When the alleged victim is a child under the age of 16 years, provide the following instruction:

Knowledge that the person assaulted was under 16 years of age is not an element of this offense. [The accused's belief that (state the name of the alleged victim) was (____ years old) (16 years or older) is not a defense to this offense.]

NOTE 5: <u>Consent as a defense</u>. Under certain circumstances, consent may be a defense to simple assault or assault consummated by a battery. See US v. Arab, 55 M.J. 508 (A. Ct. Crim. App. 2001). Consent is not generally a defense to aggravated assault. See US v. Bygrave, 46 M.J. 491 (CAAF 1997). However, even in aggravated assault cases, military judges must carefully examine the facts and law to determine whether consent is a possible defense. If the judge determines that consent is not a defense, the following instruction may be given, if necessary.

A victim may not lawfully consent to an assault in which grievous bodily harm is inflicted. Consent is not a defense to this offense.

3A–52–11. ASSAULT WITH INTENT TO COMMIT CERTAIN OFFENSES (ARTICLE 128)

a. MAXIMUM PUNISHMENT:

(1) With intent to commit murder, rape, or rape of a child: DD, TF, 20 years, E-1.

(2) With intent to commit voluntary manslaughter, robbery, arson, burglary, or kidnapping: DD, TF, 10 years, E-1.

NOTE 1: Pursuant to his authority under Article 56(a), the President has not established a maximum punishment for assault with intent to commit sexual assault or sexual assault of a child. To determine the maximum punishment, see RCM 1003(c) and US v Beaty, 70 MJ 39 (CAAF 2011).

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, with intent to commit (murder) (voluntary manslaughter) (rape) (rape of a child) (sexual assault) (sexual assault of a child) (robbery) (arson) (burglary) (kidnapping), assault _____ by (striking at (him) (her) with a _____) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused assaulted (state the name of the alleged victim) by (state the manner of the assault or battery alleged); and

(2) That, at the time, the accused intended to (kill) [commit (rape) (rape of a child) (sexual assault) (sexual assault of a child) (robbery) (arson) (burglary) (kidnapping)].

d. DEFINITIONS AND OTHER INSTRUCTIONS:

NOTE 2: Assault by attempt. If the specification alleges (or the facts indicate) an attempt to do bodily harm, give the following instruction:

An “assault” is an unlawful attempt, made with force or violence, to do bodily harm to another, whether or not the attempt is consummated. The accused must have committed an overt act with the specific intent to inflict bodily harm. An “overt act” is an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. It is not necessary that bodily harm be actually inflicted.

“Bodily harm” means an offensive touching of another, however slight.

An attempt to do bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 3: Assault by offer. If the specification alleges (or the facts indicate) an offer to do bodily harm, give the following instruction:

An "assault" is an unlawful offer, made with force or violence, to do bodily harm to another, whether or not the offer is consummated. The accused must have made a demonstration of violence, by an intentional act or omission, which created in the mind of the victim a reasonable apprehension of receiving immediate bodily harm. It is not necessary that bodily harm be actually inflicted.

(Do not provide this instruction when an intent to commit murder or voluntary manslaughter is charged. Otherwise, provide the instruction): Specific intent to inflict bodily harm is not required.

"Bodily harm" means an offensive touching of another, however slight.

An offer to do bodily harm 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, if the combination constitutes a demonstration of violence.)

NOTE 4: Assault by battery. If the specification alleges (or the facts indicate) an assault by battery, give the following instruction:

An assault in which bodily harm is inflicted is called a "battery." A "battery" is an unlawful infliction of bodily harm to another, made with force or violence, by an intentional act or omission.

"Bodily harm" means an offensive touching of another, however slight.

An infliction of bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim.

NOTE 5: 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 6: 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. US 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).

3A–52A–1. MAIMING (ARTICLE 128A)

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 _____, maim _____ by (crushing (his) (her) foot with a sledge hammer) (_____).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused, inflicted upon (state the name of the alleged victim) a certain injury, namely: (state the injury alleged);

(2) That this injury (seriously disfigured the body of (state the name of the alleged victim)) (destroyed or disabled an organ or member 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 member or be of any particular type, but must be such as to impair perceptibility and materially the victim's comeliness.)

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 or cured by surgery.

Maiming requires a specific intent to injure generally 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. Infliction of the type of injuries specified in this article upon the person of another may support an inference of the intent to injure, disfigure, or disable. The drawing of this inference is not required.

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

3A–52B–1. DOMESTIC VIOLENCE (ARTICLE 128B)

a. **MAXIMUM PUNISHMENT**: The President has not yet established any limits on the punishment which a court-martial may direct for this offense. See Article 56(a). The offense is also not yet listed in Part IV of the MCM. Under these circumstances, the maximum punishment should be calculated as prescribed in RCM 1003(c)(1)(B).

b. **MODEL SPECIFICATION**: The President has not yet established model specifications for this offense.

c. **ELEMENTS**:

VIOLENT OFFENSE

(1) That (state the time and place alleged), the accused committed a violent offense against (state the name of the alleged victim), to wit: (state the alleged violent offense); and

(2) That, at the time, (state the name of the alleged victim) was a/an (spouse) (intimate partner) (immediate family member) of the accused.

OFFENSE WITH INTENT TO THREATEN OR INTIMIDATE

(1) That (state the time and place alleged), the accused committed an offense under the Uniform Code of Military Justice against (state the name of the alleged victim against whom the offense was committed) (describe the alleged property or animal against which the offense was committed), to wit: (state the alleged offense);

(2) That the accused committed said offense with an intent to threaten or intimidate (state the name of the alleged victim of the threat or intimidation); and

(3) That, at the time, (state the name of the alleged victim of the threat or intimidation) was a/an (spouse) (intimate partner) (immediate family member) of the accused.

VIOLATION OF PROTECTION ORDER WITH INTENT TO THREATEN OR INTIMIDATE

(1) That (state the time alleged) there existed a protection order applicable to the accused;

(2) That (state the time and place alleged) the accused violated the protection order by (state the manner in which the order was allegedly violated);

(3) That the accused did so with an intent to threaten or intimidate (state the name of the alleged victim of the threat or intimidation); and

(4) That, at the time, (state the name of the alleged victim of the threat or intimidation) was a/an (spouse) (intimate partner) (immediate family member) of the accused.

VIOLATION OF PROTECTION ORDER WITH INTENT TO COMMIT A VIOLENT OFFENSE

(1) That (state the time alleged) there existed a protection order applicable to the accused;

(2) That (state the time and place alleged) the accused violated the protection order by (state the manner in which the order was allegedly violated);

(3) That the accused did so with an intent to commit a violent offense against (state the name of the alleged victim of the intended violent offense), to wit: (state the alleged violent offense); and

(4) That, at the time, (state the name of the alleged victim of the intended violent offense) was a/an (spouse) (intimate partner) (immediate family member) of the accused.

ASSAULT BY STRANGULATION OR SUFFOCATION

(1) That (state the time and place alleged), the accused assaulted (state the name of the alleged victim) by (strangling) (suffocating) him/her; and

(2) That, at the time, (state the name of the alleged victim) was a/an (spouse) (intimate partner) (immediate family member) of the accused.

d. **DEFINITIONS AND OTHER INSTRUCTIONS**:

NOTE 1: The President has not yet promulgated definitions applicable to the offenses in Article 128b. Military Judges should, therefore, consult with counsel to determine the appropriate definitions applicable to the terms used. The following definitions, found in the US Code, may be helpful to that determination: "Immediate family member" and "intimate partner" (10 USC §930, Article 130, UCMJ); "violent offense" (18 USC §16), "protection order" (18 USC §2266), "strangling" and "suffocating" (18 USC §113).

(A "violent offense" means an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another.)

(A "protection order" includes any injunction, restraining order, or any other order issued by a civil court, a criminal court, or a military commander for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person.)

(An assault in which bodily harm is inflicted is called a "battery." A "battery" is an unlawful infliction of bodily harm to another, made with force or violence, by an intentional (or a culpably negligent) act or omission. "Bodily harm" means an offensive touching of another, however slight. An infliction of bodily harm is "unlawful" if done without legal justification or excuse and without the lawful consent of the victim. ("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.))

("Strangling" means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.)

("Suffocating" means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or

both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.)

("Immediate family member" means the accused's spouse, parent, brother or sister, child, or other person to whom the accused stands *in loco parentis*; or any other person living in the accused's household and related to the accused by blood or marriage.)

("Intimate partner" means a former spouse of the accused, a person who shares a child in common with the accused, or a person who cohabitates with or has cohabitated as a spouse with the accused; or a person who has been in a social relationship of a romantic or intimate nature with the accused, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the person and the accused.)

NOTE 2: If the offense alleges that the accused committed a violent offense (Article 128b(1)) or committed an offense against the UCMJ (Article 128b(2)), the Military Judge must advise the members of the elements and appropriate definitions of the alleged offense, as follows.

In order to establish that the accused committed the offense of (state the alleged offense), the government must prove, beyond a reasonable doubt, the following elements:

NOTE 3: If the offense alleges that the accused intended to commit a violent offense (Article 128b(4)), the Military Judge must advise the members of the elements and appropriate definitions of the alleged offense, as follows.

Proof that the accused committed a violent offense is not required. However, the government must prove beyond a reasonable doubt that, at the time of the violation of the protection order, the accused intended every element of the offense of (state the alleged violent offense). The government must also prove beyond a reasonable doubt that the intended offense is a violent offense.

The elements of the intended offense are as follows:

3A–53–1. BURGLARY–SPECIFIED OFFENSES (ARTICLE 129)

NOTE 1: Use this instruction only for burglary offenses involving the intent to commit the offenses punishable under Articles 118 - 120, 120b-121, 122, 125-128a, and 130. Where the intent is to commit any other offense, use instruction 3a-53-2.

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 _____, unlawfully break and enter the (building) (structure) of _____, to wit: _____, with intent to commit an offense under the Uniform Code of Military Justice therein, to wit: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused unlawfully broke and entered the building or structure of (state the person alleged), to wit: (state the building/structure alleged); and

(2) That the breaking and entering were done with the intent to commit (state the offense alleged), an offense punishable under the Uniform Code of Military Justice.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “breaking” may be actual or constructive. Merely entering 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 screen 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.

An "entry" must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient. Insertion into the house of any tool or other instrument is also a sufficient entry, unless the insertion is solely to facilitate the breaking or entry.

An entry is "unlawful" if it is made without the consent of any person authorized to consent to entry or without other lawful authority.

(A "building" includes a room, shop, store, office, or apartment in a building.)

("Structure" refers to only those structures which are in the nature of a building or dwelling. Examples include: A stateroom, hold, or other compartment of a vessel; an inhabitable trailer; an enclosed truck or freight car; a tent; a houseboat.)

It is not necessary that the building or structure be in use at the time of entry.

> ***NOTE 2: In the case of semi-private structures, e.g., barracks or tents, the following instruction should be added to the definition of "unlawful" (above). It is based on US v. Davis, 56 MJ 299 (CAAF 2002) citing US v. Williams, 15 CMR 241 (CMA 1954).***

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).

NOTE 3: Elements of the offense intended. The following instruction, listing the elements and necessary definitions of the offense intended, must be given. If murder was the intended offense, the military judge must instruct as to the elements of murder committed with the intent to kill.

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 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, and Instruction 5-12, Voluntary Intoxication, as bearing on the issues of the specific intent to commit the allegedly intended offense, may be applicable.

3A–53–2. BURGLARY–ALL OTHERS (ARTICLE 129)

NOTE 1: Use this instruction for burglary offenses not involving the intent to commit the offenses punishable under Articles 118-120, 120b-121, 122, 125-128a, and 130. Where the intent is to commit any of those offenses, use instruction 3a-53-1.

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 break and enter the (building) (structure) of _____, to wit: _____, with intent to commit an offense under the Uniform Code of Military Justice therein, to wit: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused unlawfully broke and entered the building or structure of (state the person alleged), to wit: (state the building/structure alleged); and

(2) That the breaking and entering were done with the intent to commit (state the offense alleged), an offense punishable under the Uniform Code of Military Justice.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

A “breaking” may be actual or constructive. Merely entering 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 screen 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.

An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient. Insertion into the house of any tool or other instrument is also a sufficient entry, unless the insertion is solely to facilitate the breaking or entry.

An entry is "unlawful" if it is made without the consent of any person authorized to consent to entry or without other lawful authority.

(A "building" includes a room, shop, store, office, or apartment in a building.)

("Structure" refers to only those structures which are in the nature of a building or dwelling. Examples include: A stateroom, hold, or other compartment of a vessel; an inhabitable trailer; an enclosed truck or freight car; a tent; a houseboat.)

It is not necessary that the building or structure be in use at the time of entry.

> ***NOTE 2: In the case of semi-private structures, e.g., barracks or tents, the following instruction should be added to the definition of "unlawful" (above). It is based on US v. Davis, 56 MJ 299 (CAAF 2002) citing US v. Williams, 15 CMR 241 (CMA 1954).***

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).

NOTE 3: Elements of the offense intended. The following instruction, listing the elements and necessary definitions of the offense intended, must be given.

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).

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.

3A–53-3. UNLAWFUL ENTRY (ARTICLE 129)

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 (real property) (personal property) (a structure usually used for habitation or storage) of _____, to wit: _____.

c. ELEMENTS:

(1) That (state the time and place alleged), the accused entered the [real property of (state the person alleged)] [personal property of (state the person alleged), amounting to a structure usually used for habitation or storage], to wit: (state the property alleged); and

(2) That the entry was unlawful.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient. Insertion into the property of a tool or other instrument is also a sufficient entry, unless the insertion is solely to facilitate the entry.

An entry is “unlawful” if it is made without the consent of any person authorized to consent to entry or without other lawful authority.

It is not necessary that the property be in use at the time of entry.

(“Personal property amounting to a structure usually used for habitation or storage” usually includes vehicles expressly used for habitation, such as mobile homes and recreational vehicles. It would usually not include an aircraft, automobile, tracked vehicle, or a person’s locker, even though used for storage purposes. Whether the property alleged amounts to “personal property amounting to a structure usually used for habitation or storage” is a question of fact for you to decide.)

3A–54–1. STALKING (ARTICLE 130)

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 _____) (from about _____ to about _____), engage in a course of conduct directed at _____, that would cause a reasonable person to fear (death) (bodily harm, to wit: _____), to (himself) (herself) (a member of (his) (her) immediate family) ((his) (her) intimate partner); that the accused knew or should have known that the course of conduct would place _____ in reasonable fear of (death) (bodily harm, to wit: _____) to (himself) (herself) (a member of (his) (her) immediate family) ((his) (her) intimate partner); and that the accused's conduct placed _____ in reasonable fear of (death) (bodily harm, to wit: _____) to (himself) (herself) (a member of (his) (her) immediate family) ((his) (her) intimate partner).

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 (,including sexual assault,) to himself/herself, to a member of his/her immediate family, or to his/her intimate partner;

(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 conduct induced a reasonable fear in (state the name of alleged victim) of death or bodily harm (,including sexual assault,) to himself/herself, a member of his/her immediate family, or his/her intimate partner.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Conduct" means conduct of any kind, including use of surveillance, the mails, an interactive computer service, an electronic communications service, or an electronic communication system.

"Course of Conduct" means a repeated maintenance of visual or physical proximity to a specific person; 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; or a pattern of conduct composed of repeated acts evidencing a continuity of purpose.

("Threat" means a communication, by words or conduct, of a present determination or intent to cause bodily harm to a specific person, an immediate family member of that person, or intimate partner of that person, 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.)

"Repeated" means on two or more occasions.

("Immediate family" means a person's spouse, parent, brother, sister, child, or other person to whom he or she stands in loco parentis; or any other person living in his or her household and related to him or her by blood or marriage.)

("Intimate partner" means a former spouse of the specific person, a person who shares a child in common with the specific person, or a person who cohabits with or has cohabited as a spouse with the specific person; or a person who has been in a social relationship of a romantic or intimate nature with the specific person, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.)

"Bodily harm" means any offensive touching of another, however slight (, including sexual assault).

"Wrongful" means without legal justification or authorization.

Proof that the accused actually intended to cause bodily harm is not required.

> ***NOTE: <u>Other instructions</u>. The following modified Instruction 7-3, <u>Circumstantial Evidence</u> (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 (<u>state the name of alleged victim</u>) would be

placed in reasonable fear of death or bodily harm to (himself/herself) (a member of his/her immediate family) (his/her intimate partner). This element 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) (his/her intimate partner) by the accused's acts. To prove "should have known," the government must establish that the circumstances 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) (his/her intimate partner) by the accused's acts.

In deciding this issue you must consider all relevant facts and circumstances.

3A–55–1. 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 (judicial proceeding) (course of justice), that is: (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 gave certain testimony, namely: (set forth the testimony alleged);

(5) That the testimony was material;

(6) That the testimony was false; and

(7) That the accused did not then believe the testimony to be true.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

(A “judicial proceeding” includes a properly constituted court-martial.)

(A “course of justice” includes a preliminary hearing conducted under Article 32, UCMJ.)

(An “oath” is a pledge that binds the person to speak the truth.)

(An “affirmation” is a solemn and formal, external pledge, binding upon one’s conscience, that the truth will be stated.)

“Material” means important to the issue or matter of inquiry, but that matter need not be the main issue in the case.

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 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 (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 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 2: <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 3: <u>Proving that the accused did not believe the statement to be true</u>. 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, as long as that testimony or evidence convinces you beyond a reasonable doubt as to this element of the offense.

3A–55–2. 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 subscribed 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, but that matter need not be the main issue in the case.

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) 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 (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 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 2: <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 3: <u>Proving that the accused did not believe the statement to be true</u>. 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, as long as that testimony or evidence convinces you beyond a reasonable doubt as to this element of the offense.

3A–55A–1. PERJURY–SUBORNATION OF (ARTICLE 131A)

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 or its equivalent and to falsely (testify) (depose) (state) upon such (oath) (affirmation) concerning a certain matter: (state the alleged matter in which the perjured testimony or statement was given);

(2) That the (oath) (affirmation) was administered to (state the name of the alleged perjurer) in a (matter) (_____) in which an oath or its equivalent was required or authorized by law;

(3) That the oath or its equivalent was administered by a person having authority to do so;

(4) That upon such oath or its equivalent (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; and

(7) That the accused and (state the name of the alleged perjurer) did not then believe the statement to be true.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Induce and procure" means to influence, persuade, or cause.

(An "oath" is a pledge that binds the person to speak the truth.)

(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, but that matter need not be the main issue in the case.

> ***NOTE 1: 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 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 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 3: 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 4: <u>Requirement for witness to testify</u>. 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. See US v. Standifer, 40 MJ 440 (CMA 1994).

3A–55B–1. OBSTRUCTING JUSTICE (ARTICLE 131B)

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 do a certain act, to wit: _____, with intent to (influence) (impede) (obstruct) the due administration of justice in the case of _____, against whom the accused had reason to believe that there were or would be (criminal) (disciplinary) proceedings pending.

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 or disciplinary proceedings pending;

(3) That the act(s) (was) (were) done with the intent to influence, impede or otherwise obstruct the due administration of justice.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("Criminal proceedings" includes (lawful searches) (criminal investigations conducted by police or command authorities) (Article 32 preliminary hearings) (courts-martial) (state and federal criminal trials) (_____).)

("Disciplinary proceedings" includes summary courts-martial and Article 15 non-judicial punishment proceedings.)

"Wrongfully" means without legal justification or excuse.

(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.)

NOTE 1: Administrative process as "criminal proceedings." Criminal proceedings do not include administrative processes. US 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 2: 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. US v. Athey, 34 MJ 44 (CMA 1992); and US v. Finsel, 36 MJ 441 (CMA 1993). See also the cases and discussion in NOTE 3 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 3: 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 4, infra, also addresses issues where the accused may have advised a witness to exercise a right to remain silent.) See US 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); US 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); US 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 US 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 US 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 4: <u>Advising a witness to exercise a right to remain silent</u>. 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. US, 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 7.

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 5: <u>What constitutes obstruction of justice—acts embraced in the "original" offense</u>. 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. US 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. US 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 6: <u>Knowledge of the pendency of the proceedings</u>. 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 7: 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 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. US, supra, at 443.

NOTE 8: 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: US v. Turner, 33 MJ 40 (CMA 1991); US v. Athey, 34 MJ 44 (CMA 1992); US v. Finsel, 36 MJ 441 (CMA 1993); US v. Guerrero, 28 MJ 223 (CMA 1989); US v. Kirks, 34 MJ 646 (ACMR 1992); US v. Asfeld, 30 MJ 917 (ACMR 1990); US v. Hullet, 36 MJ 938 (ACMR 1993), rev'd on other grounds, 40 MJ 189 (CMA 1994); Cole v. US, 339 F.2d 437 (9th Cir.), cert. denied, 377 U.S. 954 (1964); US v. Williams, 29 MJ 41 (CMA 1989); US v. Jones, 20 MJ 38 (CMA 1985); US v. Barner, 56 MJ 131 (CAAF 2001).

3A–55C–1. MISPRISION OF SERIOUS OFFENSE (ARTICLE 131C)

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 serious offense of (the murder of _____) (_____) was committed by (state the name of the person who committed the offense);

(2) That the accused knew that (state the name of the person who committed the offense) had committed this serious offense; and

(3) That, thereafter, (state the time and place alleged), the accused wrongfully concealed this serious offense and failed to make it known to the civil or military authorities as soon as possible.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

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.

3A–55D–1. TESTIFY–WRONGFUL REFUSAL (ARTICLE 131D)

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 officers) (military commission) (court of inquiry) (officer conducting a preliminary hearing 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 question(s) 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) (summary) court-martial) (board of officers) (military commission) (court of inquiry) (officer conducting a preliminary hearing under Article 32, Uniform Code of Military Justice) (officer taking a deposition), (of) (for) the United States, at which (<u>state the name and rank of the presiding official</u>) was presiding;

(2) That (<u>state the name and rank of the presiding official</u>)

(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: (<u>set forth the question(s) alleged</u>);

(3) That (<u>state the time and place alleged</u>), the accused refused to (qualify as a witness) (answer such questions); and

(4) That the refusal was wrongful.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

(To "qualify as a witness" means for the witness to declare that the witness will testify truthfully.)

NOTE 1: Self-incrimination raised. A good faith but legally incorrect belief in the right to remain silent does not constitute a defense to this offense. 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. A good faith but legally incorrect belief in the right to remain silent does not constitute a defense to this offense.

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. <u>See</u> RCM 917.

NOTE 3: <u>Determining whether any privilege applies</u>. 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: <u>Refusal to answer based on degrading/non-material questions</u>. 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, but that matter need not be the main issue in the case.

3A–55E–1. PREVENTION OF AUTHORIZED SEIZURE OF PROPERTY (ARTICLE 131E)

a. MAXIMUM PUNISHMENT: DD, TF, 5 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 _____ then knew, (a) person(s) authorized to make searches and seizures 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 (was) (were) seizing, about to seize, or endeavoring to seize certain property, to wit: (state the property alleged);

(2) 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

(3) That the accused then knew that (state the name(s) of the person(s) alleged) (was) (were) seizing, about to seize, or endeavoring to seize (state the property alleged).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

("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.

3A–55F–1. NONCOMPLIANCE WITH PROCEDURAL RULES–UNNECESSARY DELAY IN DISPOSING OF CASE (ARTICLE 131F)

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 of an offense 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.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

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

3A–55F–2. NONCOMPLIANCE WITH PROCEDURAL RULES–FAILING TO ENFORCE OR COMPLY WITH CODE (ARTICLE 131F)

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 Uniform Code of Military Justice;

(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.

3A–55G–1. WRONGFUL INTERFERENCE WITH AN ADVERSE ADMINISTRATIVE PROCEEDING (ARTICLE 131G)

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 _____ 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 (<u>state the time and date alleged</u>), the accused wrongfully did (a) certain act(s), that is, (<u>state the act(s) alleged</u>);

(2) That the accused did so in the case of (himself) (herself) (_____) against whom the accused had reason to believe there (was) (were) or would be (an) adverse administrative proceeding(s) pending; and

(3) That the act(s) (was) (were) done with the intent to (influence) (impede) (obstruct) the conduct of the administrative proceeding(s), or otherwise obstruct the due administration of justice.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“Wrongfully” means without legal justification or excuse.

(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 non-Department of the Army agencies are not adverse administrative proceedings.)

NOTE 1: 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 US v. Athey, 34 MJ 44 (CMA 1992); and US v. Finsel, 36 MJ 441 (CMA 1993). 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 2: 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 3, <u>infra</u>, also addresses issues where the accused may have advised a witness to exercise a right to remain silent.) See US 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); US 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); US 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 US 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 US 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 3: <u>Advising a witness to exercise a right to remain silent</u>. 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. US, 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 5.

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 4: 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 5: 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, 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. US, supra, at 443.

NOTE 6: 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: US v. Turner, 33 MJ 40 (CMA 1991); US v. Athey, 34 MJ 44 (CMA 1992); US v. Finsel, 36 MJ 441 (CMA 1993); US v. Guerrero, 28 MJ 223 (CMA 1989); US v. Kirks, 34 MJ 646 (ACMR 1992); US v. Asfeld, 30 MJ 917 (ACMR 1990); US v. Hullet, 36 MJ 938 (ACMR 1993), rev'd on other grounds, 40 MJ 189 (CMA 1994); Cole v. US, 339 F.2d 437 (9th Cir.), cert. denied, 377 U.S. 954 (1964); US v. Jones, 20 MJ 38 (CMA 1985); US v. Barner, 56 MJ 131 (CAAF 2001).

3A–56–1. RETALIATION–THREATENING OR TAKING ADVERSE PERSONNEL ACTION (ARTICLE 132)

NOTE 1: This offense, new to the MCM after FY17 NDAA, applies to offenses allegedly committed on or after 1 January 2019.

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 retaliate against _____ for [(reporting) (planning to report) a criminal offense] [(making) (planning to make) a protected communication], wrongfully [(took) (threatened to take) an adverse personnel action against _____ to wit: _____] [(withheld) (threatened to withhold) a favorable personnel action with respect to _____ to wit: _____].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully [(took) (threatened to take) an adverse personnel action against _____, to wit: _____] [(withheld) (threatened to withhold) a favorable personnel action with respect to _____, to wit: _____]; and

(2) That, at the time of the action, the accused intended to retaliate against _____ for (reporting or planning to report a criminal offense) (making or planning to make a protected communication).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Personnel action" means any action taken on a servicemember that affects, or has the potential to affect, that servicemember's current position or career, including promotion, disciplinary or other corrective action, transfer or reassignment, performance evaluations, decisions concerning pay, benefits, awards, or training, relief and removal, separation, discharge, referral for mental evaluations, and any other personnel actions as defined by law or regulation.

An action is taken with the "intent to retaliate" when the personnel action taken or withheld, or threatened to be taken or withheld, is done for the purpose of reprisal,

retribution, or revenge for reporting or planning to report a criminal offense or for making or planning to make a protected communication.

"Wrongfully" means an act done without legal justification or excuse. Taking or threatening to take adverse personnel action, or withholding or threatening to withhold favorable personnel action, is wrongful when used for the purpose of reprisal rather than for the purpose of lawful personnel administration.

("Criminal offense" means violations of criminal law under the Uniform Code of Military Justice, the United States Code, or state law.)

NOTE 2: <u>Protected communication</u>. If a "protected communication" is alleged, the judge must craft an appropriate instruction using the definitions below.

"Protected communication" means:

A lawful communication to a Member of Congress or an Inspector General, or

A communication to a covered individual or organization in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of (1) a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination, or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

("Inspector general" means: the Inspector General of the Department of Defense; the Inspector General of the Department of Homeland Security, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy, or; any officer of the armed forces or employee of the Department of Defense who is assigned or detailed to serve as an Inspector General at any level in the Department of Defense.)

("Covered individual or organization" means: a Member of Congress; an Inspector General; a member of a Department of Defense audit, inspection, investigation, or law

enforcement organization; any person or organization in the chain of command, or; a court-martial proceeding.)

("Unlawful discrimination" means discrimination on the basis of race, color, religion, sex, or national origin.)

NOTE 3: <u>Threatens to take or withhold</u>. When the accused is charged with threatening to take an adverse personnel action or withhold a favorable personnel action, provide the instruction below.

Proof that the accused actually intended to (take an adverse personnel action) (withhold a favorable personnel action) is not required. However, the accused must have had the "intent to retaliate" against _____ for (reporting or planning to report a criminal offense) (making or planning to make a protected communication) when the threat was made. A declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense.

3A–56–2. RETALIATION–DISCOURAGING A REPORT (ARTICLE 132)

NOTE 1: This offense, new to the MCM after FY17 NDAA, applies to offenses allegedly committed on or after 1 January 2019.

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 discourage _____ from (reporting a criminal offense) (making a protected communication), wrongfully [(took) (threatened to take) an adverse personnel action against _____, to wit: _____] [(withheld) (threatened to withhold) a favorable personnel action with respect to_____, to wit: _____].

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully [(took) (threatened to take) an adverse personnel action against _____, to wit: _____] [(withheld) (threatened to withhold) a favorable personnel action with respect to _____, to wit: _____]; and

(2) That, at the time of the action, the accused intended to discourage _____ from (reporting a criminal offense) (making a protected communication).

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Personnel action" means any action taken on a servicemember that affects, or has the potential to affect, that servicemember's current position or career, including promotion, disciplinary or other corrective action, transfer or reassignment, performance evaluations, decisions concerning pay, benefits, awards, or training, relief and removal, separation, discharge, referral for mental evaluations, and any other personnel actions as defined by law or regulation.

"Wrongfully" means an act done without legal justification or excuse. Taking or threatening to take adverse personnel action, or withholding or threatening to withhold favorable personnel action, is wrongful when used for the purpose of reprisal rather than for the purpose of lawful personnel administration.

("Criminal offense" means violations of criminal law under the Uniform Code of Military Justice, the United States Code, or state law.)

NOTE 2: <u>Protected communication</u>. If a "protected communication" is alleged, the judge must craft an appropriate instruction using the definitions below.

"Protected communication" means:

A lawful communication to a Member of Congress or an Inspector General, or

A communication to a covered individual or organization in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of (1) a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination, or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

("Inspector general" means: the Inspector General of the Department of Defense; the Inspector General of the Department of Homeland Security, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy, or; any officer of the armed forces or employee of the Department of Defense who is assigned or detailed to serve as an Inspector General at any level in the Department of Defense.)

("Covered individual or organization" means: a Member of Congress; an Inspector General; a member of a Department of Defense audit, inspection, investigation, or law enforcement organization; any person or organization in the chain of command, or; a court-martial proceeding.)

("Unlawful discrimination" means discrimination on the basis of race, color, religion, sex, or national origin.)

NOTE 3: <u>Threatens to take or withhold</u>. When the accused is charged with threatening to take an adverse personnel action or withhold a favorable personnel action, provide the instruction below.

Proof that the accused actually intended to (take an adverse personnel action) (withhold a favorable personnel action) is not required. However, the accused must have had the "intent to discourage" _____ from (reporting a criminal offense) (making a protected communication) when the threat was made. A declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense.

3A–57–1. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN (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:

Copying or Using Exam Paper:

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 _____)).

Drunk or Disorderly:

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 (did) (omitted to do) a certain act(s), to wit: (state the alleged act or omission); and

(2) That, under the circumstances, the accused's conduct was unbecoming an officer and a gentleman.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

"Gentleman" includes both male and female commissioned officers, cadets, and midshipmen.

"Conduct unbecoming an officer and a gentleman" means action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness,

injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the Service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman.

3A–58–1. GENERAL ARTICLE (ARTICLE 134)

The instructions for Article 134 offenses are in four sections. Paragraph 3a-58-2A 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 3a-58-2B contains instructions for violations of Federal statutes other than the UCMJ (Clause 3, Article 134). Paragraph 3a-58-2C 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 3a-59-1 through 3a-75-1.

3A–58–2A. DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE OR OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES (ARTICLE 134, CLAUSES 1 AND 2.)

NOTE 1: <u>Limitations on offenses under Clauses 1 and 2, Article 134</u>. 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, or otherwise listed as an Article 134 offense. 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 91c(5) and (6); US v. Guardado, 77 MJ 90 (CAAF 2017).

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 closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses." But see US v. Beaty, 70 MJ 39 (CAAF 2011) (Beaty holds that, when confronted with an Article 134 offense that is not specifically listed in the MCM, that is not closely related to or included in a listed offense, that does not describe acts that are criminal under the United States Code, and that has no maximum punishment authorized by the custom of the service, the offense is punishable as a general or simple disorder, with a maximum sentence of 4 months confinement and forfeiture of 2/3 pay per month for 4 months. Beaty also provides useful guidance on how to determine if an offense is "closely related" to another offense.).

b. MODEL SPECIFICATION:

NOTE 2: The MCM does not provide a model specification for violation of unlisted offenses under Clauses 1 or 2 of Article 134. Ordinarily a specification alleging an unlisted offense in violation of Article 134 substantially as below should be sufficient.

In that _____ (personal jurisdiction data), did, at/on board—location, on or about _____, (state the act or omission alleged), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and 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) (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 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) (or) (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) (_____.))

3A–58–2B. CRIMES AND OFFENSES NOT CAPITAL–VIOLATIONS OF FEDERAL LAW (ARTICLE 134, CLAUSE 3)

NOTE 1: Limitations on offenses under 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 91c(5)

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:

NOTE 2: The MCM does not provide a model specification for violation of offenses under Clause 3 of Article 134. Ordinarily a specification alleging an offense in violation of Article 134 substantially as below should be sufficient.

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 _____, an offense not capital.

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. Federal pattern instructions are available online from the United States Court of Appeals Library.

NOTE 4: Terminal Element. The specification must expressly allege, and the military judge must instruct as a separate element, that the charged Federal offense is not a capital offense.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Provide all pertinent definitions from the federal statute.

3A–58–2C. 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 offenses under 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 91c(5).

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:

NOTE 3: The MCM does not provide a model specification for violation of offenses under Clause 3 of Article 134. Ordinarily a specification alleging an offense in violation of Article 134 substantially as below should be sufficient.

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) (_____), an offense not capital, assimilated into Federal law by 18 U.S. Code Section 13.

NOTE 4: 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 5: 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 6: Jurisdiction as an element of the offense. Extraterritorial jurisdiction does not extend to the Federal Assimilative Crimes Act, which requires the commission of the offense concerned upon an enclave of federal exclusive or concurrent jurisdiction. Exclusive or concurrent federal jurisdiction—not merely a possessory interest or military control—is therefore 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.

NOTE 7: Terminal Element. The specification must expressly allege, and the military judge must instruct as a separate element, that the charged State offense is not a capital offense.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

Provide all pertinent definitions from the state statute.

3A–59–1. ANIMAL ABUSE (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

Abuse, neglect, or abandonment of animal: BCD, TF, 1 year, E-1.

Abuse, neglect, or abandonment of a public animal: BCD, TF, 2 years, E-1.

Sexual act with an animal or cases where the accused caused the serious injury or death of the animal: DD, TF, 5 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____, (wrongfully [abuse] [neglect] [abandon]) (engage in a sexual act, to wit: _____, with) a certain (public) animal (and caused [serious injury to] [the death of] the animal), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

Abuse, neglect, or abandonment of an animal:

(1) That (<u>state the time and place alleged</u>), the accused wrongfully (abused) (neglected) (abandoned) a certain (public) animal (and caused the serious injury or death of the animal); and

(2) That, under the circumstances, the conduct of the accused was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces).

Sexual act with an animal:

(1) That (<u>state the time and place alleged</u>), the accused engaged in a sexual act with a certain animal, to wit: (<u>state the alleged sexual act</u>); and

(2) That, under the circumstances, the conduct of the accused was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit

upon the armed forces) (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 lower it in public esteem.)

"Animal" means pets and animals of the type that are raised by individuals for resale to others, including: cattle, horses, sheep, pigs, goats, chickens, dogs, cats, and similar animals owned or under the control of any person. Animal does not include reptiles, insects, arthropods, or any animal defined or declared to be a pest by the administrator of the United States Environmental Protection Agency.

("Public animal" means any animal owned or used by the United States or any animal owned or used by a local or state government in the United States, its territories or possessions. This would include, for example, drug detector dogs used by the government.)

> ***NOTE 1: Abuse, neglect, or abandonment of an animal. When abuse, neglect, or abandonment of an animal is charged, give the following definitions, as applicable:***

("Abuse" means intentionally and unjustifiably overdriving, overloading, overworking, tormenting, beating, depriving of necessary sustenance, allowing to be housed in a manner that results in chronic or repeated serious physical harm, carrying or confining in or upon any vehicles in a cruel or reckless manner, or otherwise mistreating an animal.)

("Neglect" means knowingly allowing another to abuse an animal, or, having the charge or custody of any animal, knowingly, or through culpable negligence, failing to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved.)

(“Abandon” means, while having the charge or custody of an animal, knowingly or through culpable negligence, leaving of that animal at a location without providing minimum care for the animal.)

“Wrongfully” means without legal justification or excuse.

(This offense does not include legal hunting, trapping, or fishing; reasonable and recognized acts of training, handling, or disciplining of an animal; normal and accepted farm or veterinary practices; research or testing conducted in accordance with approved governmental protocols; protection of person or property from an unconfined animal; or authorized military operations or military training.)

(“Serious injury of an animal” means physical harm that involves a temporary but substantial disfigurement; causes a temporary but substantial loss or impairment of the function of any bodily part or organ; causes a fracture of any bodily part; causes permanent maiming; causes acute pain of a duration that results in suffering; or carries a substantial risk of death. Serious injury includes burning, torturing, poisoning, or maiming.)

NOTE 2: Sexual act with an animal. When sexual act with an animal is charged, give the following definition:

“Sexual act with an animal” means (1) contact between the sex organ or anus of a person and the sex organ, anus, or mouth of an animal; or (2) contact between the sex organ or anus of an animal and a person or object manipulated by a person, if done with an intent to arouse or gratify the sexual desire of any person.

3A–60–1. 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 marry _____, having at the time of (his) (her) said marriage to a lawful spouse then living, to wit: _____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused had a lawful living spouse, to wit (state the name of the alleged lawful spouse);;

(2) That, while having such lawful spouse, the accused wrongfully married another person, to wit: (state the name of the person the accused allegedly bigamously married); and

(3) That, under the circumstances, the conduct of the accused was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (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 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 5-11-1, Ignorance or Mistake of Fact or Law, is ordinarily applicable. See RCM 916(j)(1)

3A–61–1. 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 US v. Mincey, 42 MJ 376 (CAAF 1995), and US v. Meixueiro, 73 MJ 536 (ACCA 2013)).

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, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused made and uttered 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 _____);

(3) That the accused subsequently failed to place or maintain sufficient funds in or 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) (of a nature to bring discredit upon the armed forces) (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 lower it in public esteem.)

"Made" means the act of writing and signing the check.

"Uttered" means to transfer or offer to transfer the check to another.

"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) (deliberate) (based on false promises)) (indicates a grossly indifferent attitude toward the status of one's bank account and just obligations) (_____).

NOTE 1: <u>Gambling debts and checks for gambling funds</u>. In US 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 US v. Wallace, 36 CMR 148 (CMA 1966), US v. Allberry, 44 MJ 226 (CAAF 1996); US 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 US v. Walter, 23 CMR 275 (CMA 1957), and US 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 and second paragraphs 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.

(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. US v. Moseley, 35 MJ 481 (CMA 1992). Instruction 5-11, Mistake of Fact, may be applicable.

3A–62–1. CHILD PORNOGRAPHY (ARTICLE 134)

a. MAXIMUM PUNISHMENT:

(1) Possessing, receiving or viewing: DD, TF, 10 years and E-1.

(2) Possessing with intent to distribute: DD, TF, 15 years and E-1.

(3) Distribution: DD, TF, 20 years and E-1.

(4) Production: DD, TF, 30 years and E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ knowingly and wrongfully (possess) (receive) (view) (distribute) (produce) child pornography, to wit: a (photograph) (picture) (film) (video) (digital image) (computer image) of a minor, or what appears to be a minor, engaging in sexually explicit conduct (with intent to distribute the said child pornography), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

Possessing, receiving, or viewing child pornography:

(1) That (state the time and place alleged), the accused knowingly and wrongfully (possessed) (received) (viewed) child pornography, to wit: _____; and

(2) That, under the circumstances, the conduct of the accused was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces).

Possessing child pornography with intent to distribute:

(1) That (state the time and place alleged) the accused knowingly and wrongfully possessed child pornography, to wit: _____;

(2) That the possession was with the intent to distribute; and

(3) That, under the circumstances, the conduct of the accused was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces).

Distributing child pornography:

(1) That (state the time and place alleged) the accused knowingly and wrongfully distributed child pornography, to wit: _____, to (state the name of the person to whom distributed); and

(2) That, under the circumstances, the conduct of the accused was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces).

Producing child pornography:

(1) That (state the time and place alleged) the accused knowingly and wrongfully produced child pornography, to wit: _____; and

(2) That, under the circumstances, the conduct of the accused was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (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 lower it in public esteem.)

NOTE 1: Defining "child pornography." The definition of "child pornography" used below will depend upon the evidence presented. The

first definition below should be given where actual minors are in issue. The second definition below should be given where the depictions do not involve the use of actual minors, or there is some question as to whether actual minors were used in the depictions. If appropriate, give both definitions.

("Child pornography" means material that contains a visual depiction of an actual minor engaging in sexually explicit conduct.)

("Child pornography" (also) means material that contains an obscene visual depiction of a minor engaging in sexually explicit conduct. Such a depiction need not involve an actual minor, but instead only what appears to be a minor. "Obscene" means that the average person applying contemporary community standards would find that the visual images depicting minors engaging in sexually explicit conduct, when taken as a whole, appeal to the prurient interest in sex and portray sexual conduct in a patently offensive way; and that a reasonable person would not find serious literary, artistic, political, or scientific value in the visual images depicting minors engaging in sexually explicit conduct.)

"Minor" and "child" mean any person under the age of 18 years.

"Sexually explicit conduct" means actual or simulated:

(a) sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) lascivious exhibition of the genitals or pubic area of any person.

NOTE 2. <u>Lascivious Exhibition</u>. The following instruction on "lascivious exhibition" should be given when there is an issue as to whether an exhibition of the genitals or pubic area of any person was lascivious. Note that an exhibition of the genitals or pubic area may be lascivious even if

those areas are clothed. Note also that nudity and sexually provocative depictions of minors that do not involve the exhibition of the genitals or pubic area of any person, or other sexually explicit conduct, are not child pornography.

("Lascivious" means exciting sexual desires or marked by lust. Not every exposure of the genitals or pubic area constitutes a lascivious exhibition. Consideration of the overall content of the visual depiction should be made to determine if it constitutes a lascivious exhibition. In making this determination, you should consider such factors as whether the focal point of the depiction is on the genitals or pubic area, whether the setting is sexually suggestive, whether the child is depicted in an unnatural pose or in inappropriate attire considering the child's age, whether the child is partially clothed or nude, whether the depiction suggests sexual coyness or willingness to engage in sexual activity, and whether the depiction is intended or designed to elicit a sexual response in the viewer, as well as any other factors that may be equally if not more important in determining whether a visual depiction contains a lascivious exhibition. A visual depiction, however, need not involve all these factors to be a lascivious exhibition.)

"Visual depiction" includes any developed or undeveloped photograph, picture, film or video; any digital or computer image, picture, film or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image.

("Distributing" means delivering to the actual or constructive possession of another.)

("Possessing" means exercising 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 something in a locker or a car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible for more than one person to possess an item simultaneously, as when several people share control over an item.)

("Producing" means creating or manufacturing. It refers to making child pornography that did not previously exist. It does not include reproducing or copying.)

"Wrongful" means without any legal justification or excuse. Any facts or circumstances that show that a visual depiction of child pornography was unintentionally or inadvertently acquired are relevant to wrongfulness, including, but not limited to, the method by which the visual depiction was acquired, the length of time the visual depiction was maintained, and whether the visual depiction was promptly, and in good faith, destroyed or reported to law enforcement.

An accused may not be convicted of (possessing) (receiving) (viewing) (distributing) (producing) child pornography if he/she did not know that the images were of minors, or what appeared to be minors, engaged in sexually explicit conduct. An act is done "knowingly" if done voluntarily and intentionally. An act done because of mistake or accident or other innocent reasons is not done "knowingly." Knowledge may be inferred from circumstantial evidence, such as the name of a computer file or folder, the name of the host website from which a visual depiction was viewed or received, search terms used, and the number of images possessed. However, the drawing of this inference is not required. Thus, in order to convict the accused you must be convinced beyond a reasonable doubt that the accused knew that he/she (possessed) (received) (viewed) (distributed) (produced) the child pornography. However, it is not required that the accused knew the actual ages of the persons in the child pornography, but he/she must have known or believed the persons to be minors.

NOTE 3. <u>Redacted Exhibits</u>. On motion of the government in any prosecution under this paragraph, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age of any minor who is depicted in any child pornography or visual depiction or copy thereof shall not be admissible and may be redacted from any otherwise admissible evidence, and the panel shall be instructed, upon request of the Government, that it can draw no inference from the absence of such evidence. Below is a suggested instruction concerning this issue:

Certain information in Prosecution Exhibit(s) _____ has been redacted as not relevant to these proceedings. You are not to speculate as to what has been redacted nor are you to draw any adverse inference to either side from that redaction.

NOTE 4: Other instructions. Instruction 7-3, Circumstantial Evidence (Knowledge), Instruction 7-3, Circumstantial Evidence (Intent) (when the offense is possession with the intent to distribute), and Instructions 5-11-1 or 5-11-2, Mistake of Fact, may be applicable.

e. REFERENCES:

(1) Definition of "lascivious exhibition". See US v. Roderick, 62 MJ 425, 429-430 (CAAF 2006), citing US v. Dost, 636 F.Supp 828 (S.D.Cal., 1986).

(2) "Lascivious exhibition of the genitals or pubic area of any person" does not require nudity; the minor or other person in the depiction with the minor may be clothed, provided the genitals or pubic area is a focus of the depiction. See US v. Knox, 32 F.3d 733 (3d Cir. 1994), cert. denied, 513 US 1109 (1995), cited by US v. Anderson, 2010 WL3938363 (ACCA 2010), review denied, 69 MJ 451 (CAAF 2010).

3A–63–1. 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, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That the accused was indebted to (state the name of the person or entity alleged) in the sum of (state the amount alleged) for (state the alleged debt);

(2) That this debt became due and payable 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) (of a nature to bring discredit upon the armed forces) (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 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) (deliberate) (based on false promises)) (results from a grossly indifferent attitude toward one's just obligations) (_____).

NOTE 1: Gambling debts. In US 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 US v. Wallace, 36 CMR 148 (CMA 1966), US v. Allberry, 44 MJ 226 (CAAF 1996); US 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 US v. Walter, 23 CMR 275 (CMA 1957), and US 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 US 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: US v. Gardner, 35 MJ 300 (CMA 1992); US v. Falcon, 65 MJ 386 (CAAF 2008).

3A–64–1. 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)) ((interfere with) (impair) the (loyalty) (good order and discipline)) of any member of the armed forces of the United States communicate to _____, a statement, to wit: "_____," or words to that effect, which statement was disloyal to the United States, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused made a certain statement in the following terms: "(quote the statement alleged)", or words to that effect;

(2) That the statement was communicated to (state the person alleged);

(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 by any member of the armed forces, or

(b) (interfere with) (impair) the (loyalty to the United States) (good order and discipline) of any member of the armed forces of the United States; and

(5) That, under the circumstances, the conduct of the accused was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (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 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.

(“Disloyalty” means not being true or faithful to the United States. The disloyalty involved for this offense must be to the United States as a political entity and not merely to a department or other agency, like the U.S. Army, that is a part of its administration.)

(“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.)

3A–65–1. 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 bringing 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), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (<u>state the time and place alleged</u>), 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) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and 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: <u>Further definitions of "drunk"</u>. 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: <u>Conduct pled as both prejudicial to good order and discipline and service discrediting</u>. When the conduct is pled as both prejudicial to good order and discipline and service discrediting, the following instruction should be given:

The government has alleged that the conduct in question in (the) specification (___) of (the) (additional) Charge (___) was to the prejudice of good order and discipline in the armed forces and 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 the accused's conduct was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces. 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 (drunkenness) (disorderly conduct) (drunk and disorderly conduct). In this event, you must make

appropriate findings by excepting the language “of a nature to bring discredit upon the armed forces.” On the other hand, if you are convinced of all the elements except the element of prejudice to good order and discipline in the armed forces, you may still convict the accused of (drunkenness) (disorderly conduct) (drunk and disorderly conduct). In this event, you must make appropriate findings by excepting the language “to the prejudice of good order and discipline in 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 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 (___) of (the) (additional) Charge (___).

3A–66–1. EXTRAMARITAL SEXUAL CONDUCT (ARTICLE 134)

NOTE 1: This offense, created by FY17 NDAA, applies to offenses allegedly committed on or after 1 January 2019.

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

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), (a married person), did, (at/on board – location), on or about _____, wrongfully engage in extramarital conduct, (to wit: _____) with _____, (a person the accused knew was married to a person other than the accused) (a person the accused knew was not the accused's spouse), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused wrongfully engaged in extramarital sexual conduct, to wit: _____ with _____;

(2) That, at the time, [the accused was married to someone else, which he/she knew] [(state the name of the person alleged) was married to someone else, which the accused knew]; and

(3) That, under the circumstances, the conduct of the accused was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (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:

"Extramarital sexual conduct" means any of the following acts engaged in by persons of the same or opposite sex:

(a) genital to genital sexual intercourse;

(b) oral to genital sexual intercourse;

(c) anal to genital sexual intercourse; and

(d) oral to anal sexual intercourse.

A “marriage” exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction.

(“Conduct prejudicial to good order and discipline” is conduct which causes a direct and obvious injury to good order and discipline. Extramarital sexual conduct that is directly prejudicial to good order and discipline includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a Servicemember, or both.)

(“Service discrediting conduct” is conduct which tends to harm the reputation of the service or lower it in public esteem. “Discredit” means to injure the reputation of the armed forces and includes extramarital sexual conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem.)

(Under some circumstances, extramarital sexual conduct may not be prejudicial to good order and discipline but, nonetheless, may be service discrediting. Likewise, depending on the circumstances, extramarital sexual conduct can be prejudicial to good order and discipline but not be service discrediting.)

In determining whether the alleged extramarital sexual conduct in this case is (prejudicial to good order and discipline) (and) (of a nature to bring discredit upon the armed forces), 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, and 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 extramarital sexual conduct 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 extramarital sexual conduct);

(whether the extramarital sexual conduct persisted despite counseling or orders to desist; the flagrancy of the extramarital sexual conduct, such as whether any notoriety ensued; and whether the extramarital sexual conduct was accompanied by other violations of the UCMJ);

(the impact of the extramarital sexual conduct, 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 extramarital sexual conduct involves an ongoing or recent relationship or is remote in time);

(where the extramarital sexual conduct occurred);

(who may have known of the extramarital sexual conduct);

(whether the accused's or co-actor's marriage was pending legal dissolution, defined as an action with a view towards divorce proceedings, such as the filing of a petition for divorce);

(the nature, if any, of the official and personal relationship between the accused and (_____).

NOTE 2: Legal separation. It is an affirmative defense to extramarital sexual conduct that the accused, co-actor, or both were legally separated by order of a court of competent jurisdiction. The affirmative defense does not apply unless all parties to the conduct are legally separated at the time

of the conduct. When this defense has been raised, include the following instruction.

The evidence has raised the issue of whether (the accused) (and) (state the name of the co-actor) was/were legally separated at the time of the alleged extramarital sexual conduct. It is a defense to the offense of extramarital sexual conduct that the accused and/or (state the name of the co-actor) was/were legally separated at the time of the extramarital sexual conduct. To be a legal separation, the separation must have been ordered by a court of competent jurisdiction. This defense does not exist unless all parties to the conduct were legally separated. The prosecution has the burden to prove beyond a reasonable doubt that the accused and/or (state the name of the co-actor) was/were not legally separated.

NOTE 3: <u>Mistake of fact</u>. It is an affirmative defense to extramarital sexual conduct if the accused had an honest and reasonable belief either that the accused and the co-actor were both unmarried or legally separated, or that they were lawfully married to each other. If this defense is raised by the evidence, then the burden of proof is upon the United States to establish that the accused's belief was unreasonable or not honest. When this defense has been raised, include the following instruction.

The evidence has raised the issue of mistake on the part of the accused concerning [(his/her) (state the name of the co-actor)'s marital status] [whether (he/she) (state the name of the co-actor) was legally separated] [whether he/she and (state the name of the co-actor) were lawfully married to each other] in relation to the offense(s) of extramarital sexual conduct.

The accused is not guilty of the offense of extramarital sexual conduct if:

(1) he/she mistakenly believed that [(he/she) (state the name of the co-actor) was not married to someone else] [(he/she) (state the name of the co-actor) was legally separated from his/her spouse] [he/she and (state the name of the co-actor) were lawfully married to each other] at the time of the alleged sexual conduct, and

(2) his/her mistaken 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 [(he/she) (state the name of the co-actor) was not married to someone else] [(he/she) (state the name of the co-actor) was legally separated from his/her spouse] [he/she and (state the name of the co-actor) were lawfully married to each other] at the time of the alleged sexual conduct.

Additionally, the 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 under the mistaken belief that [(he/she) (state the name of the co-actor) was not married to someone else] [(he/she) (state the name of the co-actor) was legally separated from his/her spouse] [he/she and (state the name of the co-actor) were lawfully married to each other] at the time of the alleged sexual conduct, the defense of mistake does not exist. Even if you conclude that the accused was under the mistaken belief that [(he/she) (state the name of the co-actor) was not married to someone else] [(he/she) (state the name of the co-actor) was legally separated from his/her spouse] [he/she and (state the name of the co-actor) were lawfully married to each other] at the time of the alleged sexual conduct, 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 of mistake does not exist.

3A–67–1. 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 _____ and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

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) (of a nature to bring discredit upon the armed forces) (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 lower it in public esteem.)

"Negligence" means the absence of due care. It is (an act) (or) (failure to act) of a person who is under a duty to use due care which exhibits a lack of that degree care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances.

3A–68–1. FRATERNIZATION (ARTICLE 134)

a. MAXIMUM PUNISHMENT: Dismissal, TF, 2 years.

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 shall not fraternize with enlisted persons on terms of military equality, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That, on (state the date alleged), the accused was a (commissioned) (warrant) 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 (Naval Service of the United States) (United States Army) (United States Air Force) (United States Coast Guard) that 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) (of a nature to bring discredit upon the armed forces) (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 lower it in public esteem.)

Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered 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.

> ***NOTE: Regulations, directives, and orders may also govern conduct between officer and enlisted personnel on both a Service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under Article 92.***

3A–69–1. 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 or petty officer and was subordinate to the said _____, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

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) (petty) officer at the time;

(3) That (state name and rank or grade of the person alleged) was not then a (noncommissioned) (petty) 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) (petty) 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) (of a nature to bring discredit upon the armed forces) (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 lower it in public esteem.)

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

3A–70–1. NEGLIGENT HOMICIDE (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 _____, unlawfully kill _____, (by negligently _____ the said _____ (in) (on) the _____ with a _____) (by driving a (motor vehicle) (_____) against the said _____ in a negligent manner) (_____), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

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) (of a nature to bring discredit upon the armed forces) (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 lower it in public esteem.)

Killing of a human being is unlawful when done without legal justification or excuse. An intent to kill or injure is not required.

"Simple 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 exhibits a lack of that degree 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, 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: <u>Contributory negligence of victim</u>. 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: US v. Kick, 7 MJ 82 (CMA 1979); US v. Martinez, 42 MJ 327 (CAAF 1995).

3A–71–1. INDECENT CONDUCT (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 indecent conduct, to wit: _____, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused engaged in certain conduct, to wit: (state the conduct alleged);

(2) That the conduct 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) (of a nature to bring discredit upon the armed forces) (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:

"Indecent" 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.

("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: Indecent conduct includes offenses previously proscribed by "Indecent acts with another" except that the presence of another person is no longer required. For purposes of this offense, the words "conduct" and "act" are synonymous. For child offenses, some indecent conduct may be included in the definition of lewd act and preempted by Article 120b(c).

NOTE 2. Private Consensual Sexual Activity By or Between Adults. If the evidence raises the issue of private consensual sexual conduct by or between adults (e.g., sexual intercourse, sodomy, masturbation) the following instruction should be given.

This provision is not intended to regulate wholly private consensual sexual activity. In the absence of an aggravating circumstance, private consensual sexual activity (including (sexual intercourse) (masturbation) and/or (sodomy)) is not punishable as indecent conduct. [The government has asserted the existence of the following aggravating circumstances to prove the alleged conduct is indecent: (here the military judge may list any relevant aggravating circumstances). In deciding whether these asserted aggravating circumstances exist, you should consider all the evidence on this matter, as you recall it.] [Consensual sexual activity that is "open and notorious" is not private. Sexual activity may be open and notorious when the accused knows 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.]

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

e. REFERENCES:: US v. Izquierdo, 51 MJ 421 (CAAF 1999) (Open and notorious as an aggravating circumstance making consensual activity punishable under Article 134); US v. Goings, 72 MJ 202 (2013) (Holding that "Lawrence" protections do not apply when the sexual activity is indecent because it is public rather than private conduct. One other person present at the consent of all three parties was determined to be public and, thus, not protected.) US v. Castellano, 72 MJ 217 (2013) (Whether "public" or "open and notorious" is a factual determination to be made by the trier of fact.)

3A–72–1. 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: BCD, 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: _____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused (orally) (in writing) communicated to (state the name of the alleged victim) 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) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces); [and]

[(4)] That (state the name of the alleged victim) was a child under the age of 16 years.

d. DEFINITIONS AND OTHER INSTRUCTIONS:

“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 modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its

tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts.

The language must violate community standards. "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.)

("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, by direct or circumstantial evidence, that the accused's conduct was (prejudicial to good order and discipline in the armed forces) (or) (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) (_____).)

e. REFERENCES: US v. Negron, 60 MJ 136 (CAAF 2004); US v. Brinson, 49 MJ 360 (CAAF 1998); US v. Hullett, 40 MJ 189 (CMA 1994); US v. French, 31 MJ 57 (CMA 1990).

3A–73–1. 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 (a sexual act) (sexual acts), to wit: _____, with _____, a person not (his) (her) spouse, for the purpose of receiving (money) (_____), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused engaged in (a) sexual act(s) with _____, a person not the accused's spouse;

(2) That the accused did so for the purpose of receiving money or other compensation;

(3) That the sexual act(s) (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) (of a nature to bring discredit upon the armed forces) (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:

"Sexual act" means:

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

“Wrongful” means without legal justification or excuse.

(“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.)

3A–73–2. 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 (compel) (induce) (entice) (procure) _____, a person not (his) (her) spouse, to engage in (a sexual act) (sexual acts), to wit: _____, with the accused in exchange for (money) (_____), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused engaged in (a) sexual act(s) with _____, a person not the accused's spouse;

(2) That the accused compelled, induced, enticed, or procured such person to engage in (a sexual act) (sexual acts) in exchange for money or other compensation;

(3) That the sexual act(s) (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) (of a nature to bring discredit upon the armed forces) (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:

"Sexual act" means:

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

“Wrongful” means without legal justification or excuse.

(“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.)

3A–73–3. 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 (a sexual act) (sexual acts), to wit: _____, for hire and reward with persons to be directed to (him) (her) by the said _____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused induced, enticed, or procured (state the name of the person alleged) to engage in (a sexual act) (sexual acts) for hire and reward with (a) person(s) to be directed to (state the name of the person alleged) by the accused;

(2) That this inducing, enticing, or 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) (of a nature to bring discredit upon the armed forces) (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:

“Sexual act” means:

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

"For hire and reward" means for the purpose of receiving money or other compensation.

("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: <u>Pandering as requiring three persons</u>. Pandering requires three persons. If only two are involved, the evidence may raise the offense of solicitation to commit prostitution. US v. Miller, 47 MJ 352 (CAAF 1997).

NOTE 2: This offense does not preempt any other lawful regulations or orders issued by a proper authority that proscribe other forms of sexual conduct for compensation by military personnel. Violations of such regulations or orders may be punishable under Article 92.

3A–73–4. PANDERING BY ARRANGING OR RECEIVING COMPENSATION FOR ARRANGING FOR SEXUAL ACT (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 (a sexual act) (sexual acts), to wit: _____, with _____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused arranged for or received valuable consideration for arranging for (state the name of the alleged prostitute) to engage in (a sexual act) (sexual acts) 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) (of a nature to bring discredit upon the armed forces) (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:

“Sexual act” means:

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

“Wrongful” means without legal justification or excuse.

("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: <u>Pandering as requiring three persons</u>. Pandering requires three persons. If only two are involved, the evidence may raise the offense of solicitation to commit prostitution. US v. Miller, 47 MJ 352 (CAAF 1997).

NOTE 2: This offense does not preempt any other lawful regulations or orders issued by a proper authority that proscribe other forms of sexual conduct for compensation by military personnel. Violations of such regulations or orders may be punishable under Article 92.

3A–74–1. 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), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

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) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces or 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.)

It is not required that the accused be unable to perform duties, or that the accused actually be absent from his or her place of duty as a result of the injury. The circumstances and extent of injury, however, are relevant to a determination that the accused's conduct was (prejudicial to good order and discipline) (or) (service discrediting).

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

3A–75–1. 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, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

c. ELEMENTS:

(1) That (state the time and place alleged), the accused, while accompanying (his) (her) organization on a march, maneuvers, or similar exercise, straggled;

(2) That such straggling 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) (was of a nature to bring discredit upon the armed forces) (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:

“Straggle” means to wander away, to stray, to become separated from, or to lag or linger behind.

“Wrongful” means without legal justification or excuse.

(“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.)

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: Evidence of Polygraph Examination. While MRE 707 prohibits direct or indirect reference to the results or reliability of a polygraph examination, evidence of the facts and circumstances of a polygraph examination may be relevant to explain the reason or motivation for a

confession, or for other limited purposes. US v. Kohlbeck, 78 MJ 326 (CAAF 2019); see also US v. Clark, 53 MJ 280 (CAAF 2000). When evidence concerning a polygraph examination is introduced, an appropriately tailored instruction should be considered to ensure that members do not impermissibly consider the results or reliability of the polygraph. The following instructions might also be helpful on this issue: 4-1, Confessions and Admissions (Instruction following NOTE 3); 7-9-1, Expert Witnesses; 7-26, Witness Opinion on Credibility or Guilt.

On the issue of whether the accused's statement(s) made to (identify the person to whom the statements were made) (was) (were) obtained (through the use of _____) (in violation of _____) (_____), you heard evidence that the accused (submitted to a polygraph examination) (was physically uncomfortable during the polygraph examination) (was told that he was being untruthful during a polygraph examination) (failed a polygraph examination) (describe other polygraph evidence raised). You may consider this evidence for the limited purpose of deciding the weight or significance, if any, to be given the statement(s) the accused made to (identify the person to whom the statements were made).

(You may not consider evidence regarding the results of a polygraph examination, or statements regarding the results, for the purpose of determining whether the accused was being truthful or untruthful during the polygraph examination because, under the law, polygraph examination results are not considered scientifically reliable evidence. Likewise, you may not consider the results of a polygraph examination, or statements regarding the results, for the purpose of determining whether the accused is generally a truthful or untruthful person).

NOTE 5: Corroboration. An accused's pretrial confession or admission can only be considered as evidence against the accused if it is corroborated. Determining whether the admission or confession has been corroborated requires careful attention and proper analysis. The military judge should carefully consider applicable rules of evidence and case law in making this determination. See MRE 304(c). While the military judge alone determines whether or not a confession or admission has been sufficiently corroborated, corroborating evidence should be submitted to the members so that they may consider it in deciding what weight to give the confession or admission. See US v. Duvall, 47 MJ 189 (CAAF 1997). If the corroborating evidence contains uncharged misconduct, the military judge should give

an appropriately tailored uncharged misconduct instruction. See Instruction 7-13-1.

NOTE 6: 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 7: 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, 5-3-2, and 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, 5-11-1, 5-11-2, 5-11-3, and 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 (<u>state the alleged offense(s)</u>) (and to the lesser included offense(s) of (<u>state the lesser included offense(s) raised)</u>), 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. US v. Dearing, 63 MJ 478 (CAAF 2006); US v. Cardwell, 15 MJ 124 (CMA 1983); US 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, and involuntary manslaughter. Negligent homicide is not a lesser included offense under US v. Miller, 67 MJ 385 (CAAF 2009). The degrees of culpability would then include a willful or intentional act, an inherently dangerous act, or culpable negligence.

REFERENCES: RCM 916(f); US v. Tucker, 38 CMR 349 (CMA 1968); US v. Hubbard, 33 CMR 184 (CMA 1963); US 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 US v. Blair, 36 CMR 413 (CMA 1966). See also US 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 US 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, US v. Tatum, 36 MJ 302 (CMA 1993); Nine-year-old non-judicial punishment for sale of cocaine admissible to show predisposition, US v. Rayford, 33 MJ 747 (ACMR 1991); Knowing price of drugs and where they can be bought can be predisposition, US v. Lubitz, 40 MJ 165 (CMA 1994); A "ready response" may indicate predisposition, US v. Bell, 38 MJ 358 (CMA 1993); Repeated requests do not in and of themselves constitute inducement, US v. Howell, 36 MJ 354 (CMA 1993).***
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> ***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. US v. Cooper, 33 MJ 356 (CMA 1991), upheld on reconsideration 35 MJ 417 (CMA 1992), cert. denied 507 U.S. 985 (1993); US v. Bell, 38 MJ 358 (CMA 1993); and US 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 US v. Bell, 38 MJ 358 (CMA 1993) and US v. Lemaster, 40 MJ 178 (CMA 1994).

REFERENCES: RCM 916(g); US v. Howell, 36 MJ 354 (CMA 1993); US v. Vanzandt, 14 MJ 332 (CMA 1982); US v. Tatum, 36 MJ 302 (CMA 1993); US v. Rayford, 33 MJ 747 (ACMR 1991); US v. Lubitz, 40 MJ 165 (CMA 1994); US v. Bell, 38 MJ 358 (CMA 1993); US v. Lemaster, 40 MJ 178 (CMA 1994); US v. Cooper, 33 MJ 356 (CMA 1991), upheld on reconsideration, 35 MJ 417 (CMA 1992), cert. denied, 507 U.S. 985 (1993); US 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 US 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. US v. Regalado, 33 CMR 12 (CMA 1963); US v. Payne, No. 20040756 (ACCA 15 April 2005) (may include automobiles).

REFERENCES: US v. Lee, 13 CMR 57 (CMA 1953); US 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: 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); US v. Binegar, 55 MJ 1 (CAAF 2001); US 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); US v. True, 41 MJ 424 (CAAF 1995); US v. Binegar, 55 MJ 1 (CAAF 2001); US 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.

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: US v. Schoof, 37 MJ 96 (CMA 1993); US v. Rios, 33 MJ 436 (CMA 1991); US v. Byrd, 24 MJ 286 (CMA 1987); US 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 act(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: US v. Robertson, 36 MJ 190 (CMA 1992); US v. Brown, 26 MJ 148 (CMA 1988); and US v. Scofield, 33 MJ 857 (ACMR 1991; Model Penal Code, section 3.08(1), reprinted in US v. Robertson, supra and US 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); US 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: Taking in excess of what is due. 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. If the claim of right issue arises in a robbery case, 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. 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. US 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: US v. Smith, 8 CMR 112 (CMA 1953); US v. Kachoughian, 21 CMR 276 (CMA 1956); US v. Dosal-Maldonado, 31 CMR 28 (CMA 1961); US v. Eggleton, 47 CMR 920 (CMA 1973); US v. Smith, 14 MJ 68 (CMA 1982); US v. Birdsong, 40 MJ 606 (ACMR 1994); US v. Gunter, 42 MJ 292 (CAAF 1995); US 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: Intervening cause. 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: More than one contributor to proximate cause. 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, (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 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, and involuntary manslaughter. Negligent homicide is not a lesser included offense under US v. Miller, 67 MJ 385 (CAAF 2009). The respective degrees of culpability would then include an intentional act or omission, an inherently dangerous act, an intentional act or omission or culpable negligence.

REFERENCES: US v. Lingenfelter, 30 MJ 302 (CMA 1990); US v. Reveles, 41 MJ 388 (CAAF 1995); US v. Taylor, 44 MJ 254 (CAAF 1996); US v. Cooke, 18 MJ 152 (CMA 1984); US v. Moglia, 3 MJ 216 (CMA 1977); US v. Romero, 1 MJ 227 (CMA 1975); US v. Klatil, 28 CMR 582(ABR 1959).

5–20. JUSTIFICATION

NOTE: Using this instruction. The military judge must instruct, sua sponte, on the issue of justification, when it is raised by some evidence. The following instruction, appropriately tailored, may be used in such cases.

(A) (An) (death) (injury) (or) (other) (act) (caused) (or) (done) in the proper performance of a legal duty is justified and not unlawful. The duty may be imposed by statute, regulation, or order. (For example, the use of (deadly) force by a law enforcement officer when reasonably necessary in the proper execution of law enforcement duties is justified and not unlawful.) (For example, the use of force or violence by a Soldier against an enemy combatant in the proper execution of military duties is justified and not unlawful.) (For example, the (taking) (or) (destruction) of property by a (law enforcement officer) (_____) in the proper exercise of (law enforcement) (_____) duties is justified and not unlawful.)

The burden of proof to establish the accused's guilt is on the prosecution. If you are convinced beyond a reasonable doubt that the accused was not acting in the proper performance of (his) (her) legal (duty) (duties), the defense of justification does not exist.

5–21. AUTOMATISM

NOTE: Using this instruction. If the evidence reasonably raises the issue of automatism, the judge should instruct the panel that automatism may serve to negate the actus reus of the alleged offense. US v. Torres, 74 M.J. 154 (CAAF 2015). An act must be voluntary for an accused to be criminally liable for it.

The evidence has raised an issue of automatism in relation to the offense(s) of (state the alleged offense(s)). An accused may not be held criminally liable for (his)(her) acts unless they are voluntary. An act is not voluntary if it is (a reflex or convulsion) (a bodily movement during unconsciousness or sleep) (_____).

In deciding whether the accused's acts were voluntary, you should consider all the 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 inability to remember, due to amnesia or a blackout, is not in itself a defense. It is, however, one of the factors you should consider when deciding whether the accused's acts were voluntary.)

The burden is on the prosecution to establish the guilt of the accused. Therefore, 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 alleged acts were voluntary.

CHAPTER 6: MENTAL CAPACITY AND RESPONSIBILITY

6–1. RCM 706 MENTAL CAPACITY AND MENTAL RESPONSIBILITY INQUIRY

The accused’s actions and demeanor as observed by the court or based on the assertion from a reliable source that the accused may lack mental capacity or mental responsibility may be sufficient to cause the court to order a sanity board pursuant to RCM 706. The military judge may order an RCM 706 sanity board *sua sponte* or upon request of a member of the court, the prosecution, or the defense. A good faith, non-frivolous request for a sanity board should be granted. US v. Nix, 36 CMR 76 (CMA 1965); US v. Kish, 20 MJ 652 (ACMR 1985). The military judge should remember, however, that the accused is presumed to be mentally capable and mentally responsible and that a mere assertion that the accused is not is insufficient to raise an issue of mental responsibility or capacity to stand trial.

The military judge rules finally as to whether an inquiry should be made into the accused's mental capacity or mental responsibility. If the military judge orders a sanity board, the order will be in writing and comply with RCM 706. The military judge may order additional sanity boards at any stage of the proceedings.

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. The provisions of MRE 302 prescribe additional rules and procedures governing this situation.

6–2. MENTAL CAPACITY TO STAND TRIAL

NOTE 1: General: The military judge rules finally on the issue of mental capacity, which is an interlocutory question of fact. 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 whether the accused is guilty or not guilty and the determination of an appropriate sentence.

NOTE 2: Procedure: The military judge may order an RCM 706 sanity board or may conduct a competence inquiry hearing pursuant to RCM 909 without a sanity board. However, if a sanity board finds the accused is not mentally competent, the military judge must conduct a competence inquiry hearing. A competence inquiry hearing has no particular requirements beyond those of a normal motions hearing—the gathering of facts to support the military judge's findings and conclusions. The military judge may direct the government to produce witnesses and evidence for the hearing and the military judge is not bound by the rules of evidence except those concerning privileges including MRE 302. The standard of proof on this issue is whether a preponderance of the evidence establishes that the accused is presently suffering from a mental disease or mental defect rendering the accused unable to understand the nature of the proceedings or to cooperate intelligently in the defense of the case. When the military judge determines the accused is not competent to stand trial, further action should be directed substantially as follows:

MJ: I have determined that the accused lacks the mental capacity to stand trial. The record of these proceedings with a statement of my determination must be transmitted to the convening authority. (The defense's motion for a stay of proceedings is granted.) These proceedings are abated pending the convening authority's action.

REFERENCES: RCM 909.

6–3. PRELIMINARY INSTRUCTIONS ON MENTAL RESPONSIBILITY

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 members' ability to evaluate subsequent evidence on this issue. The preliminary instructions should be given only after consultation with counsel for both sides. The following initial instruction may be appropriate:

MJ: 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(s) charged in (state the relevant charges and specifications). I will now instruct you on certain legal principles and procedures which will assist you in deciding this issue.

NOTE 2: 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 at the time of the offense is an affirmative defense which must be instructed upon, sua sponte, when the military judge presents final instructions. The following instructions may be modified for use as preliminary instructions on the issue of mental responsibility. See also Instruction 6-3, Preliminary Instructions on Mental Responsibility.

MJ: 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 has denied criminal responsibility because of a severe mental condition.)

You are not to consider this defense unless you first find 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 will vote first on whether the government has proved beyond a reasonable doubt each element of the offense(s).

I will instruct you later on the required number of votes for a finding of Guilty. If your vote results in a finding of Not Guilty, you will return a finding of Not Guilty and you do not consider the issue of mental responsibility. On the other hand, if your vote results in a finding of Guilty (of the offense or 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. I will instruct you later on the number of votes required for a finding of Not Guilty Only by Reason of Lack of Mental Responsibility. For this second vote, each member must vote, regardless of your vote on the elements of the offense(s).

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 of a lesser offense. For this scenario, the MJ must tailor the instructions above accordingly.

MJ: Regarding this second vote, you are advised of the following. The accused is presumed to be mentally responsible. This presumption is overcome only if you determine, by clear and convincing evidence, that the accused 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 regardless of whether the accused was then suffering from a severe mental disease or defect.

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 the 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 the wrongfulness of (his) (her) conduct, then you must find the accused Not Guilty Only by Reason of Lack of Mental Responsibility. Again, the accused has the burden of establishing a lack of mental responsibility by clear and convincing evidence. 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 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 that most people are mentally responsible.

NOTE 3: Other instructions. See Instructions 6-5 and 6-6 for additional instructions that are frequently applicable when mental responsibility is in issue. See Instruction 6-7 for the mandatory procedural instructions on findings when mental responsibility is in issue.

6–5. PARTIAL MENTAL RESPONSIBILITY

NOTE 1: Using these instructions. RCM 916(k)(1) provides that lack of mental responsibility based on a severe mental disease or defect is an affirmative defense. RCM 916(k)(2) provides that evidence of partial mental responsibility is not an affirmative defense, but may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense, such as premeditation, specific intent, knowledge, or willfulness. Ellis v. Jacob, 26 MJ 90 (CMA 1988); US v. Berri, 33 MJ 337 (CMA 1991); see also Discussion to RCM 916(k)(1) and (2). 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.

MJ: 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. If you are not 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 _____)) (knowing that _____) (acting 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 and the defense of partial mental responsibility are separate and distinct. For the defense of lack of mental responsibility, the burden is on the defense to prove, by clear and convincing evidence, the accused's lack of mental responsibility. On the other hand, any evidence of partial mental responsibility may be considered by you in deciding whether the government has proven beyond a reasonable doubt that the accused had the required (state of mind) (specific intent) to commit the offense. The same evidence, however, may be considered with respect to both types of defenses.

> ***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:***

MJ: 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 MJ instructs on the defense of lack of mental responsibility (Article 50a). The optional portions of the instruction contained in parentheses should also be given if the MJ instructs on partial mental responsibility, Instruction 6-5.

MJ: 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 in determining 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. Experts in a particular field are permitted to give their 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 each witness’s circumstances, opportunity to observe the accused and to know the facts to which the witness has testified, and willingness and capacity to expound freely as to his/her observations and knowledge. You may also consider 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's observation of the accused and the nature and length of time of the witness's 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 IN 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 8-3-14.

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 (primary) members of the court are required to vote. (Alternate members will not, at this time, participate in deliberations or voting.)

(The order in which the (several) charges and specifications are to be voted on will 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. 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 your 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 defense has proven, by clear and convincing evidence, the accused's lack of mental responsibility for that offense.

(If you find the accused Guilty of any specification under (The) (a) Charge, then the finding as to (The) (that) Charge must also be 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.

(IF CHARGES WERE REFERRED PRIOR TO 1 JANUARY 2019, PROVIDE THIS INSTRUCTION ON THE REQUIRED NUMBER OF VOTES TO CONVICT:) **The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding 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)).**

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

MJ: If, however, ___ or more members vote that the prosecution has proved the elements of the specification, you must next vote on whether the accused has proven, by clear and convincing evidence, that (he) (she) lacked mental responsibility.

The concurrence of a majority 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.

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 the required number of members 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 (whether it is on the elements of an offense or on the issue of mental responsibility), 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, Not Guilty or Not Guilty Only by Reason of Lack of Mental Responsibility; or (2) which specification (and charge) is involved. I will then give you specific further instructions on the procedure for reconsideration.

> ***NOTE 2: 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 Bailiff will now hand to the president).

> ***NOTE 3: 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 or completely convicted of (the) (all) charge(s) and specification(s). (The second 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: 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.)

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

MJ: The court is closed.

6–8. RECONSIDERATION INSTRUCTIONS (FINDINGS–MENTAL RESPONSIBILITY AT ISSUE)

NOTE: 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: Members, reconsideration is a process wherein you are allowed to re-vote on your finding(s) after you have reached a finding of either Guilty, Not Guilty or Not Guilty Only by Reason of Lack of Mental Responsibility. The process for reconsideration is different depending on whether the proposal is to reconsider a finding of Not Guilty, a finding of Guilty, or a finding on the issue of mental responsibility. After reaching your finding(s) by the required concurrence, any member may propose, either before or after voting on the issue of mental responsibility, that (some or all of) the finding(s) be reconsidered. When this is done, the first step is to vote, by secret written ballot, 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:

First, if you have, thus far, only reached a finding of Guilty or Not Guilty, but have not yet voted on the issue of mental responsibility (or the issue of mental responsibility does not apply to the offense proposed to be reconsidered), then the following rules apply to any proposal to reconsider.

Voting on Reconsideration:

[IF CHARGES REFERRED BEFORE 1 JANUARY 2019] **If the proposal is to reconsider a Guilty finding, then more than one-third of the members, that is ___ members, must vote in favor of reconsidering a Guilty finding. If the proposal is to reconsider a Not Guilty finding, then more than one-half of the members, that is ___ members, must vote in favor of reconsidering a Not Guilty finding.**

[IF CHARGES REFERRED ON OR AFTER 1 JANUARY 2019] **If the proposal is to reconsider a Guilty finding, then more than one-fourth of the members, that is ___ members, must vote in favor of reconsidering a Guilty finding. If the proposal is**

to reconsider a Not Guilty finding, then more than one-half of the members, that is ___ members, must vote in favor of reconsidering a Not Guilty finding.

Re-voting on a Finding:

If you do not receive the required concurrence in favor of reconsideration, then that ends the issue and you should open the court to announce the findings as you 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. If your new vote results in a Not Guilty finding, then you do not vote on the issue of mental responsibility. If your new vote results in a Guilty finding for an offense for which the defense of mental responsibility is at issue, then you next vote on the issue of mental responsibility, again following my original instructions.

MJ: Again, the reconsideration instructions I have given you so far only apply if you have, thus far, reached a finding of Guilty or Not Guilty, but have not yet voted on the issue of mental responsibility (or the issue of mental responsibility does not apply to the offense proposed to be reconsidered). If you have already reached a finding of Guilty and a finding on the issue of mental responsibility, then the following rules apply to any proposal to reconsider:

A member may propose reconsideration as to either the finding of Guilty, or as to the finding on mental responsibility, or both. The member proposing reconsideration must announce to the other members the finding or findings he or she is proposing be reconsidered.

If you have reached a finding of Guilty and have further found that the accused was mentally responsible at the time of the offense, then that constitutes a finding of Guilty. In that circumstance, a member may propose reconsideration as to either the finding of Guilty, or as to the finding that the accused was mentally responsible at the time of the offense, or both.

[IF CHARGES REFERRED BEFORE 1 JANUARY 2019] **To reconsider either finding, you will be required to vote again if more than one-third of the members, that is ___ members, vote in favor of reconsideration.**

[IF CHARGES REFERRED ON OR AFTER 1 JANUARY 2019] **To reconsider either finding, you will be require to vote again if more than one-fourth of the members, that is ___ members, vote in favor of reconsideration.**

MJ: If the required number of members votes to reconsider a finding or findings, you will vote again as I instructed you before about those votes including the number of votes required for the findings. Again, if you vote to reconsider a Guilty finding and your new vote results in a Guilty finding, you will not vote again on the finding regarding mental responsibility. Your finding remains a finding of "Guilty." In this situation, the only way you would vote again on the finding regarding mental responsibility is if a member also proposed reconsideration of your finding of mental responsibility in addition to reconsideration of the Guilty finding AND more than (one-third [for charges referred prior to 1 January 2019]**) (one-fourth** [for charges referred after 1 January 2019]**) of the members, which is __ members, votes to reconsider the finding on mental responsibility. In that case, you would vote again on the finding on mental responsibility using the instructions I gave you before about that vote including the number of votes required for the finding. On the other hand, if a member proposes only reconsideration of the finding on mental responsibility, you will not vote to reconsider the Guilty finding and will not conduct another vote on the Guilty.**

MJ: If you have reached a finding of Guilty <u>and</u> have further found that the accused was <u>not</u> 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 Guilty finding, or the finding on mental responsibility, or both. To reconsider the Guilty finding, you must vote again if more than (one-third [for charges referred prior to 1

January 2019]**) (one-fourth** [for charges preferred after 1 January 2019]**) of the members, that is ___ members, vote in favor of reconsideration. To reconsider the finding on mental responsibility, you must vote again if more than one-half of the members, that is ___ members, vote in favor of reconsideration.**

If you vote to reconsider the Guilty finding, you vote again on that finding and use the instructions I gave you before about that vote including the number of votes required for the finding. If your new vote results in a Not Guilty finding, that results in a finding of Not Guilty for that offense and your original finding that the accused was not mentally responsible is voided. Your finding will be "Not Guilty" rather than "Not Guilty Only by Reason of Lack of Mental Responsibility." On the other hand, if your new vote results in a finding of Guilty, you will not vote again on the finding regarding mental responsibility. Your finding remains Not Guilty Only by Reason of Lack of Mental Responsibility. In this situation, the only way you would vote again on the finding regarding mental responsibility is if a member also proposed reconsideration of that finding in addition to reconsideration of the Guilty finding AND more than one-half of the members, that is ___ members, votes to reconsider the finding on mental responsibility. In that case, you would vote again on the finding on mental responsibility using the instructions I gave you before about that vote including the number of votes required for the finding.

On the other hand, if a member proposes only reconsideration of the finding on mental responsibility, you will not vote to reconsider the Guilty finding and will not conduct another vote on the Guilty finding.

MJ: Counsel, any objections to the instructions given or requests for additional instructions?

TC/DC: (Respond.)

MJ: Court is again 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:

MJ: 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 an extenuating 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

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 (<u>state the name of the fellow prisoner</u>) was duly placed in confinement;

2. That (<u>state the time and place alleged</u>) (<u>state the name of the fellow prisoner</u>) freed himself/herself from the physical restraint of his/her confinement before he/she had been released by proper authority; and

3. That (<u>state the name of the accused</u>) aided and abetted (<u>state the name of the fellow prisoner</u>) 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: <u>Including definitions and other instructions</u>. 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: <u>Concluding instructions on conspiracy offenses</u>. 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: US v. Gaeta, 14 MJ 383 (CMA 1983); US 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 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 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); 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: US 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: <u>Using this instruction</u>. 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: <u>Withdrawal from a stipulation</u>. 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: <u>Joint or common trials</u>. 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, one of the following instructions should be given depending on whether the judge is taking notice of an adjudicative fact or of domestic or foreign law:

(Judicial Notice of Adjudicative Facts): I have taken judicial notice that (state the matter judicially noticed). This means that you are 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.

(Judicial Notice of Law): I have taken judicial notice of (state domestic or foreign law judicially noticed). This means that you are permitted to recognize and consider (those) (this) law(s) without further proof.

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 202.

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: US 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. 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. An expert may testify about the symptoms found among victims of certain offenses and whether the alleged victim exhibited those symptoms. However, an expert may not testify about the credibility of the victim or opine whether an offense has been committed. When an expert witness' testimony may be confused with an opinion on credibility, guilt or innocence, the instruction following NOTE 1 in instruction 7-26 would be appropriate. If testimony about the expert's opinion on credibility is offered for the proper, limited purpose of showing why the expert took certain actions, the instruction following NOTE 2 in instruction 7-26 would also be appropriate.

REFERENCES: MRE 701-706.

Expert testimony as a human lie detector impermissible: US v. Armstrong, 53 MJ 76 (CAAF 2000); US v. Birdsall, 47 MJ 404 (CAAF 1998); US v. Harrison, 31 MJ 330 (CMA 1990).

Expert testimony comparing victim's behavior / symptoms with known characteristics of victims permissible: US v. Birdsall, 47 MJ 404 (CAAF 1998); US v. Suarez, 35 MJ 374 (CMA 1992); US v. Harrison, 31 MJ 330 (CMA 1990).

7–10. ACCOMPLICE TESTIMONY

NOTE: Using this instruction. Instructions on accomplice testimony should be given whenever the evidence tends to indicate that a person whose statements are before the factfinder in any manner was culpably involved in a crime with which the accused is charged. The instructions should be substantially as follows:

A person 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 (state the name of the person)'s believability, that is, a motive to falsify his/her (statement) (testimony) in whole or in part, because of an obvious self-interest under the circumstances.

(For example, an accomplice may be motivated to falsify (a statement) (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 person), 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 person), whose (testimony) (statement) is before you, was an accomplice is a question for you to decide. If (state the name of the person) 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 (weight, if any, to be attached to all the evidence) (credibility of all the witnesses, and the weight, if any, you will accord the testimony of each witness). Although you should consider the (statement) (testimony) of an accomplice with caution, you may convict the accused based solely upon the (statement) (testimony) of an accomplice, as long as that (statement) (testimony) was not self-contradictory, uncertain, or improbable.

REFERENCES: RCM 918(c), MCM; US v. Bigelow, 57 MJ 64 (CAAF 2002); US v. Williams, 52 MJ 218 (CAAF 2000); US v. Gittens, 39 MJ 328 (CMA 1994); US v. Gillette, 35 MJ 468 (CMA 1992); US v. McKinnie, 32 MJ 141 (CMA 1991); US v. Simpson, 60 MJ 674 (ACCA 2004).

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 RIGHT TO REMAIN SILENT

NOTE: <u>Using this instruction</u>. 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: The process of admitting other acts evidence under MRE 404(b). 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: Using these instructions. 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 (See NOTE 1.1 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 3.2 and 4.2 may be appropriate in lieu of the below instruction.

You may consider evidence that the accused may have (state the evidence introduced for a limited purpose) 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: Sexual offense and child molestation cases – MRE 413 or 414 evidence. In cases in which the accused is charged with a sexual offense or an act of child molestation, MRE 413 and 414 permit the prosecution to offer, and the court to admit, evidence of the accused's commission of other uncharged sexual offenses or acts of child molestation, 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 prior to entry of pleas, or at such later time as the military judge may find for good cause. In order to admit evidence of other uncharged sexual offenses or acts of child molestation, the military judge must make findings that (1) the accused is charged with a sexual offense/act of child molestation as defined by MRE 413/414; (2) the evidence proffered is evidence of the accused's commission of another sexual offense/child molestation offense; and (3) the evidence is relevant under MRE 401 and 402. The military judge must also conduct a prejudice analysis under MRE 403. (See, U.S. v. Wright 53 MJ 476 (CAAF 2000) for factors to consider in applying MRE 403 balance test). In determining whether the proffered evidence of an uncharged act qualifies as an "other sexual offense" or "other offense of child molestation," the military judge applies a two-part test: (1) whether the conduct constituted a punishable offense under the UCMJ, federal law, or state law when the conduct occurred, and (2) whether the conduct is encompassed within one of the specific categories of "sexual offense" or "child molestation" set forth in the version of MRE 413(d) or 414(d)(2) in effect at the time of trial. When evidence of the accused's commission of other uncharged sexual offenses under MRE 413, or of other uncharged offenses of child molestation under MRE 414, is properly admitted prior to findings as an exception to the general rule excluding such evidence, the MJ must give the following appropriately tailored instruction based on the evidence admitted. Evidence of other charged sexual offenses or acts of child molestation is not admissible under MRE 413/414 unless the accused has pled guilty to these other charged offenses.

You have heard evidence that the accused may have committed (another) (other) (sexual) (child molestation) offenses(s). [The military judge may list/identify the evidence admitted pursuant to MRE 413/414, if appropriate]. The accused is not charged with (this) (these) offense(s). You may consider the evidence of (this) (these) other offense(s) for its bearing on any matter to which it is relevant, to include its tendency, if any, to show the accused's propensity to engage in (sexual) (child molestation) offenses.

However, evidence of another (sexual) (child molestation) offense, on its own, is not sufficient to prove the accused guilty of a charged offense. You may not convict the accused solely because you believe (he) (she) committed another (sexual) (child molestation) offense or offenses or solely because you believe the accused has a propensity to engage in (sexual) (child molestation) offenses. Bear in mind that the government has the burden to prove that the accused committed each of the elements of each charged offense.

> ***NOTE 4: 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 must be within the scope of RCM 1001(b). The military judge must ensure that the government does not invite the members to sentence the accused for uncharged misconduct.***

REFERENCES:

(1) MRE 105, 403, 404(b), 413, and 414.

(2) Application of Federal Rules of Evidence and MRE 413 and 414; US v. Wright, 53 MJ 476 (CAAF 2000); US v. Henley, 53 MJ 488 (CAAF 2000); US v. Parker, 54 MJ 700 (ACCA 2001) (disclosure requirements); US v. Myers, 51 MJ 570 (NMCCA 1999).

(3) Test for admissibility under MRE 404(b); US v. Mirandez-Gonzalez, 26 MJ 411 (CMA 1988); US v. Reynolds, 29 MJ 105 (CMA 1989); Huddleston v. US, 485 U.S. 681 (1988).

(4) Test for admissibility under MRE 413/414; US v. Burton, 67 MJ 150 (CAAF 2009); Not applicable to other charged sexual/child molestation offenses to which the accused has pled not guilty. US v. Hills. 75 MJ 350 (CAAF 2016). (NOTE: In the unlikely event an accused pleads guilty to some sexual/child molestation offenses and not guilty to others, you may instruct the members on the 413/414 application of the pled guilty to offenses to the unpled offenses however, absent an express request by the defense, you may not mention to the members the fact that the accused pled guilty to those offenses. See, US v. Kiser, 58 MJ 146 (2003)). Determining if an uncharged act qualifies as an “other sexual offense” or “other offense of child molestation”; US v. Fetrow, 76 MJ 181 (CAAF 2017) (addressing MRE 414, but equally applicable to MRE 413 evidence).

(5) Use of uncharged misconduct as aggravation evidence; US v. Hardison, 64 MJ 279 (CAAF 2007). Improper use of uncharged misconduct as aggravation in sentencing; US v. Schroder, 65 MJ 49 (CAAF 2007).

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 SEX OFFENSE VICTIM

NOTE: Using this instruction. In a prosecution for a 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: <u>Using this instruction</u>. 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: <u>Modifying findings by exceptions and substitutions</u>. 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 US 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); US v. Palacios, 37 MJ 366 (CMA 1993); US 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. US, 335 U.S. 469 (1948); US v. White, 36 MJ 306 (CMA 1993); US v. Pearce, 27 MJ 121 (CMA 1988); US v. Donnelly, 13 MJ 79 (CMA 1982); US v. Pauley, 24 MJ 521 (AFCMR 1987); US 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. US 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. US, 162 U.S. 613 (1896), this instruction has long been accepted by courts. US v. McDougal, 650 F.2d 532 (4th Cir. 1981). The instruction has been validated in three military cases: US v. Opalka, 36 CMR 938 (AFBR), pet. denied, 36 CMR 541 (CMA 1966); US v. Colcol, 16 MJ 479 (CMA 1983); and US 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. US 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. US 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(f)(2) 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: <u>Necessary instructions during findings</u>. 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: <u>Instructing the members upon their excusal at the close of the trial</u>. 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: US v. Fleming, 38 MJ 126 (CMA 1993); US 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: US v. Gomez, 15 MJ 954 (ACMR), pet. denied sub nom., US v. Kamyal, 17 MJ 22 (CMA 1983); US 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: <u>Divers occasions</u>. 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 US 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

The procedural guides and instructions in this chapter outline the sequence of events normally followed in a case that has been referred capital **on or after 1 January 2019**. If charges were referred in a capitally-referred case **before 1 January 2019**, refer to prior versions of Chapter 8. In addition to serving as a procedural guide in a capital case, this chapter provides the majority of standard, non-evidentiary instructions on findings and sentencing in a capital case. The order in which the guides and instructions appear generally corresponds with the point in the trial when the particular wording or instruction is needed or is otherwise appropriate. The *NOTEs* must be carefully reviewed to help determine the applicability of the surrounding procedural guides and instructions.

SECTION I: INITIAL SESSION THROUGH ARRAIGNMENT (CAPITAL CASE)

8–1–1. 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 _____); copies of which have been furnished the military judge, counsel, and the accused, and which will be inserted at this point in the record.

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

> ***NOTE: The MJ should examine the convening order(s) and any amendments for accuracy. Only minor changes may be made at trial to the convening orders. Any correction which affects the identity of the individual concerned must be made by an amending or correcting order. If not a CAPITAL CASE, go to Chapter 2.***

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

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

TC: The charge(s) (has) (have) been properly referred to this court for trial with a special instruction to be tried as a capital case and (was) (were) served on the accused on _____. The five day statutory waiting period has (not) expired. The government provided the defense with written notice of the aggravating factor(s) it intends to prove on _____ and has provided a written copy to the court to be included in the record of trial as Appellate Exhibit ___.

> ***NOTE: The MJ must pay attention to the date of service. In peacetime, for a GCM, if less than 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, WAIVER OF STATUTORY WAITING PERIOD.

TC: The prosecution is ready to proceed (with the arraignment) in the case of *United States versus (Private) (___)* _____. 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).

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

8–1–2. RIGHTS TO COUNSEL

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

You also have the right to be represented by a military counsel of your own selection, provided that the counsel you request is reasonably available. If you were represented by military counsel of your own selection, then your detailed defense counsel would normally be excused. However, you could request that your detailed counsel continue to represent you, but your request would not have to be granted. Do you understand that?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

MJ: By whom do you wish to be represented?

ACC: (Responds.)

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

ACC: (Responds.)

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

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

NOTE: The MJ should require all defense counsel to place on the record their background(s) in detail, to specifically include capital litigation experience. See RCM 502(d)(2)(C), RCM 506(a)(2) and RCM 901(d)(2)B). In US 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.

DC: My experience and training include (___) special courts-martial, (___) general courts-martial, including (___) fully contested courts-martial as a (defense counsel/trial counsel) (and) (___) capital cases as a (defense/trial) counsel. I have attended the following courses (list all training as a trial counsel/defense counsel). I (will/will not) be acting as the learned counsel on this case.

NOTE: If any defense counsel needs to be sworn, the MJ will provide the following oath: "Do you swear or affirm that you will faithfully perform all

the duties of defense counsel in the case now in hearing (so help you God)?"

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.

CDC: My experience and training include (___) special courts-martial, (___) general courts-martial, including (___) fully contested courts-martial as a (defense counsel/trial counsel) (___) civilian felony trials, (___) civilian misdemeanor trials, (___) capital cases. I have attended the following courses (list all training as a trial counsel/defense counsel). I (will/will not) be acting as the learned counsel on this case.

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

MJ: I have been properly certified and sworn, and detailed (myself) (by_____) to this court-martial. I am not aware of any matter that might present a ground for challenge against me. Does either side desire to question or challenge me?

TC/DC: (Respond.)

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

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

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

8–1–3. FORUM RIGHTS CAPITAL CASE (GENERAL COURTS-MARTIAL REFERRED CAPITAL ON OR AFTER 1 JANUARY 2019)

MJ: _____, you have a right to be tried by a court consisting of twelve members. You are also advised that no member of the court would be junior in rank to you.

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

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

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

ACC: (Responds.)

MJ: In a trial by court members, the members will vote by secret, written ballot and three-fourths of the members must agree before you could be found guilty of any offense. Do you understand what I have said so far?

ACC: (Responds.)

MJ: This case includes (a) capital offense(s). A capital offense is any offense for which, if convicted of that offense, death may be adjudged as a possible punishment. As the trial counsel announced earlier, this case has been referred to be tried as a capital case. Therefore, if panel members unanimously find you guilty of (any of) the capital offense(s) or you plead guilty to (any of) the capital offense(s), then one of the possible punishments that may be adjudged is death.

(OPTION 1. TO BE USED IF ALL SPECIFICATIONS ALLEGE OFFENSES COMMITTED PRIOR TO 1 JANUARY 2019:)
MJ: If you are found guilty of any offense, then you will also be sentenced by the members. Three-fourths of the members must agree in voting on a sentence.

(OPTION 2. TO BE USED IF ALL SPECIFICATIONS ALLEGE OFFENSES COMMITTED ON OR AFTER 1 JANUARY 2019:)
MJ: If you are found guilty of any offense, then there will be sentencing proceedings. If all of the findings of guilty are for specifications for which death may be adjudged, then the members will determine your sentence. If you are found guilty of at least one specification for which death may be adjudged and at least one specification for which death may not be adjudged, then either (1) the members will determine the sentence for each specification for which death may be adjudged and the military judge alone will determine the sentence for each specification for which death may not be adjudged or (2) you may elect instead to have the members determine the sentence for all specifications. If you are found guilty of only specifications for which death may not be adjudged, then either (1) the military judge alone will determine your sentence for all specifications or (2) you may elect instead to have the members determine the sentence for all specifications. If the members determine any part of your sentence, then three-fourths of the members must agree in voting on a sentence.

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

MJ: If you are found guilty of any offense, then there will be sentencing proceedings. If you are found guilty in a trial with members, you will also be sentenced by the members. Three-fourths of the members must agree in voting on a sentence. If, however, you elect to be sentenced under the sentencing rules that became effective on 1 January 2019 and you are found guilty of at least one specification for which death may be adjudged and at least one specification for which death may not be adjudged, then either (1) the members will determine the sentence for each specification for which death may be adjudged and the military judge alone will determine the sentence for each specification for which death may not be adjudged or (2) you may elect instead to have the members determine the sentence for all specifications. If you elect to be sentenced under the sentencing rules that became effective on 1 January 2019 and you are found guilty of only specifications for which death may not be adjudged, then either (1) the military judge alone will determine your sentence for all specifications or (2) you may elect instead to have the members determine the sentence for all specifications. Regardless of which sentencing rules you elect to be sentenced under, if all of the findings of guilty are for specifications for which death may be adjudged, then the members will determine your sentence. If the members determine any part of your sentence, then three-fourths of the members must agree in voting on a sentence.)

NOTE: In all capital cases, continue below.

MJ: The death penalty may only be adjudged if you are convicted of a capital offense by either (1) the unanimous vote of all twelve members of the court-martial, or (2) the military judge pursuant to a plea of guilty to a capital offense.

MJ: Also, to impose a death sentence, the court members, at the sentencing phase, must: (1) unanimously find, beyond a reasonable doubt, evidence of (the) (at least one) aggravating factor; (2) unanimously find that any extenuating or mitigating circumstance(s) (is) (are) substantially outweighed by any aggravating circumstance(s), including the aggravating factor(s); and (3) unanimously vote to impose death. If any one of these votes is not unanimous, then death may not be adjudged.

MJ: For any sentence that does not include death, three-fourths of the members must agree in voting on a sentence.

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.)

8–1–4. SENTENCING RIGHTS

NOTE: This paragraph <u>only</u> applies in courts-martial with specifications alleging offenses committed <u>both</u> <u>before 1 January 2019</u> <u>and</u> <u>on or after 1 January 2019</u>. If so, the applicable sentencing rules are the sentencing rules in effect prior to 1 January 2019. However, an accused may, instead, elect to be sentenced under the sentencing rules in effect on and after 1 January 2019. In this scenario, the MJ shall ascertain, prior to arraignment, whether the accused elects to be sentenced under the sentencing rules in effect on and after 1 January 2019. See RCM 902A, RCM 1002(b)(2), and the Discussion to RCM 1004(b)(6). The accused may not defer this election – it must be made prior to arraignment.

MJ: Because you are charged with offenses allegedly occurring both before 1 January 2019 and on or after 1 January 2019, the applicable sentencing rules for this court-martial are the sentencing rules in effect prior to 1 January 2019. If you are convicted of any offense, no matter when the offense was committed, this court-martial will apply the sentencing rules in effect prior to 1 January 2019. However, you may elect to be sentenced under the sentencing rules in effect as of 1 January 2019. If you make this election, and are later convicted of any offense, no matter when the offense occurred, you will be sentenced under the sentencing rules in effect on 1 January 2019. You must make this election prior to arraignment. Your election regarding the applicable sentencing rules is irrevocable, unless I find good cause for a later request to withdraw the election.

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

ACC: (Responds)

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

ACC: (Responds)

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

ACC: (Responds.)

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

ACC: (Responds)

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

8–1–5. ARRAIGNMENT

MJ: The accused will now be arraigned.

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

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

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

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

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

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

> ***NOTE: Whenever factual issues are involved in ruling on a motion, the MJ shall state essential findings of fact. If trial counsel requests a delay to determine whether to file notice of appeal under Article 62 (See RCM 908), the MJ should note the time on the record so that the 72-hour period may be accurately calculated.***
>
> ***NOTE: Before 1 January 2019, a plea of guilty could not be received as to an offense for which the death penalty may be imposed. In a court-martial referred capital on or after 1 January 2019, an accused may plead guilty to an offense for which the death penalty may be imposed. See RCM 910(a) and its Discussion.***

DC: The accused, _____, pleads as follows:

> ***NOTE: The MJ must ensure that pleas are entered after all motions are litigated.***
>
> ***NOTE: The following admonition is suggested after arraignment. RCM 804(c)(1).***

MJ: _____, what has just happened is called an arraignment. An arraignment has certain legal consequences, one of which I'd like to explain to you now. Under ordinary circumstances, you have the right to be present at every session and stage of your trial. However, if you are voluntarily absent at any point in this trial going forward, you may forfeit the right to be present. Future sessions

and the trial could go forward even if you were not present, up to and including sentencing, if necessary. Do you understand this?

ACC: (Responds.)

MJ: It is important that you keep your defense counsel and your chain of command apprised of your whereabouts at all times between now and all future sessions of this court-martial. Do you have any questions about what I've told you?

ACC: (Responds.)

> ***NOTE: If the accused entered a plea of GUILTY, continue to Section II, GUILTY PLEA (CAPITAL CASE). 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 CAPITAL CASE).***

SECTION II: GUILTY PLEA (CAPITAL CASE)

8–2–1. GUILTY PLEA (CAPITAL CASE) INTRODUCTION

NOTE: Before 1 January 2019, a plea of guilty could "not be received as to an offense for which the death penalty may be adjudged by the court-martial." RCM 910(a)(1), MCM, 2016 edition. In a court-martial referred capital on or after 1 January 2019, an accused may plead guilty to an offense for which the death penalty may be imposed. See RCM 910(a)(1), MCM, 2019 edition and its Discussion. See also, RCM 1004(a)(2)(B).

NOTE: If the parties enter into a pretrial agreement or plea agreement in a capitally referred case, the MJ must determine if the agreement has a provision providing for a noncapital referral by operation of the agreement. If so, the MJ should ask the questions below and then follow Chapter 2's procedural guides for non-capitally referred cases (including advising the accused of his forum rights as a MJ would for any case that was not referred capital). In other words, if the death penalty is no longer a permissible punishment, the MJ should use the procedural guides and instructions in Chapter 2, not Chapter 8. If there is no agreement or the agreement does not have a provision providing for a noncapital referral by operation of the agreement (i.e., the accused is pleading guilty, but the case remains a capitally referred case per RCM 1004(a)(2)(B)), then skip to the next NOTE.

MJ: _____, paragraph ___ of the (pretrial) (plea) agreement states that, if you comply with the provisions of the (pretrial) (plea) 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: It is my understanding that, during pretrial negotiations, the Convening Authority, defense counsel, and the accused agreed that, if the accused successfully pled guilty and complied with all the terms of the agreement, then the case would be tried as a noncapital case. Is that understanding correct?

TC/DC: (Respond.)

MJ: _____, do you agree?

ACC: (Responds.)

MJ: Do all parties agree that the effect of paragraph ___ of the (pretrial) (plea) agreement is that after a thorough providence inquiry, a comprehensive review of the agreement, the acceptance of the accused's plea, and entry of findings

thereon, this case will be thereby referred, by operation of the agreement, for trial only as a noncapital case?

TC/DC/ACC: (Respond.)

> ***NOTE: If the Accused pled guilty to any specifications, the MJ must first follow the appropriately-tailored procedural guides and instructions in Chapter 2, Section II, GUILTY PLEA INQUIRY. If, after completion of the guilty plea inquiry and acceptance of the plea, the death penalty is no longer a possible punishment, then the MJ should follow appropriately-tailored procedural guides and instructions in Chapter 2, not Chapter 8. If, after completion of the guilty plea inquiry and acceptance of the plea, the death penalty is still a possible punishment per RCM 1004(a)(2)(B)), then the MJ must follow either the procedural guides and instructions in Chapter 8, Section III, COURT MEMBERS (CONTESTED CAPITAL CASE) or the procedural guides and instructions in Chapter 8, Section IV, COURT MEMBERS (CAPITAL CASE SENTENCING ONLY), as appropriate.***

> ***NOTE: A plea agreement's sentence limitations cannot include the possibility of death.***

SECTION III: COURT MEMBERS (CONTESTED CAPITAL CASE)

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 _____, Court Members.

The following person(s) (is) (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* (*Private*) (___) _____.

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.

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

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

(AIR FORCE) **A "reasonable doubt" is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged, you must find (him) (her) guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.**

(NAVY / USMC) **By "reasonable doubt" is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we**

know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt.

NOTE: In all cases, continue below.

The fact that (a) charge(s) (has) (have) been preferred against this accused and referred to this court for trial does not permit any inference of guilt. You must determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court and upon the instructions I will give you. Because you cannot properly make that determination until you have heard all 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.

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

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

It is no adverse reflection upon a court member to be excused from a particular case. You may be questioned either individually or collectively, but in either event, you should indicate an individual response to the question asked. Unless I indicate otherwise, you are required to answer all questions.

You must keep an open mind throughout the trial. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to whether the accused is guilty or not guilty or, as to an appropriate sentence if the accused is found guilty of (any) (this) offense. With regard to sentencing, should that become necessary, you may not have 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.

Until you close to deliberate, you may not discuss this court-martial with anyone, even amongst yourselves. You must wait until you are all together in your closed session deliberations so that all panel members have the benefit of your

discussion. During the course of the trial, including all periods of recess and adjournment, you must not communicate with anyone about the case, either in person or by email, blog, text message, twitter or any form of social media. Posting information about the case on a Facebook page, for example, is considered a form of communicating about the case. You must also not listen to or read any accounts of the case or visit the scene of any incident alleged in the specification(s) or mentioned during the trial. Do not consult any source of law or information, written or otherwise, as to any matters involved in this case and do not conduct your own investigation or research. For example, you cannot consult the Manual for Courts-Martial, dictionaries or reference materials, search the internet, 'Google' the witnesses to learn more about them, review a Wikipedia entry or consult a map or satellite picture to learn more about the alleged crime scene.

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

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

While you are in your closed session deliberations, only the members will be present. You must remain together and you may not allow any unauthorized intrusion into your deliberations.

Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. However, in addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations and will speak for the court in announcing the results.

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

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If it becomes too hot or 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) and specification(s) on the flyer provided to you. Please also ensure that your name is correctly reflected on (at least 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 _____. (A preliminary hearing was conducted by _____).

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

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

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 instructions immediately below and throughout Chapter 8 are 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 MJ may have a case referred capital for some other offense(s) 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; or espionage, Article 103a). In such cases, the MJ should edit and insert appropriately tailored instructions concerning other possible sentences.

MJ: This is a capital murder case. I want to direct your attention specifically to the capital offense(s) in [state the charge(s) and specification(s) for which a sentence of death may be adjudged] commonly referred to as (premeditated murder) (felony murder). If the accused is convicted of (premeditated murder) (felony murder) by a unanimous vote, then the court may have the option, 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(s) exist(s) 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, the death penalty will be a possible punishment, but only if you then 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) (felony murder), but the vote for conviction is 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 innocent 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) (The) Specification(s)?**

3. (The trial counsel is) (I am) going to read a list of the potential witnesses in this case. Afterwards, (the trial counsel) (I) will ask you if anyone knows any of the potential witnesses in this case. [Read list of witnesses] **Does anyone know any of the potential witnesses in this case?**

4. Having seen the accused and having read the charge(s) and specification(s), does anyone believe that you cannot give the accused a fair trial for any reason?

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

6. 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 7-12; if none, go to Question 13.***

7. Members, regarding the media and media reporting, is there any member who has participated in a military operation that received press coverage?

8. 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?

9. Is there any member who believes that, merely because the press reports something, it is, in fact, the truth?

10. Do all members agree with the proposition that press reports of military affairs or about any kind of event may be incorrect or inaccurate?

11. 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?

12. 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?

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

14. 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?

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

> ***NOTE: If Question 15 is answered in the affirmative, the MJ may want to ask any additional questions concerning this out of the hearing of the other members.***

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

17. (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?**

18. 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?

19. 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?

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

21. 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?

22. Members, as I told you earlier, if the accused is convicted of (premeditated murder) (_____) by a unanimous vote, one of the possible punishments may be death. Is there any member who, due to religious, moral, or ethical beliefs, would be unable to vote for a finding of guilty even if you are convinced that, under the law, the accused's guilt has been proved by legal and competent evidence, because death may be a possible punishment?

23. 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?

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

25. Has anyone had any legal training or experience other than that generally received by military personnel of your rank or position?

26. 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?

27. 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?

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

> ***NOTE: If Question 27 is answered in the affirmative, the MJ may want to ask questions 28 and 29 out of the hearing of the other members.***

29. (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?**

30. (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?**

31. 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?

32. 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?

33. 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." 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)?

34. Members, as I 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 religious, moral, or ethical beliefs, who would

be unable to give meaningful consideration to the imposition of the death penalty?

35. 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) (_____)?

36. 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. 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. Will each of you follow this instruction?

37. 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?

38. 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?

39. 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 may conduct group voir dire.

8–3–2. INDIVIDUAL VOIR DIRE

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

MBRS: (Comply.)

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

TC: (Responds.)

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

DC: (Responds.)

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

8–3–3. 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. US 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 MJ is afforded significant latitude in determining whether it is present in a prospective member. The MJ's physical presence during voir dire and ability to watch the challenged member's demeanor make the MJ specially situated in making this determination. US 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. US v. Napolitano, 53 MJ 162 (CAAF 2000). In determining whether implied bias is present, MJs look to the totality of the circumstances. US 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 MJ. US v. Armstrong, 54 MJ 51, 54 (CAAF 2000). In close cases, MJs are enjoined to liberally grant defense challenges for cause. US v. Clay, 64 MJ 274 (CAAF 2007). This "liberal grant mandate" does not apply to government challenges for cause. US v. James, 61 MJ 132 (CAAF 2005). Where a MJ 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 MJ 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. US v. Townsend, 65 MJ 480 (CAAF 2008). The following is a suggested procedure for an Article 39(a) session.

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

TC: (Responds.)

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

DC: (Responds.)

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

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

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

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

DC: (Responds.)

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

TC: (Responds.)

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

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

> ***NOTE: If charges were referred <u>on or after 1 January 2019</u>, following the exercise of challenges for cause, if any, and prior to the exercise of peremptory challenges, the MJ, or a designee thereof, shall randomly assign numbers to the remaining members for purposes of impaneling members in accordance with RCM 912A. See RCM 912(f)(5). The MJ should proceed as stated below (or as directed by MJ's service Trial Judiciary).***

MJ: In a moment, we will recess to allow the court reporter to randomly assign numbers to the remaining members. The court reporter will do so using the panel member random number generator on the Army JAG Corps' website. Each party may be present and observe the court reporter perform this task, if desired.

MJ: Counsel, do you want to observe the court reporter randomly assign these numbers?

TC/DC: (Respond.)

MJ: Court reporter, please print a copy of the results, once you have them, and mark them as the next appellate exhibit in order. (Please also allow the (trial counsel) (defense counsel) to observe you when you randomly assign the numbers.)

(Recess.)

MJ: This Article 39(a) session is called to order. All parties are present, except the members. Appellate exhibit __ reflects the result of the random assignment of numbers to the remaining members. Does any party have an objection to the manner in which numbers were assigned to the members?

TC/DC: (Respond.)

> ***NOTE: Continue below with the exercise of peremptory challenges, if any.*****MJ: Trial Counsel, do you have a peremptory challenge?**

TC: (Responds.)

MJ: Defense Counsel, do you have a peremptory challenge?

DC: (Responds.)

> ***NOTE: After excusing the members who were successfully challenged for cause or peremptorily, the MJ will verify that a quorum remains. The MJ will also verify that enlisted members comprise at least one-third of the members, if so requested by the accused.NOTE: If charges were referred <u>on or after 1 January 2019</u>, and excess members remain, the MJ must impanel the members (and any alternate members, if authorized) in accordance with the procedures in RCM 912A. Once the members are impaneled, and any excess members have been excused, the judge must announce that the members have been impaneled, as stated below.***

MJ: The members are impaneled. Call the members.

TC: All parties are present as before, to now include the court members (with the exception of _____, who (has) (have) been excused).

> ***NOTE: If alternate members were authorized and impaneled, the MJ should provide the following instruction to the alternate members.***

MJ: _____, you have been designated as (an) alternate member(s) of this court-martial. As (an) alternate member(s), you have the same duties as the other members. You will observe the same trial, pay attention to all of my instructions, and may ask questions, if necessary. Sometimes during a trial, a member must be excused due to illness or some other reason. If that occurs, you may be designated as a member of this court-martial. Unless you are later designated as a member, you will not participate in the deliberations or vote on findings or, if necessary, sentence.

8–3–4. ANNOUNCEMENT OF PLEA

NOTE: If the accused has pled not guilty to all charges and specifications, or if the accused has pled guilty to only some specifications, and has specifically requested members be advised of those guilty pleas, announce the following:

MJ: 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: _____.

MJ: 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.

8–3–5. 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 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 evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. See RCM 917 and the instruction at paragraph 2-7-13, MOTION FOR FINDING OF NOT GUILTY.***

8–3–6. 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.

8–3–7. 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 findings instructions. You are excused until approximately _____.

MBRS: (Comply.)

8–3–8. 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:***

MJ: _____, you did not testify. Was it your personal decision not to testify?

ACC: (Responds.)]

MJ: Counsel, which exhibits go to the court members?

TC/DC: (Respond.)

MJ: Counsel, do you see any lesser included offenses that are in issue?

TC/DC: (Respond.)

MJ: (IF THE ACCUSED ELECTED NOT TO TESTIFY.) **Defense, do you wish for me to instruct on the fact the accused did not testify?**

DC: (Responds.)

MJ: I intend to give the following instructions: _____. Does either side have any objection to those instructions?

TC/DC: (Respond.)

MJ: What other instructions do the parties request?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Findings Worksheet as Appellate Exhibit ___, show it to the defense, and present it to me.

TC: (Complies.)

MJ: Defense Counsel, do you have any objections to the Findings Worksheet?

DC: (Responds.)

MJ: Is there anything else that needs to be taken up before calling the members?

TC/DC: (Respond.)

MJ: Call the members.

8–3–9. 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, 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 whether the accused is guilty or not guilty. The law presumes the accused to be innocent of the charge(s) against (him) (her).

During 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 now advise you of the elements of each offense alleged.

In (The) Specification (____) of (The) (Additional) Charge (____), the accused is charged with the offense of (<u>specify the offense</u>). 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 and/or Chapter 3A of the Benchbook.***
>
> _____ _____ _____ _____.

NOTE: If lesser included offenses are in issue, use paragraph 8-3-9 LESSER INCLUDED OFFENSE(S); if no lesser included offenses are in issue, go to paragraph 8-3-10, OTHER APPROPRIATE INSTRUCTIONS.

8–3–10. LESSER INCLUDED OFFENSE(S)

NOTE: After instructions on the elements of an offense alleged, the members 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:

8-3-10a. 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 or 3A of the Benchbook.

8-3-10b. LIO Differences
MJ: The offense charged,_____, and the lesser included offense of _____ differ (in that the offense charged requires as (an) element(s) that you be convinced beyond a reasonable doubt that (<u>state the element(s) applicable only to the greater offense</u>), whereas the lesser offense of _____ does not include such (an) element(s).

(When an LIO involves lesser specific intent) **MJ: However, the lesser offense of _____ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done (recklessly) (negligently) (with the specific intent to _____).**

(When attempt is an LIO) **MJ: However, the lesser offense of attempted _____ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done with the specific intent to commit the offense of _____, that the act(s) amounted to more than mere preparation and that the act(s) apparently tended to bring about the commission of the offense of _____.**

8-3-10c. Other LIO's Within the Same Specification

MJ: This lesser included offense differs from the lesser included offense I just discussed with you previously in that the previous lesser included offense of _____ requires as (an) essential element(s) that you be convinced beyond a reasonable doubt that (state the element(s) applicable only to the previous lesser offense) whereas this lesser offense of _____ does not include such (an) element(s).

(When an LIO involves lesser specific intent) **MJ: However, the lesser offense of _____ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done (recklessly) (negligently) (with the specific intent to _____).**

(When attempt is a subsequent LIO) **MJ: However, the lesser offense of attempted _____ does require that you be satisfied beyond a reasonable doubt that the accused's act(s) (was) (were) done with the specific intent to commit the offense of _____, that the act(s) amounted to more than mere preparation and that the act(s) apparently tended to bring about the commission of the offense of _____.**

NOTE: Repeat the above as necessary to cover all LIO's.

8–3–11. 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 (Instruction 7-7-1) and circumstantial evidence (Instruction 7-3) are typical in most cases and should be given prior to proceeding to the following instructions.

8–3–12. 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 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.

> ***NOTE: The services use different definitions of "reasonable doubt." The judge should give the appropriate definition from one of the three options below.***

(ARMY / COAST GUARD) **A "reasonable doubt" is not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. "Proof beyond a reasonable doubt" means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution which does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole evidence you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.**

(AIR FORCE) **A "reasonable doubt" is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged, you must find (him) (her) guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.**

(NAVY / USMC) **By reasonable doubt is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a**

real possibility that he/she is not guilty, you shall give him/her the benefit of the doubt and find him/her not guilty. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution that does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element of an offense, then you should find the accused guilty of that offense.

NOTE: In all cases, continue below.

MJ: 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.

MJ: 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.

8–3–13. 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.

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.)

NOTE: If there is an objection that counsel is misstating the evidence during argument, advise the panel as follows:

(MJ: Argument by counsel is not evidence. Counsel are not witnesses. If the facts as you remember them differ from the way counsel state the facts, it is your memory of the facts that controls.)

8–3–14. 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 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 (primary) members of the court are required to vote. (Alternate members will not, at this time, participate in deliberations or voting.)

(The order in which the (several) charges and specifications are to be voted on will 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 (the) (a) charge, then the finding as to (the) (that) Charge must also 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 three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have twelve (12) members, that means nine (9) members must concur in any finding of guilty.

If you have at least nine (9) votes of guilty of any offense, then that will result in a finding of guilty for that offense. If fewer than nine (9) 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 three-fourths 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 findings. 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 contains 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 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 will 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 the findings worksheet, the first portion will be used if the accused is completely acquitted or completely convicted of (the) (all) charge(s) and specification(s). (The second part 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 has 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. The worksheet is 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 trial, you must all remain together in the deliberations room during deliberations. During your deliberations, you must not communicate with or provide any information to anyone outside the deliberation room by any means. You also may not conduct any research about this case. Unless authorized by the court, you may not use any electronic device or media, such as a telephone, smart phone, or computer during deliberations. If you need a recess, if you have a question, or when you have reached your findings, you may notify the bailiff, who will then notify me that you desire to return to open court to make your desires or findings known.

MJ: Do counsel object to the instructions given or request additional instructions?

TC/DC: (Respond.)

MJ: Does any member of the court have any questions concerning these instructions?

MBR: (Respond.)

MJ: If it is necessary (and I mention this because there is no latrine immediately adjacent to your deliberation room), your deliberations may be interrupted by a recess. However, before you may leave your closed session deliberations, you must notify us, we must come into the courtroom, formally convene and then recess the court; and, after the recess, we must reconvene the court and formally close again for your deliberations. So, with that in mind, (COL) (____) _____, do you desire to take a brief recess before you begin your deliberations or would you like to begin immediately?

PRES: (Responds.)

MJ: (Trial Counsel) (Bailiff), please hand to the president (Prosecution Exhibit(s) _____) (Defense Exhibit(s) _____) (and) (the Findings Instructions) for use during deliberations.

TC/BAILIFF: (Complies.)

MJ: (COL) (____)_____, please do not mark on any of the exhibits except the Findings Worksheet (and please bring all of the exhibits with you when you return to the courtroom to announce your findings).

> ***NOTE: Prior to closing the court for deliberations, the MJ must instruct the alternate members, if any, that they will not be participating in deliberations, unless later needed, and that they must not discuss the case with anyone. The MJ may allow the alternate members to return to their duties or homes, subject to recall if needed. Requiring alternate members to leave the courthouse may be the prudent course of action in order to avoid contact with the parties and witnesses during deliberations. The alternate members should be told that they may be required to return for presentencing proceedings.***

MJ: The court is closed.

8–3–15. 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) (the) charge(s) and specification(s), then 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, 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. 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 that you have?

ACC: (Responds.)

MJ: Counsel, is the personal data on the first page of the charge sheet correct?

TC/DC: (Respond.)

MJ: Defense Counsel, has the accused been punished in any way that would constitute illegal pretrial punishment under Article 13?

DC: (Responds.)

MJ: _____, is that correct?

ACC: (Responds.)

MJ: Counsel, based on the information on the charge sheet, the accused is to be credited with ___days of pretrial confinement credit. Is that the correct amount?

TC/DC: (Respond.)

MJ: Counsel, do you have any documentary evidence on sentencing that could be marked and offered at this time?

TC/DC: (Comply.)

MJ: Is there anything else by either side?

TC/DC: (Respond.)

MJ: This Article 39(a) session is terminated as we await the members' findings.

8–3–16. 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 US 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 reviewed the Findings Worksheet and (the findings appear to be in proper form) (_____). Bailiff, please return the findings worksheet to the President.

BAILIFF: (Complies.)

MJ: Accused and Defense Counsel, please rise.

ACC/DC: (Comply.)

MJ: (COL) (___) _____, please announce the findings of the court.

PRES: (Complies.)

MJ: Please be seated. Bailiff, please retrieve all exhibits from the president and hand them to the court reporter.

BAILIFF: (Complies.)

NOTE: If the accused is acquitted of all charges, skip to the next NOTE. If there is one or more findings of guilty, the MJ must determine whether the accused has the option of electing the sentencing forum:

-<u>If all referred specifications allege offenses committed prior to 1 January 2019</u>, the members will determine the sentence (skip to Instruction 8-3-17).

-<u>If all referred specifications allege offenses committed on or after 1 January 2019</u>, the sentencing forum will depend on the nature of the offenses of which the accused was convicted:

-If the accused was convicted of only specifications for which the death penalty may be adjudged, then the members will determine the sentence (RCM 1002(e)(1)) (skip to Instruction 8-3-17).

-If the accused was convicted of at least one specification for which the death penalty may be adjudged and at least one specification for which the death penalty may not be adjudged, then the accused may elect to be sentenced by (1) the members for all offenses, or (2) the members for the specifications for which the death penalty may be adjudged and the MJ alone for the specifications for which the death penalty may not be adjudged (RCM 1002(b)(2), RCM 1002(e)(2)).

-If the accused was convicted of only specifications for which the death penalty may NOT be adjudged, then the accused may elect to be sentenced by the members or the MJ alone (See Article 53, UCMJ; RCM 1002(b)(2)). Under these circumstances, the death penalty is obviously no longer a permissible punishment and the MJ should use appropriate procedural guides and instructions for sentencing proceedings in Chapter 2, not Chapter 8.

-If the referred specifications allege at least one offense committed prior to 1 January 2019 and at least one offense committed on or after 1 January 2019, then the sentencing forum will depend on both the sentencing rules election made by the accused prior to arraignment and the nature of the offenses of which the accused was convicted.

-If the accused elected to be sentenced under the sentencing rules in effect prior to 1 January 2019, then the members will determine the accused's sentence (skip to Instruction 8-3-17).

-If the accused elected to be sentenced under the rules in effect on 1 January 2019 and was convicted of only a specification(s) for which the death penalty may be adjudged, then the members will determine the accused's sentence (See RCM 1002(e)(1)) (skip to Instruction 8-3-17).

-If the accused elected to be sentenced under the rules in effect on 1 January 2019 and was convicted of at least one specification for which the death penalty may be adjudged and at least one specification for which the death penalty may not be adjudged, then the accused may elect to be sentenced by (1) the members for all offenses, or (2) the members for capital offenses and the MJ alone for non-capital offenses (See RCM 1002(e)(2)).

-If the accused elected to be sentenced under the rules in effect on 1 January 2019 and was convicted of only specifications for which the death penalty may not be adjudged, then the accused may elect to be sentenced by the members or the MJ alone (See Article 53, UCMJ; RCM 1002(b)(2)). Under these circumstances, the death penalty is obviously no longer a permissible punishment and the MJ should

use appropriate procedural guides and instructions for sentencing proceedings in Chapter 2, not Chapter 8.

When an accused has the option of electing the sentencing forum, the MJ must hold an Article 39(a) session, provide the following advice, and obtain the accused's forum election for sentencing.

((If appropriate:) **MJ: Members, we need to have a hearing outside of your presence. Please return to the deliberation room.**

(Members withdraw from the courtroom)

MJ: This Article 39(a) session is called to order. All parties are present, except the members.

(OPTION 1: IF THE SENTENCING RULES IN EFFECT ON 1 JANUARY 2019 CONTROL AND THE ACCUSED WAS CONVICTED OF AT LEAST ONE OFFENSE FOR WHICH THE DEATH PENALTY MAY BE ADJUDGED AND AT LEAST ONE OFFENSE FOR WHICH THE DEATH PENALTY MAY NOT BE ADJUDGED) **MJ: _____, you have been found guilty of at least one specification for which death may be adjudged and at least one specification for which death may not be adjudged. Therefore, you have the option of either (1) electing to have the members decide the sentence for all offenses or (2) electing to have the members decide the sentence for the specification(s) for which death may be adjudged and the military judge alone decide the sentence for the specification(s) for which death may not be adjudged. If you choose to be sentenced by members, three-fourths of the members must agree in voting on a sentence. However, to impose a death sentence, the members must: (1) unanimously find, beyond a reasonable doubt, evidence of (the) (at least one) aggravating factor, (2) unanimously find that any extenuating or mitigating circumstance(s) (is) (are) substantially outweighed by any aggravating circumstance(s), including the aggravating factor(s) and (3) unanimously vote to impose death. If any one of these votes is not unanimous, then death may not be adjudged. If you choose to be sentenced by the military judge for the specification(s) for which death may not be adjudged, the military judge alone will determine your sentence for (that) (those) specification(s).**

(OPTION 2: IF THE SENTENCING RULES IN EFFECT ON 1 JANUARY 2019 CONTROL AND THE ACCUSED WAS CONVICTED OF ONLY OFFENSES FOR WHICH THE DEATH PENALTY MAY NOT BE ADJUDGED) **MJ: _____, you have been found guilty of only (a) specification(s) for which death may not be adjudged. Therefore, you have the right to elect sentencing by members or sentencing by the military judge. If you choose to be sentenced by members, three-fourths of the members must agree in voting on a sentence. If you choose to be sentenced by the military judge, the military judge alone will determine your sentence.**

MJ: Have you discussed this right with your defense counsel?

ACC: (Responds.)

MJ: Did your defense counsel explain the difference between sentencing by members and sentencing by the military judge?

ACC: (Responds.)

MJ: Do you understand the difference between sentencing by members and sentencing by the military judge?

ACC: (Responds.)

MJ: Do you have any questions about the difference between sentencing by members and sentencing by the military judge?

ACC: (Responds.)

MJ: How do you choose to be sentenced, (by members for all offenses or by members for the specification(s) for which death may be adjudged and the military judge for the specification(s) for which death may not be adjudged) (by members or by the military judge alone)?

ACC: (Responds.))

> ***NOTE: If the accused is acquitted of all charges and specifications OR if the accused elects to be sentenced by the MJ alone, provide the following appropriately-tailored advice to the members.***

(If necessary:) **MJ: Call the members.**

MJ: (Members, the accused has elected to be sentenced by the military judge. Therefore, I am about to excuse you from further participation in this trial.) Before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may discuss your personal observations in the courtroom and the process of how a court-martial functions but not what was discussed during your deliberations. Thank you for your attendance and service. You are excused.

> ***NOTE: If the accused was acquitted of all charges and specifications, adjourn the court. If the accused was convicted of only specifications for which the death penalty may NOT be adjudged (i.e., the death penalty is no longer a permissible punishment but sentencing proceedings are still required), the MJ should use the appropriate procedural guides and instructions for sentencing proceedings in Chapter 2, not Chapter 8. If the***

death penalty is still a possible punishment, continue to Paragraph 8-3-17 (CAPITAL SENTENCING PROCEEDINGS) below.

(If appropriate:) **MJ: This court-martial is adjourned.**

8–3–17. CAPITAL SENTENCING PROCEEDINGS

NOTE: If the MJ has not previously advised the accused of his allocution rights (Instruction 8-3-15), the MJ must do so at this time outside the presence of the court members. If there were findings of guilty of which the members had not previously been informed, they should be advised of such now. An amended flyer containing the other offense(s) is appropriate.

NOTE: The MJ should only use the following procedural guides and instructions if the death penalty remains a possible punishment.

NOTE: The instructions immediately below and throughout Chapter 8 are 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 MJ may have a case referred capital for some other offense(s) 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; or espionage, Article 103a). In such cases, the MJ should edit and insert appropriately tailored instructions concerning other possible sentences.

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: Any crime victim who is present at this presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement. A crime victim may exercise this right following the government's opportunity to present evidence.

MJ: Trial Counsel, do you have anything to present at this time?

TC: (Responds and presents case on sentencing.)

NOTE: The TC administers the oath/affirmation to all witnesses.

NOTE: After a witness testifies, the MJ should instruct the witness along the following lines:

MJ: _____, you are (temporarily) (permanently) excused. As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within __ minutes).

TC: The government rests.

NOTE: If a crime victim exercises the right to be reasonably heard, the MJ must ensure that the crime victim is afforded the opportunity to present a sworn statement, following the government case on sentencing and prior to the defense case on sentencing. Crime victims may not make unsworn statements in capital sentencing proceedings. See RCM 1001(a)(1)(B), RCM 1001(a)(3)(A), and RCM 1001(c); US v. Barker, 77 MJ 377 (CAAF 2018).

(**MJ: Is there a crime victim present who desires to be heard?**

VIC: (Responds.))

MJ: Defense Counsel, you may proceed.

NOTE: MRE 412 evidence offered in sentencing. MRE 412 applies in sentencing, as it does on findings. US v. Fox, 24 MJ 110 (CMA 1987); US v. Whitaker, 34 MJ 822 (AFCCA 1992); US v. Gaddis, 70 MJ 248 (CAAF 2011).

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

8–3–18. 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 of the evidence in this case. At this time, we need to have a hearing outside of your presence to go over the sentencing instructions that I will give you. I expect that you will be required to be present again at _____.

(The members withdraw from the courtroom.)

8–3–19. DISCUSSION OF SENTENCING INSTRUCTIONS

MJ: All parties are present, except the members.

> ***NOTE: If the accused did not testify or provide an unsworn statement, the MJ must ask the following question outside the presence of the members:***

MJ: _____, you did not testify or provide an unsworn statement during the sentencing phase of the trial. Was it your personal decision not to testify or provide an unsworn statement?

ACC: (Responds.)

MJ: Counsel, what do you calculate to be the maximum sentence authorized (and the minimum punishment required) based upon the findings of the court?

> ***NOTE: If the members are determining the accused's sentence for only the death penalty offenses and the MJ is determining the sentence for the non-death penalty offenses, then the MJ should obtain the parties' understanding as to the maximum punishment that may be imposed by the members and the maximum punishment that may be imposed by the MJ.***

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. Any mandatory minimum punishment should be listed on the worksheet in order to aid in announcing the sentence.***

MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?

DC: (Responds.)

NOTE: The panel members will not be informed of the existence of a plea agreement unless the accused requests that they be informed. See RCM 705(f). The military judge may ask the defense at this point.

(**MJ: Defense Counsel, do you desire the Court to inform the members of the existence of the plea agreement?**

DC: (Responds.))

MJ: Counsel, I intend to give the following sentencing instructions.

NOTE: The MJ 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.)

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 that the accused did not testify?**

NOTE: Unsworn statement instruction within MJ's discretion. See US v. Breese, 11 MJ 17 (CMA 1981).

DC: (Responds.)

MJ: Call the members.

8–3–20. 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 inquiry to ascertain if the accused knowingly and intelligently agrees with the counsel's argument with respect to the discharge. See paragraph 2-7-26 for procedural instructions on ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE.

8–3–21. SENTENCING INSTRUCTIONS

MJ: Members, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment 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.

NOTE: Provide the following instruction ONLY if the accused was convicted of at least one offense for which death may be adjudged and at least one offense for which death may not be adjudged AND the accused elected to have the members determine the sentence for death penalty offense(s) and the MJ alone determine the sentence for the non-death penalty offense(s) (See RCM 1004(b)(6)).

(MJ: Members, you must determine a sentence for the accused only for the offense(s) for which a sentence of death may be adjudged; that is, [state the charge(s) and specification(s) for which a sentence of death may be adjudged]. I shall determine a sentence for the accused for the offense(s) for which a sentence of death may not be adjudged; that is [state the charge(s) and specification(s) for which a sentence of death may not be adjudged]. Again, when deliberating on and deciding a sentence, you must bear in mind that you are only sentencing the accused for the offense(s) for which a sentence of death may be adjudged. Stated another way, you must not punish the accused for any offense(s) other than [state the charge(s) and specification(s) for which a sentence of death may be adjudged].)

(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 single sentence shall be adjudged for all offenses for which you must sentence the accused) (A separate sentence must be adjudged for each accused.)

8–3–22. MAXIMUM PUNISHMENT

NOTE: Maximum and Minimum Punishment. The MJ must instruct the members on the maximum authorized punishment that may be adjudged and the mandatory minimum punishment. See RCM 1005(e)(1). If the accused pleaded guilty pursuant to a plea agreement that contains sentence limitations, the MJ must instruct the members on the limitations (RCM 705(d)(1)) without informing the members of the existence of the plea agreement (RCM 705(f)). The accused may request the members be informed of the plea agreement or the MJ may inform the members only after finding that disclosure of the existence of the plea agreement is manifestly necessary in the interest of justice because of circumstances arising during the proceeding. RCM 705(f). The sentence limitations in a plea agreement may not include the possibility of a sentence to death. RCM 705(d)(4).

NOTE: If the accused was convicted of at least one offense for which the death penalty may be adjudged and at least one offense for which the death penalty may not be adjudged AND the accused elected to have the members determine the sentence for death penalty offenses and the MJ determine the sentence for the non-death penalty offenses, then the MJ must advise the members only of the maximum and mandatory minimum punishments for the death penalty offenses (See RCM 1004(b)(6)).

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:

Reduction to the grade of ___;

Forfeiture of all pay and allowances;

(A dishonorable discharge) (Dismissal from the service); and

(Confinement for life) (Confinement for life without eligibility for parole) (To be put to death).

MJ: The mandatory minimum punishment that must be adjudged in this case is: (_____).

The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence, so long as your sentence includes at least the mandatory minimum punishment I just stated.

> ***NOTE: The instruction on sentencing considerations following this NOTE should be given only if: (1) all referred specifications allege offenses committed before 1 January 2019, or (2) the referred specifications allege at least one offense committed before 1 January 2019 and at least one offense committed on or after 1 January 2019 AND the accused <u>did not elect</u> to be sentenced under the "new" sentencing rules which became effective on 1 January 2019. Otherwise, proceed to the next NOTE.***

MJ: There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principle reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

> ***NOTE: The instruction on sentencing considerations following this NOTE should be given only if: (1) all referred specifications allege offenses committed on or after 1 January 2019, or (2) the referred specifications allege some offenses committed before 1 January 2019 and some offenses committed on or after 1 January 2019 AND the accused <u>elected</u> to be sentenced under the "new" sentencing rules which became effective on 1 January 2019. Otherwise, the instruction in the preceding NOTE should be given. RCMs 1005(e), 1002(f).***

MJ: In sentencing the accused, you must impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces. In doing so, you must take into consideration the following factors:

1. The nature and circumstances of the offense(s) and the history and characteristics of the accused;

2. The impact of the offense(s) on the financial, social, psychological, or medical well-being of any victim of the offense(s); and the mission, discipline, or efficiency of the command of the accused and any victim of the offense(s);

3. The need for the sentence to reflect the seriousness of the offense(s); promote respect for the law; provide just punishment for the offense(s); promote adequate

deterrence of misconduct; protect others from further crimes by the accused; rehabilitate the accused; and provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and

4. The sentences available under these rules as I have instructed you.

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.

8–3–23. TYPES OF PUNISHMENT

MJ: In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe.

(REPRIMAND:) **MJ: This court may adjudge a reprimand, being in the nature of a censure. The court shall not specify the terms or wording of any adjudged reprimand.**

(REDUCTION:) **MJ: This court may adjudge reduction to the lowest (or any intermediate) enlisted grade. A reduction carries both the loss of military status and the incidents thereof and results in a corresponding reduction of military pay. You should designate only the pay grade to which the accused is to be reduced, for example, E-__. (An accused may not be reduced laterally, that is, from corporal to specialist.)**

> ***NOTE: In Army and Navy/USMC courts-martial, the appropriate instruction (from the two below) on automatic reduction in enlisted grade should be given. However, automatic reductions do not apply in the Air Force and Coast Guard, or in <u>any</u> service in which all offenses were committed on or after 1 January 2019 unless and until an Executive Order is signed authorizing the Service Secretary to implement Article 58a (as of the date of the publication of this DA Pam, no such EO had yet been signed).***

(EFFECT OF ARTICLE 58a—ARMY:) **MJ: I also advise you that any sentence of an enlisted service member in a pay grade above E-1 that includes either of the following two punishments will automatically reduce that service member to the lowest enlisted pay grade E-1 by operation of law. The two punishments are: One, a punitive discharge, meaning in this case (a bad-conduct discharge) (or) (a dishonorable discharge); or two, confinement in excess of six months, if the sentence is adjudged in months, or 180 days, if the sentence is adjudged in days. (Accordingly, if your sentence includes either a punitive discharge or confinement in excess of six months or 180 days, the accused will automatically be reduced to E-1.) (Because (a dishonorable discharge) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically be reduced to E-1.) However, notwithstanding these automatic provisions if you wish to sentence the accused to a reduction, you should explicitly state the reduction as a separate element of the sentence.**

(EFFECT OF ARTICLE 58a—NAVY / USMC:) **MJ: I also advise you that any sentence of an enlisted service member in a pay grade above E-1 that includes either of the following two punishments will automatically reduce that service member to the lowest enlisted pay grade E-1 by operation of law. The two punishments are: One, a punitive discharge, meaning in this case (a bad-conduct discharge) (or) (a dishonorable discharge); or two, confinement in excess of three months, if the sentence is adjudged in months, or 90 days, if the sentence is adjudged in days. (Accordingly, if your sentence includes either a punitive discharge or confinement in excess of three months or 90 days, the accused will automatically be reduced to E-1.) (Because (a dishonorable discharge) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically be reduced to E-1.) However, notwithstanding these automatic provisions if you wish to sentence the accused to a reduction, you should explicitly state the reduction as a separate element of the sentence.**

(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 $_____.

(EFFECT OF ARTICLE 58b IN GCM:) **MJ: Under the law, any sentence that includes either (1) confinement for more than six months or death or (2) any confinement and a (punitive discharge) (dismissal) will require the accused, by operation of law, to forfeit all pay and allowances during the period of confinement. Because (a dishonorable discharge) (a dismissal) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically forfeit all pay and allowances during any period of confinement.**

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 MJ's discretion:

(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: 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.

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.

(FINE—GCM:) **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.**

(CONFINEMENT:) **MJ: You are advised that 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. Accordingly, the sentence you adjudge must include, at a minimum, a term of confinement for life. You have the discretion to determine whether that confinement will be "with eligibility for parole" or "without eligibility for parole."**

MJ: A sentence to "confinement for life without eligibility for parole" means that the accused will be confined for the remainder of (his) (her) life and will not be eligible for parole by any official, but it does not preclude clemency action that might convert the sentence to one that allows parole. A sentence to "confinement for life," by comparison, means the accused will be confined for the rest of (his) (her) life, but (he) (she) will have the possibility of earning parole from such confinement, under such circumstances as are or may be provided by law or regulations. "Parole" is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility of return to incarceration to complete (his) (her) sentence of confinement if the conditions of parole are violated. In determining whether to adjudge "confinement for life without eligibility for parole" or "confinement for life" bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating or clemency action by the convening authority or any higher authority, nor in the case of

"confinement for life" in **reliance upon future decisions on parole that might be made by appropriate officials.**

> ***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 MJ 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 MJ should have counsel present evidence at an Article 39(a) session to determine the probability of whether the accused will reach retirement or eligibility for early retirement. Any instruction should be appropriately tailored to the facts of the case with the assistance of counsel and should include the below instruction. Even if the instruction is not required, the MJ nonetheless should consider giving the instruction and allowing the members to consider the matter. US v. Boyd, 55 MJ 217 (CAAF 2001); US v. Luster, 55 MJ 67 (CAAF 2001); US v. Greaves, 46 MJ 133 (CAAF 1997); US 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. US v. Becker, 46 MJ 141 (CAAF 1997).***

(MJ: 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. US v. Boyd, 55 MJ 217 (CAAF 2001).***

(MJ: On the issue of the possibility of becoming a military retiree and receiving retired pay and benefits, you should consider the evidence submitted on the legal and factual obstacles to retirement faced by the accused.)

(DISHONORABLE DISCHARGE ALLOWED:) **MJ: (This court may adjudge either a dishonorable discharge or a bad-conduct discharge.) (The law imposes a mandatory minimum sentence of a dishonorable discharge for the offense(s) of _____.) Such a discharge may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. A dishonorable discharge should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad-conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature).**

(DISMISSAL:) **MJ: (This court may adjudge a dismissal.) (The law imposes a mandatory minimum sentence of a dismissal for the offense(s) of _____.) You are advised that a sentence to a dismissal of a (commissioned officer) (cadet) is, in general, the equivalent of a dishonorable discharge of a noncommissioned officer, a warrant officer who is not commissioned, or an enlisted service member. A dismissal may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. It should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. Dismissal, however, is the only type of discharge the court is authorized to adjudge in this case.**

(DEATH:) **MJ: Finally, the court may sentence the accused to be put to death.**

8–3–24. OTHER INSTRUCTIONS

> ***NOTE: In addition to the other instructions below, MJs should review the instructions in Section VII of Chapter 2 for any other instructions that may be applicable.***

(ACCUSED NOT TESTIFYING:) **MJ: The court will not draw any adverse inference from the fact that the accused did not elect to testify.**

(ACCUSED AND/OR VICTIM NOT TESTIFYING UNDER OATH:) **MJ: (The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court, and must be given appropriate consideration.)**

An accused making an unsworn statement cannot be cross-examined by the prosecution or defense, or interrogated by court members or me. However, evidence may be offered to rebut statements of fact contained in unsworn statements. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

> ***NOTE: SCOPE OF ACCUSED'S UNSWORN STATEMENT. The scope of an accused's unsworn statement is broad. US v. Grill, 48 MJ 131 (CAAF 1998); US v. Jeffrey, 48 MJ 229 (CAAF 1998); US v. Britt, 48 MJ 233 (CAAF 1998). If the accused addresses collateral consequences (the treatment or sentence of others, command options, sex offender registration, or other matters) that would be inadmissible but for their being presented in an unsworn statement, the MJ can use the instruction below to "put the information in proper context by effectively advising the members to ignore it." US v. Talkington, 73 MJ 212 (CAAF 2014) (sex offender registration), citing US v. Barrier, 61 MJ 482 (CAAF 2005). In giving the instruction, the MJ must be careful not to suggest that the members should disregard the accused's unsworn statement.***

MJ: The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (_____). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted. (Under DOD Instructions, when convicted of certain offenses, including the offense(s) here, the accused must register as a sex offender with the appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration is required in all 50 states; though requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable.)

It is not your duty (to determine relative blameworthiness of (and whether appropriate disciplinary action has been taken against) others who might have

committed an offense, whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused's chain of command or other authorities) (or) (to attempt to predict sex offender registration requirements, or the consequences thereof) (_____).

While the accused is permitted to address these matters in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based upon the offense(s) for which (he) (she) has been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends upon (actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases)) (or) (possible requirements of sex offender registration, and the consequences thereof, at certain locations in the future).

(PLEA OF GUILTY:) **MJ: A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.**

(MENDACITY:) **MJ: The evidence presented (and the sentencing argument of trial counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints.**

First, this factor should play no role in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court.

Second, such lies must have been, in your view, willful and material, meaning important, before they can be considered in your deliberations.

Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

> ***NOTE: When evidence of rehabilitative potential, defense retention evidence, or government rebuttal to defense retention evidence is introduced, the MJ should consider the following instructions, tailored to the specific evidence. See US v. Eslinger, 70 MJ 193 (CAAF 2011); US v. Griggs, 61 MJ 402 (CAAF 2005).***

(IF REHABILITATIVE POTENTIAL EVIDENCE IS PRESENTED:) **MJ: You have heard testimony from (name witness(es)) indicating an opinion regarding the accused's rehabilitative potential. "Rehabilitative potential" refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive**

place in society. You may consider this evidence in determining an appropriate sentence for the accused.

(IF DEFENSE RETENTION EVIDENCE IS PRESENTED:) **MJ: You have (also) heard testimony from (name witness(es)) indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____). The testimony of a witness indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____) is a matter in mitigation that you should consider in determining an appropriate sentence in this case.**

(IF THERE IS REBUTTAL TO DEFENSE RETENTION EVIDENCE:) **MJ: In response to this evidence offered by the defense, you have heard testimony from (name witness(es)) indicating that the witness does not (desire to continue to serve with the accused) (desire to deploy with the accused) (_____). This evidence can only be considered for its tendency, if any, to rebut the defense evidence on this issue.**

(CONCLUDING INSTRUCTIONS FOR ALL REHABILITATIVE POTENTIAL/ RETENTION EVIDENCE:) **MJ: You may not consider testimony about (an accused's rehabilitative potential) (and) (whether a witness does (or does not) (desire to continue to serve with the accused) (desire to deploy with the accused) (_____)) as a recommendation regarding the appropriateness of a punitive discharge or any other specific sentence in this case, because no witness may suggest a specific punishment or sentence. (This rule does not apply to (statements) (testimony) by the accused regarding personal requests he/she may make in relation to specific punishments.). Whether the accused should receive a punitive discharge or any other authorized legal punishment is a matter for you alone to decide in the exercise of your independent discretion based on your consideration of all the evidence.**

> ***NOTE: Pretrial punishment evidence introduced for purposes of mitigation. An accused may introduce evidence of pretrial punishment in mitigation, even though the judge has already awarded specific credit for the Article 13 violation as a matter of law. See US v. Carter, 74 MJ 204 (CAAF 2015). If so, the following instruction is appropriate.***

(PRETRIAL PUNISHMENT EVIDENCE OFFERED IN MITIGATION:) **MJ: In determining an appropriate sentence, you should consider evidence presented that the accused was illegally punished for (this) (these) offense(s) prior to trial in violation of Article 13, UCMJ. You should consider evidence of this pretrial punishment in deciding an appropriate sentence in this case.**

(ARGUMENT FOR A SPECIFIC SENTENCE:) **MJ: During argument, trial counsel recommended that you consider a specific sentence in this case. You are advised that the arguments of the trial counsel and (her) (his) recommendations are only (her) (his) individual suggestions and may not be considered as the**

recommendation or opinion of anyone other than such counsel. In contrast, you are advised that the defense counsel is speaking on behalf of the accused.

8–3–25. CONCLUDING SENTENCING INSTRUCTIONS

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(b)(1)(B) and (c) have been proven. If so, then the court members must unanimously find that the aggravating circumstances substantially outweigh all 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.

When you close to deliberate and vote, only the members will be present. (Alternate members will not, at this time, participate in deliberation or voting.) I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your 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 (the) (one or more) aggravating factor(s) existed. The alleged aggravating factor(s) (is) (are) as follows: (<u>read the aggravating factor(s) specified by the trial counsel upon which some evidence has been introduced</u>). (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.

NOTE: The services use different definitions of "reasonable doubt." The judge should give the appropriate definition from one of the three options below.

(ARMY / COAST GUARD) **A "reasonable doubt" is an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. "Proof beyond a reasonable doubt" means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt.**

(AIR FORCE) **A "reasonable doubt" is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged, you must find (him) (her) guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.**

(NAVY / USMC) **By "reasonable doubt" is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt.**

NOTE: The MJ 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).

NOTE: In all cases, continue below.

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. You will then proceed to vote on an appropriate sentence that does not include death as I will instruct you in a moment.

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 all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances, including (the) aggravating factor(s) as you have found existed in the first step of this procedure. Thus, in addition to the aggravating factor(s) you 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
(_____),(_____),(_____),(_____),(_____)

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:

(The accused's age)
(The accused's good military character)
(The accused's (record) (reputation) in the service for (good conduct) (efficiency) (bravery) (_____))
(The prior honorable discharge(s) of the accused)
(The combat record of the accused)
(The (family) (domestic) difficulties experienced by the accused)
(The financial difficulties experienced by the accused)
(The accused's (mental condition) (mental impairment) (behavior disorder) (personality disorder) (character disorder) (nervous disorder) (_____))
(The accused's (physical disorder) (physical impairment) (addiction))
(The duration of the accused's pretrial confinement or restriction)
(The accused's GT score of _____)
(The accused's education, which includes: _____)
(That the accused is a graduate of the following service schools:_____)
(That the accused's (evaluation reports) (_____) indicate: _____)
(That the accused is entitled to (wear the following medals and awards: _____) (wear the medals and awards as reflected on (his) (her) record brief)
(That the accused's civilian records which indicate: _____)
(Lack of (previous convictions) (and) (Article 15 punishments))
(Past performance and conduct in the Army as reflected by _____)
(Defense exhibits _____)
(Character evidence testimony of _____)
(Accused's (testimony) (statement) _____)
(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. 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. You will then proceed to vote on an appropriate sentence that does not include death as I will instruct you in a moment.

MJ: If you unanimously find (the) (one or more) aggravating factor(s) existed beyond a reasonable doubt and even if you unanimously determine that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, a sentence of death is only a possibility, it is not automatic. You must still vote on an appropriate sentence, and you still have the absolute discretion to decline to impose the death sentence. Even if death is a possible sentence, the decision to vote for death is each member's individual decision.

Once you have completed the voting to determine whether death is a possible punishment, you must then follow the procedures I will describe to determine the sentence for ((the) (all) offense(s)) (specify the offense(s) for which the members are sentencing). 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.

Once again, I advise you that any proposed sentence must include at least (a Dishonorable Discharge) (a Dismissal) (confinement for life) (_____). Unless the sentence includes death. The imposition of any other lawful punishment is totally within your discretion.

No proposed sentence may include both, (1) confinement for life or confinement for life without eligibility for parole and (2) death or (1) a punitive discharge and death. This is because 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 the death sentence, you need not announce (dishonorable discharge) (dismissal) and confinement as part of your sentence.

Members, the (only) offense(s) that (is) (are) punishable by a death sentence (is) (are) Specification(s) _____ of Charge(s) _____, in violation of _____.

Once the President has arranged the proposed sentences, 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 which may only be imposed if the members unanimously vote to impose it. To adopt a sentence that does not include the death penalty, the required concurrence is three-fourths; that is nine (9) of the twelve (12) members. Because you vote on the lowest proposed sentence first, if you arrive at any sentence that does not include death by a three-fourths concurrence, then that is your sentence and death is no longer available as a possible punishment. Members, in this connection, you are again advised that the mandatory minimum sentence is (a Dishonorable Discharge) (a Dismissal) (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. Additionally, at any time prior to the sentence being announced in open court, any member of the court may propose reconsideration of the votes regarding the establishment of the aggravating factor(s) or the balancing of extenuating and mitigating factors against the aggravating circumstances. If any member suggests that you reconsider the sentence or the votes regarding the establishment of the aggravating factor(s) or the balancing of extenuating and mitigating factors against the aggravating circumstances, open the court and the President should announce only that reconsideration has been proposed. Do not state whether the proposed reballot concerns increasing or decreasing the sentence, whether it concerns reconsideration of the votes regarding the establishment of the aggravating factor(s) or the balancing of extenuating and mitigating factors against the aggravating circumstances, or whether it concerns a unanimous or non-unanimous vote. I will then give you detailed instructions in open court on how to reconsider it.

NOTE: See paragraph 2-7-19, RECONSIDERATION INSTRUCTION (SENTENCE).

MJ: As an aid in putting the sentence in proper form, the court will use the Sentence Worksheet marked Appellate Exhibit ___, which the Bailiff will now hand to the president.

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) unanimously agreed upon as indicated in Part A.

If the court members do not unanimously find that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, then you may not consider 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 ___.

(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. Additionally, a sentence of death includes a punitive discharge which need not be announced as a separate element of the sentence.

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 that should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. The only permissible punishments are those listed on the Sentence Worksheet. When the court returns, I will examine the Sentence Worksheet.

MJ: Do counsel object to the instructions as given or request 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: Bailiff, please give the President (Prosecution Exhibit(s) _____) (and Defense Exhibit(s) _____) (and) (the Sentencing Instructions).

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.

> ***NOTE: Prior to closing the court for deliberations, the MJ must instruct the alternate members, if any, that they will not be participating in deliberations, unless later needed, and that they must not discuss the case with anyone. The MJ may allow the alternate members to return to their duties or homes, subject to recall if needed. Requiring alternate members to leave the courthouse may be the prudent course of action in order to avoid contact with the parties and witnesses during deliberations.***

MJ: The court is closed. Counsel and the accused will remain. (Members withdraw)

8–3–26. POST-TRIAL AND APPELLATE RIGHTS ADVICE

MJ: This Article 39(a) session is called to order. All parties are present, except the members.

MJ: Defense Counsel, have you advised the accused orally and in writing of (his) (her) post-trial and appellate rights including the rights contained in Rule for Court-Martial 1010?

DC: (Responds.)

MJ: Does the accused have a copy in front of (him) (her)?

DC: (Responds.)

MJ: _____, I have Appellate Exhibit __, an appellate rights advice form. Is that your signature on this form?

ACC: (Responds.)

MJ: Defense Counsel, is that your signature on Appellate Exhibit __?

DC: (Responds.)

MJ: _____, did your defense counsel explain your post-trial and appellate rights to you?

ACC: (Responds.)

MJ: _____, do you have any questions about your post-trial and appellate rights?

ACC: (Responds.)

> ***NOTE: If more than one DC, the MJ should determine which counsel will be responsible for post-trial actions.***

MJ: Which counsel will be responsible for post-trial actions in this case?

DC: (Responds.)

MJ: While we wait for the members' sentence, this Article 39(a) session is terminated.

8–3–27. ANNOUNCEMENT OF SENTENCE

MJ: The court is called to order. All parties are present, to include the members.

MJ: (COL) (___) _____, 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: (COL) (___) _____, 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 may examine it.

PRES/BAILIFF: (Complies.)

MJ: I reviewed the Sentence Worksheet and it appears (to be in proper form) (_____).

NOTE: If the accused was convicted of at least one specification for which death may be adjudged and at least one specification for which death may not be adjudged <u>AND</u> the accused elected to be sentenced by the members for the death penalty specification(s) and by the military judge alone for the non-death penalty specification(s), then the MJ must announce the sentence in compliance with RCM 1002(e)(2).

MJ: Accused and Defense Counsel, please rise.

ACC/DC: (Complies)

MJ: _____, this court sentences you to: _____.

MJ: Please be seated.

ACC/DC: (Complies)

NOTE: If the sentence announced by the MJ includes death, the MJ must also announce which aggravating factors under RCM 1004(c) the members unanimously found to exist beyond a reasonable doubt See RCM 1004(b)(8), RCM 1004(c),1006(e), and Discussion following RCM 1007(b).

(MJ: The court unanimously found, beyond a reasonable doubt, that the following aggravating factor(s) exist: _____ (_____) (_____).)

MJ: (COL) (___) _____, did I accurately announce the sentence (and the aggravating factors)?

PRES: (Responds.)

Bailiff, please retrieve the exhibit(s) from the president and return them to the court reporter.

BAILIFF: (Complies.)

NOTE: In all cases, continue below.

MJ: Members of the Court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may 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 withdrew from the courtroom. All other parties are present.

MJ: Are there other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

SECTION IV: COURT MEMBERS (CAPITAL CASE SENTENCING ONLY)

8–4–1. SENTENCING FORUM RIGHTS ELECTION

NOTE: Use this section when an accused has pled guilty to at least one specification for which death may be adjudged and there are no contested specifications. See RCM 1004(a)(2)(B). Before following the procedural guides and instructions below, the MJ must first follow the appropriately tailored procedural guides and instructions in Chapter 2, Section II, GUILTY PLEA INQUIRY for the offense(s) to which the accused pled guilty. Upon completion of the guilty plea inquiry and acceptance of the plea, the MJ should use the following appropriately-tailored procedural guides and instructions.

NOTE: Under certain circumstances, the MJ must determine whether the accused has the option of electing the sentencing forum:

-<u>If all referred specifications allege offenses committed prior to 1 January 2019</u>, the members will determine the sentence (skip to Instruction 8-4-2).

-<u>If all referred specifications allege offenses committed on or after 1 January 2019</u>, the sentencing forum will depend on the nature of the offenses of which the accused was convicted:

> ***-If the accused was convicted of only specifications for which the death penalty may be adjudged, then the members will determine the sentence (RCM 1002(e)(1)) (skip to Instruction 8-4-2).***
>
> ***-If the accused was convicted of at least one specification for which the death penalty may be adjudged and at least one specification for which the death penalty may not be adjudged, then the accused may elect to be sentenced by (1) the members for all offenses, or (2) the members for the specifications for which the death penalty may be adjudged and the MJ alone for the specifications for which the death penalty may not be adjudged (RCM 1002(b)(2), RCM 1002(e)(2)).***
>
> ***-If the accused was convicted of only specifications for which the death penalty may <u>NOT</u> be adjudged, then the accused may elect to be sentenced by the members or the MJ alone (See Article 53, UCMJ; RCM 1002(b)(2)). Under these circumstances, the death penalty is obviously no longer a permissible punishment and the MJ should use appropriate procedural guides and instructions for sentencing proceedings in Chapter 2, not Chapter 8.***

-<u>If the referred specifications allege at least one offense committed prior to 1 January 2019 and at least one offense committed on or after 1 January 2019</u>, then the sentencing forum will depend on both the sentencing rules

election made by the accused prior to arraignment and the nature of the offenses of which the accused was convicted.

-If the accused elected to be sentenced under the sentencing rules in effect prior to 1 January 2019, then the members will determine the accused's sentence (skip to Instruction 8-4-2).

-If the accused elected to be sentenced under the rules in effect on 1 January 2019 and was convicted of only a specification(s) for which the death penalty may be adjudged, then the members will determine the sentence (See RCM 1002(e)(1)) (skip to Instruction 8-4-2).

-If the accused elected to be sentenced under the rules in effect on 1 January 2019 and was convicted of at least one specification for which the death penalty may be adjudged and at least one specification for which the death penalty may not be adjudged, then the accused may elect to be sentenced by (1) the members for all offenses, or (2) the members for all offenses for which death may be adjudged and by the MJ alone for all offenses for which death may not be adjudged (See RCM 1002(e)(2)).

-If the accused elected to be sentenced under the rules in effect on 1 January 2019 and was convicted of only specifications for which the death penalty may NOT be adjudged, then the accused may elect to be sentenced by the members or the MJ alone (See Article 53, UCMJ; RCM 1002(b)(2)). Under these circumstances, the death penalty is obviously no longer a permissible punishment and the MJ should use appropriate procedural guides and instructions for sentencing proceedings in Chapter 2, not Chapter 8.

When an accused has the option of electing the sentencing forum, the MJ must provide the following advice and obtain the accused's forum election for sentencing.

(IF THE SENTENCING RULES IN EFFECT ON 1 JANUARY 2019 CONTROL AND THE ACCUSED WAS CONVICTED OF AT LEAST ONE OFFENSE FOR WHICH THE DEATH MAY BE ADJUDGED AND AT LEAST ONE OFFENSE FOR WHICH THE DEATH MAY NOT BE ADJUDGED) **MJ: _____, you have been found guilty of at least one specification for which death may be adjudged and at least one specification for which death may not be adjudged. Therefore, you have the option of either (1) electing to have the members decide the sentence for all offenses or (2) electing to have the members decide the sentence for the specification(s) for which death may be adjudged and the military judge alone decide the sentence for the specification(s) for which death may not be adjudged. If you choose to be sentenced by members, three-fourths of the members must agree in voting on a sentence. However, to impose a death sentence, the members must: (1) unanimously find, beyond a reasonable doubt, evidence of**

(the) (at least one) aggravating factor, (2) unanimously find that any extenuating or mitigating circumstance(s) (is) (are) substantially outweighed by any aggravating circumstance(s), including the aggravating factor(s) and (3) unanimously vote to impose death. If any one of these votes is not unanimous, then death may not be adjudged. If you choose to be sentenced by the military judge for the specification(s) for which death may not be adjudged, the military judge alone will determine your sentence for (that) (those) specification(s).

MJ: Have you discussed this right with your defense counsel?

ACC: (Responds.)

MJ: Did your defense counsel explain the difference between sentencing by members and sentencing by the military judge?

ACC: (Responds.)

MJ: Do you understand the difference between sentencing by members and sentencing by the military judge?

ACC: (Responds.)

MJ: Do you have any questions about the difference between sentencing by members and sentencing by the military judge?

ACC: (Responds.)

MJ: How do you choose to be sentenced, by members for all offenses or by members for the specification(s) for which death may be adjudged and the military judge for the specification(s) for which death may not be adjudged?

ACC: (Responds.))

8–4–2. PRELIMINARY INSTRUCTIONS

NOTE: The instructions immediately below and throughout Chapter 8 are 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 MJ may have a case referred capital for some other offense(s) 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; or espionage, Article 103a). In such cases, the MJ should edit and insert appropriately tailored instructions concerning other possible sentences.

MJ: _____, we now enter into the sentencing phase of the trial where you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself, which you want the court to consider in deciding your sentence. In addition to the testimony of witnesses and the offering of documentary evidence, you may testify under oath as to these matters, or you may remain silent, in which case the court members may not draw any adverse inference from your silence. On the other hand, if you desire, you may make an unsworn statement. Because the statement is unsworn, you cannot be cross-examined on it; however, the government may offer evidence to rebut any statement of fact contained in any unsworn statement. An unsworn statement may be made orally, in writing, or both. It may be made by you, by your counsel on your behalf, or by both. Do you understand these rights?

ACC: (Responds.)

MJ: Counsel, is the personal data on the first page of the charge sheet correct?

TC/DC: (Respond.)

MJ: Defense Counsel, has the accused been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13?

DC: (Responds.)

MJ: _____, is that correct?

ACC: (Responds.)

MJ: Counsel, 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 person(s) (is) (are) absent: _____, _____, and _____.

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 (Private) (___) _____.*

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.

MJ: Members of the Court, it is appropriate that I give you some preliminary instructions. My duty as military judge is to ensure this trial is conducted in a fair, orderly, and impartial manner in accordance with the law. I preside over open sessions, rule upon objections, and instruct you on the law applicable to this case. You are required to follow my instructions on the law and may not consult any other source as to the law pertaining to this case unless it is admitted into evidence. This rule applies throughout the trial including closed sessions and periods of recess and adjournment. Any questions you have of me should be asked in open court.

At a session held earlier, the accused pled guilty to the charge(s) and specification(s) which you have before you. I accepted that plea and entered findings of guilty. Therefore, you will not have to determine whether the accused is guilty or not guilty as that has been established by (his) (her) plea. Your duty is to determine an appropriate sentence. That duty is a grave responsibility requiring the exercise of wise discretion. Your determination must be based upon all the evidence presented and the instructions I will give you as to the applicable law. Since you cannot properly reach your determination until all the evidence has been presented and you have been instructed, it is of vital

importance that you keep an open mind until all the evidence and instructions have been presented to you.

Counsel soon will be given an opportunity to ask you questions and exercise challenges. With regard to challenges, if you know of any matter that you feel might affect your impartiality to sit as a court member, you must disclose that matter when asked to do so. Bear in mind that any statement you make should be made in general terms so as not to disqualify other members who hear the statement.

Any matter that may affect your impartiality regarding an appropriate sentence for the accused is a ground for challenge. Some of the grounds for challenge would be if you were the accuser in the case, if you have been an investigating or preliminary hearing officer as to any offense charged, or if you have formed a fixed opinion as to what an appropriate punishment would be for this accused. To determine if any grounds for challenge exist, counsel for both sides are given an opportunity to question you. These questions are not intended to embarrass you. They are not an attack upon your integrity. They are asked merely to determine whether a basis for challenge exists.

If, at any time after answering these questions, you realize that any of your answers were incorrect, you recognize a witness whose name you did not previously recognize, or you think of any matter that might affect your impartiality, you have a continuing duty to bring that to the attention of the court. You do that simply by raising your hand and stating only that you have an issue to discuss with the court. I will then follow up with you individually as necessary.

It is no adverse reflection upon a court member to be excused from a particular case. You may be questioned either individually or collectively, but in either event, you should indicate an individual response to the question asked. Unless I indicate otherwise, you are required to answer all questions.

You must keep an open mind throughout the trial. You must impartially hear the evidence, the instructions on the law, and only when you are in your closed session deliberations may you properly make a determination as to an appropriate sentence, after considering all the alternative punishments of which I will later advise you. You may not have a preconceived idea or formula as to either the type or the amount of punishment which should be imposed.

Counsel are given an opportunity to question all witnesses. When counsel have finished, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so. There are forms provided for your use if you desire to question any witness. You are required to write your question on the form and sign legibly at the bottom. This method gives counsel for both sides and me an opportunity to review the questions before they are asked since your questions, like questions of counsel, are subject to objection. I will conduct any

needed examination. There are a couple of things you need to keep in mind with regard to questioning.

First, you cannot attempt to help either the government or the defense.

Second, counsel have interviewed the witnesses and know more about the case than we do. Very often they do not ask what may appear to us to be an obvious question because they are aware this particular witness has no knowledge on the subject.

Rules of evidence control what can be received into evidence. As I indicated, questions of witnesses are subject to objection. During the trial, when I sustain an objection, disregard the question and answer. If I overrule an objection, you may consider both the question and answer.

Until you close to deliberate, you may not discuss this court-martial with anyone, even amongst yourselves. You must wait until you are all together in your closed session deliberations so that all panel members have the benefit of your discussion. During the course of the trial, including all periods of recess and adjournment, you must not communicate with anyone about the case, either in person or by email, blog, text message, twitter or other form of social media. Posting information about the case on a Facebook page, for example, is considered a form of communicating about the case. You must also not listen to or read any accounts of the case or visit the scene of any incident alleged in the specification(s) or mentioned during the trial. Do not consult any source of law or information, written or otherwise, as to any matters involved in this case and do not conduct your own investigation or research. For example, you cannot consult the Manual for Courts-Martial, dictionaries or reference materials, search the internet, 'Google' the witnesses to learn more about them, review a Wikipedia entry or consult a map or satellite picture to learn more about any alleged crime scene.

During any recess or adjournment, you must also avoid contact with witnesses or potential witnesses in this case, counsel, and the accused. If anyone attempts to discuss the case or communicate with you during any recess or adjournment, you must immediately tell them to stop and report the occurrence to me at the next session. I may not repeat these matters to you before every recess or adjournment, but keep them in mind throughout the trial.

We will try to estimate the time needed for recesses or hearings out of your presence. Frequently their duration is extended by consideration of new issues arising in such hearings. Your patience and understanding regarding these matters will contribute greatly to an atmosphere consistent with the fair administration of justice.

While you are in your closed session deliberations, only the members will be present. You must remain together and you may not allow any unauthorized intrusion into your deliberations.

Each of you has an equal voice and vote with the other members in discussing and deciding all issues submitted to you. However, in addition to the duties of the other members, the senior member will act as your presiding officer during your closed session deliberations.

This general order of events can be expected at this court-martial: Questioning of court members, challenges and excusals, presentation of evidence, closing argument by counsel, instructions on the law, your deliberations, and announcement of the sentence.

The appearance and demeanor of all parties to the trial should reflect the seriousness with which the trial is viewed. Careful attention to all that occurs during the trial is required of all parties. If it becomes too hot or cold in the courtroom, or if you need a break because of drowsiness or for comfort reasons, please tell me so that we can attend to your needs and avoid potential problems that might otherwise arise.

Each of you may take notes if you desire and use them to refresh your memory during deliberations, but they may not be read or shown to other members. At the time of any recess or adjournment, you should (take your notes with you for safekeeping until the next session) (leave your notes in the courtroom).

One other administrative matter: if during the course of the trial it is necessary that you make any statement, if you would preface the statement by stating your name, that will make it clear on the record which member is speaking.

MJ: Are there any questions?

MBRS: (Respond.)

MJ: (Apparently not.) Please take a moment to read the charge(s) on the flyer provided to you and to ensure that your name is correctly reflected on (one of) the convening order(s). If it is not, please let me know.

MBRS: (Comply.)

MJ: Trial Counsel, you may announce the general nature of the charge(s).

TC: The general nature of the charge(s) in this case is: _____. The charge(s) (was) (were) preferred by _____, and forwarded with recommendations as to disposition by _____. (A preliminary hearing was conducted by _____.)

TC: The records of this case disclose (no grounds for challenge) (grounds for challenge of _____ for the following reasons).

TC: If any member of the court is aware of any matter which he (or she) believes may be a ground for challenge by either side, such matter should now be stated.

MBRS: (Respond.) or

TC: (Negative response from the court members.)

MJ: Members, before I or counsel ask you any questions, it is appropriate that I give you some additional instructions.

> ***NOTE: The instructions immediately below and throughout Chapter 8 are 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; or espionage, Article 103a). In such cases, the MJ should edit and insert appropriately tailored instructions concerning other possible sentences.***

MJ: Members, this is a capital murder case. I want to direct your attention specifically to the capital offense(s) in [state the charge(s) and specification(s) for which a sentence of death may be adjudged] commonly referred to as (premeditated murder) (felony murder). As I previously mentioned, the accused pled guilty to (this) (these) offense(s) at a prior session. I accepted (his) (her) guilty plea. One of the possible punishments for the offense of (premeditated murder) (felony murder) is death. Therefore, the court may, but is not required to, impose the death penalty. In this 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(s) exist(s) 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. I will explain these rules to you again in more detail before you begin your sentence deliberations.

Because one possible punishment is death, it will be necessary to ask you questions regarding your views concerning the death penalty.

8–4–3. 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. (If appropriate) **Does anyone know any person named in (any of the) (The) Specification(s)?**

3. (The trial counsel is) (I am) going to read a list of the potential witnesses in this case. Afterwards, (the trial counsel) (I) will ask you if anyone knows any of the potential witnesses in this case. [Read list of witnesses] **Does anyone know any of the potential witnesses in this case?**

4. Having seen the accused and having read the charge(s) and specification(s), does anyone feel that you cannot give the accused a fair trial for any reason?

5. Does anyone have any prior knowledge of the facts or events in this case?

6. 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 7-12; if none, go to Question 13.***

7. Members, regarding the media and media reporting, is there any member who has participated in a military operation that received press coverage?

8. 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?

9. Is there any member who believes that, merely because the press reports something, it is, in fact, the truth?

10. Do all members agree with the proposition that press reports of military affairs or about any kind of event may be incorrect or inaccurate?

11. 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?

12. 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?

13. Has anyone or any member of your family ever been charged with an offense similar to any of those charged in this case?

14. 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?

15. If so, will that experience influence your performance of duty as a court member in this case in any way?

> ***NOTE: If Question 15 is answered in the affirmative, the military judge may want to ask any additional questions concerning this outside the hearing of the other members.***

16. How many of you are serving as court members for the first time in a trial by court-martial?

17. (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?**

18. Has anyone had any legal training or experience other than that generally received by military personnel of your rank or position?

19. 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?

20. Is any member of the court in the rating chain, supervisory chain, or chain of command, of any other member?

> ***NOTE: If question 20 is answered in the affirmative, the military judge may want to ask questions 21 and 22 out of the hearing of the other members.***

21. (To junior) **Will you feel inhibited or restrained in any way in performing your duties as a court member, including the free expression of your views during deliberation, because another member holds a position of authority over you?**

22. (To senior) **Will you be embarrassed or restrained in any way in the performance of your duties as a court member if a member over whom you hold a position of authority should disagree with you?**

23. Has anyone had any dealings with any of the parties to the trial, to include me and counsel, which might affect your performance of duty as a court member in any way?

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(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)?

25. Members, as I told you earlier, the accused previously pled guilty to and was found guilty of (premeditated murder) (felony murder), therefore, one of the possible punishments is death. Is there any member, due to religious, moral, or ethical beliefs, who would be unable to give meaningful consideration to the imposition of the death penalty?

26. 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) (felony murder)?

27. You will be instructed in detail before you begin your deliberations. I will instruct you on the full range of punishments. 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 and will each of you follow this instruction?

28. Can each of you be fair, impartial, and open-minded in your consideration of an appropriate sentence in this case?

29. 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?

30. 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 may conduct group voir dire.

8–4–4. INDIVIDUAL VOIR DIRE

MJ: Members of the Court, there are some matters that we must now consider outside of your presence. Please return to the deliberation room. Some of you may be recalled for individual questioning.

MBRS: (Comply.)

MJ: All the members are absent. All other parties are present. Trial Counsel, do you request individual voir dire and if so, state the member and your reason(s).

TC: (Responds.)

MJ: Defense Counsel, do you request individual voir dire and if so, state the member and your reason(s).

DC: (Responds.)

NOTE: Individual members are recalled for questioning until all individual questioning is complete. Advise any member who is questioned individually not to discuss what he/she just said in the courtroom with any other member when he/she returns to the deliberation room, in order to avoid inadvertently biasing or disqualifying any other member.

8–4–5. 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. US 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. US 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. US v. Napolitano, 53 MJ 162 (CAAF 2000). In determining whether implied bias is present, military judges look to the totality of the circumstances. US 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. US v. Armstrong, 54 MJ 51, 54 (CAAF 2000). In close cases, military judges are enjoined to liberally grant defense

challenges for cause. US v. Clay, 64 MJ 274 (CAAF 2007). This "liberal grant mandate" does not apply to government challenges for cause. US 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. US v. Townsend, 65 MJ 480 (CAAF 2008). The following is a suggested procedure for an Article 39(a) session.

MJ: All the members are absent. All other parties are present. Trial Counsel, do you have any challenges for cause?

TC: (Responds.)

(IF A CHALLENGE IS MADE) **MJ: Defense Counsel, do you object?**

DC: (Responds.)

(IF DENYING THE CHALLENGE) **MJ: The challenge is denied.**

(IF GRANTING THE CHALLENGE WITHOUT A DEFENSE OBJECTION) **MJ: The challenge is granted.**

(IF GRANTING THE CHALLENGE OVER A DEFENSE OBJECTION) **MJ: The challenge is granted because _____.**

MJ: Defense Counsel, do you have any challenges for cause?

DC: (Responds.)

(IF A CHALLENGE IS MADE) **MJ: Trial Counsel, do you object?**

TC: (Responds.)

(IF GRANTING THE CHALLENGE) **MJ: The challenge is granted.**

(IF DENYING THE CHALLENGE) **MJ: I have considered the challenge for cause on the basis of both actual and implied bias and the mandate to liberally grant defense challenges. The challenge is denied because (_____).**

NOTE: If charges were <u>referred on or after 1 January 2019</u>, following the exercise of challenges for cause, if any, and prior to the exercise of peremptory challenges, the military judge, or a designee thereof, shall randomly assign numbers to the remaining members for purposes of

impaneling members in accordance with RCM 912A. See RCM 912(f)(5). The military judge should proceed, as stated below (or as directed by military judge's service Trial Judiciary).

MJ: In a moment, we will recess to allow the court reporter to randomly assign numbers to the remaining members. The court reporter will do so using the panel member random number generator on the Army JAG Corps' site. Each party may be present and observe the court reporter perform this task, if desired.

MJ: Counsel, do you want to observe the court reporter randomly assign these numbers?

TC/DC: (Respond.)

MJ: Court reporter, please print a copy of the results, once you have them, and mark them as the next appellate exhibit in order. (Please also allow the (trial counsel) (defense counsel) to observe you when you randomly assign the numbers.)

(Recess.)

MJ: This Article 39(a) session is called to order. All parties are present, except the members. Appellate exhibit __ reflects the result of the random assignment of numbers to the remaining members. Does any party have an objection to the manner in which numbers were assigned to the members?

TC/DC: (Respond.)

NOTE: Continue below with the exercise of peremptory challenges, if any.

MJ: Trial Counsel, do you have a peremptory challenge?

TC: (Responds.)

MJ: Defense Counsel, do you have a peremptory challenge?

DC: (Responds.)

NOTE: After excusing the members who were successfully challenged for cause or peremptorily, the MJ will verify that a quorum remains. The MJ will also verify that enlisted members comprise at least one-third of the members, if so requested by the accused.

If charges were referred <u>on or after 1 January 2019</u>, and excess members remain, the military judge must impanel the members (and any alternate members, if authorized) in accordance with the procedures in RCM 912A. Once the members are impaneled, and any excess members have been

excused, the judge must announce that the members have been impaneled, as stated below.

MJ: The members are impaneled. Call the members.

TC: All parties are present as before, to now include the court members (with the exception of _____, who (has) (have) been excused).

NOTE: If alternate members were authorized and impaneled, the MJ should provide the following instruction to the alternate members.

MJ: _____, you have been designated as (an) alternate member(s) of this court-martial. As (an) alternate member(s), you have the same duties as the other members. You will observe the same trial, pay attention to all of my instructions, and may ask questions, if necessary. Sometimes during a trial, a member must be excused due to illness or some other reason. If that occurs, you may be designated as a member of this court-martial. Unless you are later designated as a member, you will not participate in the deliberations or vote on a sentence.

8–4–6. SENTENCING PROCEEDINGS

MJ: Court Members, at this time we will begin the sentencing phase of this court-martial. Trial Counsel, you may read the personal data concerning the accused as shown on the first page of the charge sheet.

TC: The first page of the charge sheet shows the following personal data concerning the accused: _____.

MJ: Members of the Court, I have previously admitted into evidence (Prosecution Exhibit(s) ___, which (is) (are) _____) (and) (Defense Exhibit(s) ___, which (is) (are) _____). You will have (this) (these) exhibit(s) available to you during your deliberations. (Trial Counsel, you may read the stipulation of fact into evidence.)

(MJ: Any crime victim who is present at this presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. A crime victim may exercise this right following the government's opportunity to present evidence.)

MJ: Trial Counsel, you may proceed.

TC: (Responds and presents case on sentencing.)

NOTE: The TC administers the oath/affirmation to all witnesses.

MJ: Does any court member have questions of this witness?

MBRS: (Respond.)

NOTE: If the members have questions, the Bailiff will collect the written questions, hand them to the TC and DC (for an opportunity to write objections), have them marked as appellate exhibits, and present them to the MJ so that the MJ May ask the witness the questions.

NOTE: After a witness testifies, the MJ should instruct the witness along the following lines:

MJ: _____, you are (temporarily) (permanently) excused. As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone other than counsel and accused. You may step down and (return to the waiting room) (go about your duties) (return to your activities) (be available by telephone to return within __ minutes).

TC: The government rests.

NOTE: If a crime victim exercises the right to be reasonably heard, the MJ must ensure that the crime victim is afforded the opportunity to present a sworn or unsworn statement, following the government case on sentencing and prior to the defense case on sentencing. See RCM 1001(a)(1)(B), RCM 1001(a)(3)(A), and RCM 1001(c); US v. Barker, 77 MJ 377 (CAAF 2018).

(**MJ: Is there a crime victim present who desires to be heard?**

VIC: (Responds.))

MJ: Defense Counsel, you may proceed.

NOTE: MRE 412 evidence offered in sentencing. MRE 412 applies in sentencing, as it does on findings. US v. Fox, 24 MJ 110 (CMA 1987); US v. Whitaker, 34 MJ 822 (AFCCA 1992); US v. Gaddis, 70 MJ 248 (CAAF 2011).

DC: (Responds and presents case on sentencing.)

DC: The defense rests.

8–4–7. 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 sentencing instructions that I will give you. I expect that you will be required to be present again in about _____.

(The members withdraw from the courtroom.)

8–4–8. DISCUSSION OF SENTENCING INSTRUCTIONS

MJ: All parties are present, except the members.

> ***NOTE: If the accused did not testify or provide an unsworn statement, the MJ must ask the following question outside the presence of the members:***

MJ: _____, you did not testify or provide an unsworn statement during the sentencing phase of the trial. Was it your personal decision not to testify or provide an unsworn statement?

ACC: (Responds.)

MJ: Counsel, what do you calculate to be the maximum sentence authorized (and the minimum punishment required)?

TC/DC: (Respond.)

> ***NOTE: If the members are determining the accused's sentence for only the death penalty offenses and the MJ is determining the sentence for the non-death penalty offenses, then the MJ should obtain the parties' understanding as to the maximum punishment that may be imposed by the members and the maximum punishment that may be imposed by the MJ.***
>
> ***NOTE: <u>Plea Agreement</u>. If a plea agreement exists, the members must be instructed on the permissible sentence in accordance with the sentence limitations agreed to by the parties. See RCM 705(d) and RCM 1006(d)(6). The existence of a plea agreement, however, will not be disclosed to the members, except upon request of the accused or when the MJ finds that disclosure of the existence of the plea agreement is manifestly necessary in the interest of justice because of circumstances arising during the proceeding. See RCM 705(f).***

MJ: Do counsel agree that an instruction on a fine is (not) appropriate in this case?

TC/DC: (Respond.)

MJ: Trial Counsel, please mark the Sentence Worksheet as Appellate Exhibit __, show it to the Defense, and present it to me.

TC: (Complies.)

NOTE: Listing of punishments. Only those punishments on which an instruction will be given should ordinarily be listed on the Sentence Worksheet. If all have agreed that a fine is not appropriate, then it ordinarily should not be listed on the worksheet. Any mandatory minimum punishment should be listed on the worksheet in order to aid in announcing the sentence. Also, if a plea agreement exists, the Sentence Worksheet should reflect only those punishments that are within the sentence limitations agreed to by the parties. See RCM 705(d).

MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?

DC: (Responds.)

MJ: Counsel, I intend to give the following sentencing instructions.

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.)

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 MJ's discretion. See US v. Breese, 11 MJ 17 (CMA 1981).

DC: (Responds.)

MJ: Call the members.

8–4–9. SENTENCING ARGUMENTS

MJ: The court is called to order.

TC: All parties, to include the members, are present.

MJ: Trial Counsel, you may present argument.

TC: (Argument.)

MJ: Defense Counsel, you may present argument.

DC: (Argument.)

NOTE: If the DC concedes that a punitive discharge is appropriate, the MJ shall conduct an out-of-court hearing to ascertain if the accused knowingly and intelligently agrees with counsel's actions with respect to a discharge. See paragraph 2-7-26 for the procedural instructions on ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE.

8–4–10. SENTENCING INSTRUCTIONS

MJ: Members, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty. Your determination of the kind and amount of punishment 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.

NOTE: Provide the following instruction ONLY if the accused was convicted of at least one offense for which death may be adjudged and at least one offense for which death may not be adjudged AND the accused elected to have the members determine the sentence for death penalty offenses and the MJ alone determine the sentence for the non-death penalty offenses (See RCM 1004(b)(6)).

(MJ: Members, you must determine a sentence for the accused only for the offense(s) for which a sentence of death may be adjudged; that is, [state the charge(s) and specification(s) for which a sentence of death may be adjudged]. I shall determine a sentence for the accused for the offense(s) for which a sentence of death may not be adjudged; that is [state the charge(s) and specification(s) for which a sentence of death may not be adjudged]. Again, when deliberating on and deciding a sentence, you must bear in mind that you are only sentencing the accused for the offense(s) for which a sentence of death may be adjudged; that is [state the charge(s) and specification(s) for which a sentence of death may be adjudged].)

(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 single sentence shall be adjudged for all offenses for which you must sentence the accused) (A separate sentence must be adjudged for each accused.)

8–4–11. MAXIMUM PUNISHMENT

NOTE: Maximum and Minimum Punishment. The MJ must instruct the members on the maximum authorized punishment that may be adjudged and the mandatory minimum punishment. See RCM 1005(e)(1).

NOTE: If the accused was convicted of at least one offense for which the death penalty may be adjudged and at least one offense for which the death penalty may not be adjudged AND the accused elected to have the members determine the sentence for death penalty offenses and the MJ determine the sentence for the non-death penalty offenses, then the MJ must advise the members only of the maximum and permissible punishments for the death penalty offenses (See RCM 1004(b)(6)).

NOTE: Confinement for Life without Eligibility for Parole. Section 856a of The Defense Authorization Act of 1998 added 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.

NOTE: If there is a plea agreement, the MJ must ensure that this instruction is in accordance with the sentence limitation contained in the plea agreement. See RCM 705(d) and RCM 1006(d)(6). The existence of a plea agreement, however, will not be disclosed to the members, except upon request of the accused or when the MJ finds that disclosure of the existence of the plea agreement is manifestly necessary in the interest of justice because of circumstances arising during the proceeding. See RCM 705(f).

MJ: The maximum permissible punishment that may be adjudged in this case is:

Reduction to the grade of ___;

Forfeiture of all pay and allowances;

(A dishonorable discharge) (Dismissal from the service); and

(Confinement for life) (Confinement for life without eligibility for parole) (To be put to death).

MJ: The mandatory minimum punishment that must be adjudged in this case is: (_____).

The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence (, so long as your sentence includes at least the mandatory minimum punishment I just stated).

> ***NOTE: The instruction on sentencing considerations following this NOTE should be given only if: (1) all referred specifications allege offenses committed before 1 January 2019, or (2) the referred specifications allege at least one offense committed before 1 January 2019 and at least one offense committed on or after 1 January 2019 AND the accused <u>did not elect</u> to be sentenced under the "new" sentencing rules which became effective on 1 January 2019. Otherwise, proceed to the next NOTE.***

MJ: There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principle reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

> ***NOTE: The instruction on sentencing considerations following this NOTE should be given only if: (1) all referred specifications allege offenses committed on or after 1 January 2019, or (2) the referred specifications allege some offenses committed before 1 January 2019 and some offenses committed on or after 1 January 2019 AND the accused <u>elected</u> to be sentenced under the "new" sentencing rules which became effective on 1 January 2019. Otherwise, the instruction in the preceding NOTE should be given. RCMs 1005(e), 1002(f).***

MJ: In sentencing the accused, you must impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces. In doing so, you must take into consideration the following factors:

1. The nature and circumstances of the offense(s) and the history and characteristics of the accused;

2. The impact of the offense(s) on the financial, social, psychological, or medical well-being of any victim of the offense(s); and the mission, discipline, or efficiency of the command of the accused and any victim of the offense(s);

3. The need for the sentence to reflect the seriousness of the offense(s); promote respect for the law; provide just punishment for the offense(s); promote adequate

deterrence of misconduct; protect others from further crimes by the accused; rehabilitate the accused; and provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and

4. The sentences available under these rules as I have instructed you.

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.

8–4–12. TYPES OF PUNISHMENT

MJ: In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe.

(REPRIMAND:) **MJ: This court may adjudge a reprimand, being in the nature of a censure. The court shall not specify the terms or wording of any adjudged reprimand.**

(REDUCTION:) **MJ: This court may adjudge reduction to the lowest (or any intermediate) enlisted grade. A reduction carries both the loss of military status and the incidents thereof and results in a corresponding reduction of military pay. You should designate only the pay grade to which the accused is to be reduced, for example, E-__. (An accused may not be reduced laterally, that is, from corporal to specialist.)**

> ***NOTE: In Army and Navy/USMC courts-martial, the appropriate instruction (from the two below) on automatic reduction in enlisted grade should be given. However, automatic reductions do not apply in the Air Force and Coast Guard, or in <u>any</u> service in which all offenses were committed on or after 1 January 2019 unless and until an Executive Order is signed authorizing the Service Secretary to implement Article 58a (as of the date of the publication of this DA Pam, no such EO had yet been signed).***

(EFFECT OF ARTICLE 58a—ARMY:) **MJ: I also advise you that any sentence of an enlisted service member in a pay grade above E-1 that includes either of the following two punishments will automatically reduce that service member to the lowest enlisted pay grade E-1 by operation of law. The two punishments are: One, a punitive discharge, meaning in this case (a bad-conduct discharge) (or) (a dishonorable discharge); or two, confinement in excess of six months, if the sentence is adjudged in months, or 180 days, if the sentence is adjudged in days. (Accordingly, if your sentence includes either a punitive discharge or confinement in excess of six months or 180 days, the accused will automatically be reduced to E-1.) (Because (a dishonorable discharge) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically be reduced to E-1.) However, notwithstanding these automatic provisions if you wish to sentence the accused to a reduction, you should explicitly state the reduction as a separate element of the sentence.**

(EFFECT OF ARTICLE 58a—NAVY / USMC:) **MJ: I also advise you that any sentence of an enlisted service member in a pay grade above E-1 that includes either of the following two punishments will automatically reduce that service member to the lowest enlisted pay grade E-1 by operation of law. The two punishments are: One, a punitive discharge, meaning in this case (a bad-conduct discharge) (or) (a dishonorable discharge); or two, confinement in excess of three months, if the sentence is adjudged in months, or 90 days, if the sentence is adjudged in days. (Accordingly, if your sentence includes either a punitive discharge or confinement in excess of three months or 90 days, the accused will automatically be reduced to E-1.) (Because (a dishonorable discharge) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically be reduced to E-1.) However, notwithstanding these automatic provisions if you wish to sentence the accused to a reduction, you should explicitly state the reduction as a separate element of the sentence.**

(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 $_____.

(EFFECT OF ARTICLE 58b IN GCM:) **MJ: Under the law, any sentence that includes either (1) confinement for more than six months or death or (2) any confinement and a (punitive discharge) (dismissal) will require the accused, by operation of law, to forfeit all pay and allowances during the period of confinement. Because (a dishonorable discharge) (a dismissal) (and) (confinement for life) is the mandatory minimum sentence, the accused will automatically forfeit all pay and allowances during any period of confinement.**

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 MJ's discretion:

(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: 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.

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.

(FINE—GCM:) **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.**

(CONFINEMENT:) **MJ: You are advised that 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. Accordingly, the sentence you adjudge must include, at a minimum, a term of confinement for life. You have the discretion to determine whether that confinement will be "with eligibility for parole" or "without eligibility for parole."**

MJ: A sentence to "confinement for life without eligibility for parole" means that the accused will be confined for the remainder of (his) (her) life and will not be eligible for parole by any official, but it does not preclude clemency action that might convert the sentence to one that allows parole. A sentence to "confinement for life," by comparison, means the accused will be confined for the rest of (his) (her) life, but (he) (she) will have the possibility of earning parole from such confinement, under such circumstances as are or may be provided by law or regulations. "Parole" is a form of conditional release of a prisoner from actual incarceration before (his) (her) sentence has been fulfilled, on specific conditions of exemplary behavior and under the possibility of return to incarceration to complete (his) (her) sentence of confinement if the conditions of parole are violated. In determining whether to adjudge "confinement for life without eligibility for parole" or "confinement for life" bear in mind that you must not adjudge an excessive sentence in reliance upon possible mitigating or clemency action by the convening authority or any higher authority, nor in the case of

"confinement for life" in **reliance upon future decisions on parole that might be made by appropriate officials.**

> ***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 MJ 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 MJ should have counsel present evidence at an Article 39(a) session to determine the probability of whether the accused will reach retirement or eligibility for early retirement. Any instruction should be appropriately tailored to the facts of the case with the assistance of counsel and should include the below instruction. Even if the instruction is not required, the MJ nonetheless should consider giving the instruction and allowing the members to consider the matter. US v. Boyd, 55 MJ 217 (CAAF 2001); US v. Luster, 55 MJ 67 (CAAF 2001); US v. Greaves, 46 MJ 133 (CAAF 1997); US 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. US v. Becker, 46 MJ 141 (CAAF 1997).***

(MJ: 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. US v. Boyd, 55 MJ 217 (CAAF 2001).***

(MJ: On the issue of the possibility of becoming a military retiree and receiving retired pay and benefits, you should consider the evidence submitted on the legal and factual obstacles to retirement faced by the accused.)

(DISHONORABLE DISCHARGE ALLOWED:) **MJ: (This court may adjudge either a dishonorable discharge or a bad-conduct discharge.) (The law imposes a mandatory minimum sentence of a dishonorable discharge for the offense(s) of _____.) Such a discharge may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. A dishonorable discharge should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad-conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature).**

(DISMISSAL:) **MJ: (This court may adjudge a dismissal.) (The law imposes a mandatory minimum sentence of a dismissal for the offense(s) of _____.) You are advised that a sentence to a dismissal of a (commissioned officer) (cadet) is, in general, the equivalent of a dishonorable discharge of a noncommissioned officer, a warrant officer who is not commissioned, or an enlisted service member. A dismissal may deprive one of substantially all benefits administered by the Department of Veterans Affairs and the military establishment. It should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. Dismissal, however, is the only type of discharge the court is authorized to adjudge in this case.**

(DEATH:) **MJ: Finally, the court may sentence the accused to be put to death.**

8–4–13. OTHER INSTRUCTIONS

> ***NOTE: In addition to the other instructions below, MJs should review the instructions in Section VII of Chapter 2 for any other instructions that may be applicable.***

(ACCUSED NOT TESTIFYING:) **MJ: The court will not draw any adverse inference from the fact that the accused did not elect to testify.**

(ACCUSED AND/OR VICTIM NOT TESTIFYING UNDER OATH:) **MJ: (The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court, and must be given appropriate consideration.)**

(An unsworn statement is (also) an authorized means for a crime victim to bring relevant information to the attention of the court.)

A person making an unsworn statement cannot be cross-examined by the prosecution or defense, or interrogated by court members or me. However, evidence may be offered to rebut statements of fact contained in unsworn statements. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

> ***NOTE: SCOPE OF ACCUSED'S UNSWORN STATEMENT. The scope of an accused's unsworn statement is broad. US v. Grill, 48 MJ 131 (CAAF 1998); US v. Jeffrey, 48 MJ 229 (CAAF 1998); US v. Britt, 48 MJ 233 (CAAF 1998). If the accused addresses collateral consequences (the treatment or sentence of others, command options, sex offender registration, or other matters) that would be inadmissible but for their being presented in an unsworn statement, the MJ can use the instruction below to "put the information in proper context by effectively advising the members to ignore it." US v. Talkington, 73 MJ 212 (CAAF 2014) (sex offender registration), citing US v. Barrier, 61 MJ 482 (CAAF 2005). In giving the instruction, the MJ must be careful not to suggest that the members should disregard the accused's unsworn statement.***

MJ: The accused's unsworn statement included the accused's personal (thoughts) (opinions) (feelings) (statements) about (certain matters) (_____). An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offense(s) of which the accused stands convicted. (Under DOD Instructions, when convicted of certain offenses, including the offense(s) here, the accused must register as a sex offender with the appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration is required in all 50 states; though requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable.)

It is not your duty (to determine relative blameworthiness of (and whether appropriate disciplinary action has been taken against) others who might have committed an offense, whether involved with this accused or not) (or) (to try to anticipate discretionary actions that may be taken by the accused's chain of command or other authorities) (or) (to attempt to predict sex offender registration requirements, or the consequences thereof) (_____).

While the accused is permitted to address these matters in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based upon the offense(s) for which (he) (she) has been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends upon (actions that others (have taken) (or) (may or may not take) (in this case) (or) (in other cases)) (or) (possible requirements of sex offender registration, and the consequences thereof, at certain locations in the future).

(PLEA OF GUILTY:) **MJ: A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government (have been) (usually are) saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.**

(MENDACITY:) **MJ: The evidence presented (and the sentencing argument of trial counsel) raised the question of whether the accused testified falsely before this court under oath. No person, including the accused, has a right to seek to alter or affect the outcome of a court-martial by false testimony. You are instructed that you may consider this issue only within certain constraints.**

First, this factor should play no role in your determination of an appropriate sentence unless you conclude that the accused did lie under oath to the court.

Second, such lies must have been, in your view, willful and material, meaning important, before they can be considered in your deliberations.

Finally, you may consider this factor insofar as you conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated. You may not mete out additional punishment for the false testimony itself.

> ***NOTE: When evidence of rehabilitative potential, defense retention evidence, or government rebuttal to defense retention evidence is introduced, the MJ should consider the following instructions, tailored to the specific evidence. See US v. Eslinger, 70 MJ 193 (CAAF 2011); US v. Griggs, 61 MJ 402 (CAAF 2005).***

(IF REHABILITATIVE POTENTIAL EVIDENCE IS PRESENTED:) **MJ: You have heard testimony from (name witness(es)) indicating an opinion regarding the accused's rehabilitative potential. "Rehabilitative potential" refers to the**

accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society. You may consider this evidence in determining an appropriate sentence for the accused.

(IF DEFENSE RETENTION EVIDENCE IS PRESENTED:) **MJ: You have (also) heard testimony from (name witness(es)) indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____). The testimony of a witness indicating (a desire to continue to serve with the accused) (a desire to deploy with the accused) (_____) is a matter in mitigation that you should consider in determining an appropriate sentence in this case.**

(IF THERE IS REBUTTAL TO DEFENSE RETENTION EVIDENCE:) **MJ: In response to this evidence offered by the defense, you have heard testimony from (name witness(es)) indicating that the witness does not (desire to continue to serve with the accused) (desire to deploy with the accused) (_____). This evidence can only be considered for its tendency, if any, to rebut the defense evidence on this issue.**

(CONCLUDING INSTRUCTIONS FOR ALL REHABILITATIVE POTENTIAL/ RETENTION EVIDENCE:) **MJ: You may not consider testimony about (an accused's rehabilitative potential) (and) (whether a witness does (or does not) (desire to continue to serve with the accused) (desire to deploy with the accused) (_____)) as a recommendation regarding the appropriateness of a punitive discharge or any other specific sentence in this case, because no witness may suggest a specific punishment or sentence. (This rule does not apply to (statements) (testimony) by the accused regarding personal requests he/she may make in relation to specific punishments.). Whether the accused should receive a punitive discharge or any other authorized legal punishment is a matter for you alone to decide in the exercise of your independent discretion based on your consideration of all the evidence.**

> ***NOTE: Pretrial punishment evidence introduced for purposes of mitigation. An accused may introduce evidence of pretrial punishment in mitigation, even though the judge has already awarded specific credit for the Article 13 violation as a matter of law. See US v. Carter, 74 MJ 204 (CAAF 2015). If so, the following instruction is appropriate.***

(PRETRIAL PUNISHMENT EVIDENCE OFFERED IN MITIGATION:) **MJ: In determining an appropriate sentence, you should consider evidence presented that the accused was illegally punished for (this) (these) offense(s) prior to trial in violation of Article 13, UCMJ. You should consider evidence of this pretrial punishment in deciding an appropriate sentence in this case.**

(ARGUMENT FOR A SPECIFIC SENTENCE:) **MJ: During argument, trial counsel recommended that you consider a specific sentence in this case. You are advised that the arguments of the trial counsel and (her) (his) recommendations**

are only (her) (his) individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel. In contrast, you are advised that the defense counsel is speaking on behalf of the accused.

8–4–14. CONCLUDING SENTENCING INSTRUCTIONS

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.

When you close to deliberate and vote, only the members will be present. (Alternate members will not, at this time, participate in deliberation or voting.) I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known. Your 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.

> ***NOTE: The services use different definitions of "reasonable doubt." The judge should give the appropriate definition from one of the three options below.***

(ARMY / COAST GUARD) **A "reasonable doubt" is an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. "Proof beyond a reasonable doubt" means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt.**

(AIR FORCE) **A "reasonable doubt" is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the offense charged, you must find (him) (her) guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.**

(NAVY / USMC) **By "reasonable doubt" is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we**

know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt.

> ***NOTE: The MJ 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).***
>
> ***NOTE: In all cases, continue below.***

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
(_____),(_____),(_____),(_____),(_____)

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:

(The accused's age)
(The accused's good military character)
(The accused's (record) (reputation) in the service for (good conduct) (efficiency) (bravery) (_____))
(The prior honorable discharge(s) of the accused)
(The combat record of the accused)
(The (family) (domestic) difficulties experienced by the accused)
(The financial difficulties experienced by the accused)
(The accused's (mental condition) (mental impairment) (behavior disorder) (personality disorder) (character disorder) (nervous disorder) (_____))
(The accused's (physical disorder) (physical impairment) (addiction))
(The duration of the accused's pretrial confinement or restriction)
(The accused's GT score of _____)
(The accused's education, which includes: _____)
(That the accused is a graduate of the following service schools:_____)
(That the accused's (evaluation reports) (_____) indicate: _____)
(That the accused is entitled to (wear the following medals and awards: _____) (wear the medals and awards as reflected on (his) (her) record brief)
(That the accused's civilian records which indicate: _____)
(Lack of (previous convictions) (and) (Article 15 punishments))
(Past performance and conduct in the Army as reflected by _____)
(Defense exhibits _____)
(Character evidence testimony of _____)
(Accused's (testimony) (statement) _____)
(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. 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.

MJ: Once again, I advise you that any proposed sentence, that does not include death, must include at least (a Dishonorable Discharge) (a Dismissal) (confinement for life) (_____) The imposition of any other lawful punishment is totally within your discretion.)

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, 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) (are) Specification(s) _____ of Charge(s) _____, in 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 nine (9) of the twelve (12) members present. Members, in this connection, you are again advised that the mandatory minimum sentence is (a Dishonorable Discharge) (a Dismissal) (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: See paragraph 2-7-19, RECONSIDERATION INSTRUCTION (SENTENCE).***

MJ: As an aid in putting the sentence in proper form, the court will use the Sentence Worksheet marked Appellate Exhibit ___, which the Bailiff will now hand to the president.

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 ___.

(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 that should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. When the court has determined a sentence,

the inapplicable portions of the Sentence Worksheet should be lined through. The only permissible punishments are those listed on the Sentence Worksheet. When the court returns, I will examine the Sentence Worksheet.

MJ: Do counsel object to the instructions as given or request 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: Bailiff, please give the President (Prosecution Exhibit(s) _____) (and Defense Exhibit(s) _____) (and) (the Sentencing Instructions).

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.

> ***NOTE: Prior to closing the court for deliberations, the MJ must instruct the alternate members, if any, that they will not be participating in deliberations, unless later needed, and that they must not discuss the case with anyone. The MJ may allow the alternate members to return to their duties or homes, subject to recall if needed. Requiring alternate members to leave the courthouse may be the prudent course of action in order to avoid contact with the parties and witnesses during deliberations.***

MJ: The court is closed. Counsel and the accused will remain. (Members withdraw)

8–4–15. POST-TRIAL AND APPELLATE RIGHTS ADVICE

MJ: This Article 39(a) session is called to order. All parties are present, except the members.

MJ: Defense Counsel, have you advised the accused orally and in writing of (his) (her) post-trial and appellate rights including the rights contained in Rule for Court-Martial 1010?

DC: (Responds.)

MJ: Does the accused have a copy in front of (him) (her)?

DC: (Responds.)

MJ: _____, I have Appellate Exhibit __, an appellate rights advice form. Is that your signature on this form?

ACC: (Responds.)

MJ: Defense Counsel, is that your signature on Appellate Exhibit __?

DC: (Responds.)

MJ: _____, did your defense counsel explain your post-trial and appellate rights to you?

ACC: (Responds.)

MJ: _____, do you have any questions about your post-trial and appellate rights?

ACC: (Responds.)

NOTE: If more than one DC, the MJ should determine which counsel will be responsible for post-trial actions.

MJ: Which counsel will be responsible for post-trial actions in this case?

DC: (Responds.)

MJ: While we wait for the members' sentence, this Article 39(a) session is terminated.

8–4–16. ANNOUNCEMENT OF SENTENCE

MJ: The court is called to order. All parties are present, to include the members.

MJ: (COL) (___) _____, 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: (COL) (___) _____, 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 may examine it.

PRES/BAILIFF: (Complies.)

MJ: I reviewed the Sentence Worksheet and it appears (to be in proper form) (_____).

> ***NOTE: If the accused was convicted of at least one specification for which death may be adjudged and at least one specification for which death may not be adjudged <u>AND</u> the accused elected to be sentenced by the members for the death penalty specification(s) and by the military judge alone for the non-death penalty specification(s), then the MJ must announce the sentence in compliance with RCM 1002(e)(2).***

MJ: Accused and Defense Counsel, please rise.

ACC/DC: (Complies)

MJ: _____, this court sentences you to: _____.

MJ: Please be seated.

ACC/DC: (Complies)

> ***NOTE: If the sentence announced by the MJ includes death, the MJ must also announce which aggravating factors under RCM 1004(c) the members unanimously found to exist beyond a reasonable doubt See RCM 1004(b)(8), RCM 1004(c),1006(e), and Discussion following RCM 1007(b).***

(MJ: The court unanimously found, beyond a reasonable doubt, that the following aggravating factor(s) exist: _____ (_____) (_____).)

MJ: (COL) (___) _____, did I accurately announce the sentence (and the aggravating factors)?

PRES: (Responds.)

Bailiff, please retrieve the exhibit(s) from the president and return them to the court reporter.

BAILIFF: (Complies.)

> ***NOTE: In all cases, continue below.***

MJ: Members of the Court, before I excuse you, let me advise you of one matter. If you are asked about your service on this court-martial, I remind you of the oath

you took. Essentially, that oath prevents you from discussing your deliberations with anyone, to include stating any member's opinion or vote, unless ordered to do so by a court. You may 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 withdrew from the courtroom. All other parties are present.

MJ: Are there other matters to take up before this court adjourns?

TC/DC: (Respond.)

MJ: This court is adjourned.

APPENDICES

Appendix A

References

Section I

Required Publications

This section contains no entries.

Section II

Related Publications

Unless otherwise indicated, DA Forms are available on the APD website at https://armypubs.army.mil.

DA Form 2028
Recommended Changes to Publications and Blank Forms

Section III

Prescribed Forms

This section contains no entries.

Section IV

Referenced Forms

This section contains no entries.

APPENDIX B: INSTRUCTIONS CHECKLISTS

Instructions Checklists for contested cases are located at Appendix B-1 (Mental Responsibility Not in Issue) and Appendix B-2 (Mental Responsibility in Issue).

APPENDIX B–1. INSTRUCTIONS CHECKLIST (MENTAL RESPONSIBILITY NOT IN ISSUE)

Instructions checklist for cases with mental responsibility in issue is Appendix B-2.

Instructions Checklist-Mental Responsibility Is **NOT** In Issue:

I. INTRODUCTORY (*As Required)

(___) Preliminary Instructions (2-5 to 2-5-4)

(___) Joint Offenders (7-2)*

(___) Absent Accused (2-7-23)*

(___) Elements of Offenses (Chap 3, 3a)

(___) Vicarious Liability (7-1)

(___) _____

(___) _____

II. DURING TRIAL (As Required)

(___) Stipulation of Fact (7-4-1)

(___) Stipulation of Expected Testimony (7-4-2)

(___) Expert Testimony (7-9-1)

(___) Prior Inconsistent Statement (7-11-1)

(___) Prior Consistent Statement (7-11-2)

(___) Other Crimes, Wrongs, or Acts (7-13-1)

(___) Prior Conviction to Impeach (7-13-2)

(___) Past Sexual Behavior of Sex Victim (7-14)

(___) Have You Heard Questions to Impeach Opinion (7-18)

(___) Comment on Rights to Silence or Counsel (2-7-20)

(___) Views and Inspections (2-7-22)

(___) Confessions and Admissions (4-1)

(___) _____

III. FINDINGS (Mental Responsibility NOT an Issue)

A. (___) Prefatory Instructions (2-5-9)

B. (___) Elements of Offenses (Chap 3 and/or Chap 3a)

(___) CH/SP _____ LIO _____

(___) CH/SP _____ LIO _____

(___) CH/SP _____ LIO _____

(___) CH/SP _____ LIO _____

C. (___) Terms having special legal significance.

(___) Divers Occasions (7-25)

(___) Brain Death (7-24)

(___) _____

D. (___) Vicarious Liability (7-1)

(___) 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)

E (___) Joint Offenders (7-2)

F. 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)
- (___) Excessive 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)

(___) Justification (5-20)

(___) Automatism (5-21)

(___) _____

G. Pretrial Statements

(___) Pretrial Statements of Accused (Chap 4)

H. Evidentiary and other instructions

(___) Circumstantial Evidence (7-3)

(___) Circumstantial Evidence to Prove Intent

(___) Circumstantial Evidence to Prove 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)

(___) Accomplice Testimony (7-10)

(___) Prior Inconsistent Statement (7-11-1)

(___) Prior Consistent Statement (7-11-2)

(___) Accused Not Testifying (7-12)

(___) Other Crimes, Wrongs, or Acts (7-13-1)

(___) Prior Conviction to Impeach (7-13-2)

(___) Past Sexual Behavior of 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)

(___) Witness Opinion on Credibility or Guilt (7-26)

(___) _____

I. (___) Closing Substantive Instructions on Findings (2-5-12)

J. (___) Argument by Counsel (2-5-13)

K. (___) Procedural Instructions on Findings (2-5-14)

L. (___) Reconsideration of Findings (2-7-14)

M. (___) Excusal Instruction - NO SENTENCING PROCEEDINGS (end of 2-5-16.)

IV. SENTENCING (2-5-21 through 2-5-23) (2-6-1 through 2-6-11)

(___) Offenses considered one for sentencing

(___) Article 58a

(___) Pretrial confinement credit

(___) Article 58b

(___) 58b clemency powers by CA

(___) Fine

(___) Punitive discharge - vested benefits

(___) Summary of evidence in extenuation/mitigation (2-5-23)

(___) Accused not testifying

(___) Accused and/or victim not testifying under oath

(___) Scope unsworn statement

(___) Effect of guilty plea

(___) Mendacity

(___) Rehabilitative potential

    (___) Defense retention evidence

    (___) Rebuttal of defense retention evidence

(___) Pretrial punishment as mitigation

(___) Argument for specific sentence

(___) Members' clemency request (2-7-16 and 2-7-17)

(___) Relative severity of sentence (2-7-15)

(___) "Hung Jury" instruction (2-7-18)

(___) Credit for Article 15 punishment (2-7-21)

(___) _____

(___) Concluding sentencing instructions (2-5-24) (2-6-12)

(___) Reconsideration of Sentence (2-7-19)

V. EXCUSING MEMBERS. Give Excusal Instruction at 2-5-26 (Members-Contested) or 2-6-14 (Members-Sentencing Only)

APPENDIX B–2. INSTRUCTIONS CHECKLIST (MENTAL RESPONSIBILITY IN ISSUE)

Instructions checklist for cases with mental responsibility not in issue is Appendix B-1.

Instructions Checklist-Mental Responsibility **IS** In Issue:

I. INTRODUCTORY (*As Required)

(___) Preliminary Instructions (2-5 to 2-5-4)

(___) Joint Offenders (7-2)*

(___) Absent Accused (2-7-23)*

(___) Elements of Offenses (Chap 3, 3a)

(___) Vicarious Liability (7-1)

(___) Preliminary Instruction on Insanity (6-3)

(___) _____

(___) _____

II. DURING TRIAL (As Required)

(___) Stipulation of Fact (7-4-1)

(___) Stipulation of Expected Testimony (7-4-2)

(___) Expert Testimony (7-9-1)

(___) Prior Inconsistent Statement (7-11-1)

(___) Prior Consistent Statement (7-11-2)

(___) Other Crimes, Wrongs, or Acts (7-13-1)

(___) Prior Conviction to Impeach (7-13-2)

(___) Past Sexual Behavior of Sex Victim (7-14)

(___) Have You Heard Questions to Impeach Opinion (7-18)

(___) Comment on Rights to Silence or Counsel (2-7-20)

(___) Views and Inspections (2-7-22)

(___) Confessions and Admissions (4-1)

(___) Preliminary instruction on insanity (6-3)

(___) _____

III. FINDINGS (Mental Responsibility IS an Issue)

A. (___) Prefatory Instructions (2-5-9)

B. (___) Elements of Offenses (Chap 3 and/or Chap 3a)

(___) CH/SP _____ LIO _____

(___) CH/SP _____ LIO _____

(___) CH/SP _____ LIO _____

(___) CH/SP _____ LIO _____

C. (___) Terms having special legal significance.

(___) Divers Occasions (7-25)

(___) Brain Death (7-24)

(___) _____

D. (___) Vicarious Liability (7-1)

(___) 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)

E. (___) Joint Offenders (7-2)

F. 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)
- (___) Excessive 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 – See NOTEs to 5-17)

(___) Claim of Right (5-18)

(___) Causation-Lack of (5-19)

(___) Justification (5-20)

(___) Automatism (5-21)

(___) _____

G. Pretrial Statements

(___) Pretrial Statements of Accused (Chap 4)

H. Defense of Lack of Mental Responsibility

(___) Preliminary Instructions on Sanity (6-3)

(___) Mental Responsibility at Time of Offense (6-4)

(___) Partial Mental Responsibility (6-5)

(___) Expert Testimony (7-9-1)

(___) Evaluation of Testimony (6-6)

I. Evidentiary and Other Instructions

(___) Circumstantial Evidence (7-3)

(___) Circumstantial Evidence to Prove Intent

(___) Circumstantial Evidence to Prove 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)

(___) Accomplice Testimony (7-10)

(___) Prior Inconsistent Statement (7-11-1)

(___) Prior Consistent Statement (7-11-2)

(___) Accused Not Testifying (7-12)

(___) Other Crimes, Wrongs, or Acts (7-13-1)

(___) Prior Conviction to Impeach (7-13-2)

(___) Past Sexual Behavior of 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)

(___) Witness Opinion on Credibility or Guilt (7-26)

(___) _____

J. (___) Closing Substantive Instructions on Findings (2-5-12)

K. Argument by Counsel (2-5-13)

L. (___) Procedural Instructions on Findings (Mental Responsibility in Issue) (6-7)

M. (___) Reconsideration of Findings (2-7-14)

N (___) Excusal Instruction - NO SENTENCING PROCEEDINGS (end of 2-5-16)

IV. SENTENCING

A. (___) Argument or Request for Punitive Discharge Inquiry (2-7-26)

B. (___) Argument by Counsel)

C. Sentence Instructions (2-5-21 through 2-5-23) (2-6-1 through 2-6-11)

(___) Offenses considered one for sentencing

(___) Article 58a

(___) Pretrial confinement credit

(___) Article 58b

(___) 58b clemency powers by CA

(___) Fine

(___) Punitive discharge - vested benefits

(___) Summary of evidence in extenuation/mitigation

(___) Mental responsibility sentencing factors (6-9)

(___) Accused not testifying

(___) Accused and/or victim not testifying under oath

(___) Scope unsworn statement

(___) Effect of guilty plea

(___) Mendacity

(___) Rehabilitative potential

    (___) Defense retention evidence

    (___) Rebuttal of defense retention evidence

(___) Pretrial punishment as mitigation

(___) Argument for specific sentence

(___) Members' clemency request (2-7-16 and 2-7-17)

(___) Relative severity of sentence (2-7-15)

(___) "Hung Jury" instruction (2-7-18)

(___) Credit for Article 15 punishment (2-7-21)

(___) _____

(___) Concluding sentencing instructions (2-5-24) (2-6-12)

(___) Reconsideration of Sentence (2-7-19)

V. EXCUSING MEMBERS. Give Excusal Instruction at 2-5-26 (Members-Contested) or 2-6-14 (Members-Sentencing Only)

APPENDIX C: FINDINGS WORKSHEETS

1. Sample Findings Worksheets for each of the various situations which may arise are located at C-1 through C-4. An alternative Findings Worksheet is located at C-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 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, amount, or nomenclature.

4. Counsel for both sides should consent to the Findings Worksheet on the record before it is given to the 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 closing the court.

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.

Table C-1: Sample Findings Worksheet – No Lesser Included Offenses

UNITED STATES	)	
	)	
v.	)	**FINDINGS WORKSHEET**
	)	
JONES, James D.,	)	
Specialist, U.S. Army,	)	
A Company, 1st Battalion,	)	
1st Brigade Combat Team,	)	
8th Infantry Division,	)	
Fort Swampy, Georgia	)	

[NOTE: After the 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 stricken through or 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)

Table C-2: Sample Findings Worksheet –Lesser Included Offenses

UNITED STATES	)	
	)	
v.	)	**FINDINGS WORKSHEET**
	)	
JONES, James D.,	)	
Specialist, U.S. Army,	)	
A Company, 1st Battalion,	)	
1st Brigade Combat Team,	)	
8th Infantry Division,	)	
Fort Swampy, Georgia	)	

[NOTE: After the 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 stricken through or 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 Rape, but Guilty of Assault with Intent to Commit Rape)
Of Specification 2 of Charge I: (Not Guilty) (Guilty)

Of Charge I: (Guilty)

or, only if a finding of guilty of a lesser included offense]:

Of Charge I as to Specification 1: Not Guilty, but Guilty of Assault with Intent to Commit Rape in violation of Article 128
Of Charge I as to Specification 2: (Not Guilty) (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)

Table C-3: Sample Findings Worksheet –Capital Cases

UNITED STATES	)	
	)	
v.	)	**FINDINGS WORKSHEET**
	)	
JONES, James D.,	)	
Specialist, U.S. Army,	)	
A Company, 1st Battalion,	)	
1st Brigade Combat Team,	)	
8th Infantry Division,	)	
Fort Swampy, Georgia	)	

[NOTE: After the 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 stricken through or 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. Other Findings

Of Charge I and its Specification:

a. Not Guilty
b. Not Guilty of Premeditated Murder, but Guilty of Unpremeditated Murder
c. Guilty
d. By a unanimous vote of all members, Guilty

_____	_____
President	CSM Sally Member
_____	_____
COL Joyce Member	CSM Sam Member
_____	_____
LTC Jack Member	SGM Steven Member
_____	_____
LTC Jane Member	SGM Shirley Member
_____	_____
MAJ John Member	MSG Susan Member
_____	_____
MAJ Josephine Member	SFC Scott Member

Of Charge II and its Specification: (Not Guilty) (Guilty)

Of The Additional Charge and its Specification:

a. Not Guilty
b. Not Guilty of Felony Murder, but Guilty of Unpremeditated Murder
c. Guilty
d. By a unanimous vote of all members, Guilty

_____	_____
President	CSM Sally Member
_____	_____
COL Joyce Member	CSM Sam Member
_____	_____
LTC Jack Member	SGM Shirley Member
_____	_____
LTC Jane Member	SGM Steven Member
_____	_____
MAJ John Member	MSG Susan Member
_____	_____
MAJ Josephine Member	SFC Scott Member

_____
(Signature of President)

Table C-4: Sample Findings Worksheet –Exceptions and Substitutions

UNITED STATES	)	
	)	
v.	)	**FINDINGS WORKSHEET**
	)	
JONES, James D.,	)	
Specialist, U.S. Army,	)	
A Company, 1st Battalion,	)	
1st Brigade Combat Team,	)	
8th Infantry Division,	)	
Fort Swampy, Georgia	)	

[NOTE: After the 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 stricken through or 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)

Table C-5: Sample Findings Worksheet –Sample Alternative Findings Worksheet

UNITED STATES	)	
	)	
v.	)	**FINDINGS WORKSHEET**
	)	
JONES, James D.,	)	
Specialist, U.S. Army,	)	
A Company, 1st Battalion,	)	
1st Brigade Combat Team,	)	
8th Infantry Division,	)	
Fort Swampy, Georgia	)	

[NOTE: After the 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 stricken through or in bold print.]

Specialist James D. Jones, this Court-Martial finds you:

I. Full Acquittal or Full Conviction

Of The Charges and their Specifications:
[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 (Desertion)

Of Specification 1 of Charge II:
[a] Not Guilty
[b] Guilty
[c] Not Guilty, but Guilty of Absence Without Leave, in violation of Article 86
[d] 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:

[a] Not Guilty
[b] Guilty
[c] Not Guilty, but Guilty of Absence Without Leave, in violation of Article 86
[d] 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 Charge II:

[a] Not Guilty
[b] Guilty

Charge III (Larceny)

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 Larceny, in violation of Article 80
[d] Not Guilty, but Guilty of Wrongful Appropriation, and of Charge III, Guilty.

_____
(Signature of President)

APPENDIX D: SENTENCING WORKSHEETS

1. Sample Sentence Worksheets for the various types of courts-martial are located at D-1 through D-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 case, 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.

Table D-1: Sample Sentencing Worksheet –Special Court-Martial Not Authorized to Adjudge a Bad Conduct Discharge

UNITED STATES	)	
	)	
v.	)	**SENTENCE WORKSHEET**
	)	
JONES, James D.,	)	
Specialist, U.S. Army,	)	
A Company, 1st Battalion,	)	
1st Brigade Combat Team,	)	
8th Infantry Division,	)	
Fort Swampy, Georgia	)	

[NOTE: After the members have reached their sentence, the President shall strike out all inapplicable language.]

Specialist James D. Jones, this Court-Martial sentences you:

NO PUNISHMENT

- To no punishment.

REPRIMAND

- To be reprimanded.

REDUCTION

- To be reduced to the grade of _____.

FINE AND FORFEITURES

- To pay the United States a fine of $_____ (and to serve (additional) confinement of _____ [day(s)] [month(s)] if the fine is not paid).
- To forfeit $_____ pay per month for _____ month(s).

RESTRAINT AND HARD LABOR

- To be restricted for _____ (days) (months) to the limits of:

_____

- To perform hard labor without confinement for _____ [day(s)] [month(s)].
- To be confined for _____ [day(s)] [month(s)].

_____
(Signature of President)

Table D-2: Sample Sentencing Worksheet –Special Court-Martial Authorized to Adjudge a Bad Conduct Discharge

UNITED STATES	)	
	)	
v.	)	**SENTENCE WORKSHEET**
	)	
JONES, James D.,	)	
Specialist, U.S. Army,	)	
A Company, 1st Battalion,	)	
1st Brigade Combat Team,	)	
8th Infantry Division,	)	
Fort Swampy, Georgia	)	

[NOTE: After the members have reached their sentence, the President shall strike out all inapplicable language.]

Specialist James D. Jones, this Court-Martial sentences you:

NO PUNISHMENT

- To no punishment.

REPRIMAND

- To be reprimanded.

REDUCTION

- To be reduced to the grade of _____.

FINE AND FORFEITURES

- To pay the United States a fine of $_____ (and to serve (additional) confinement of _____ [day(s)] [month(s)] if the fine is not paid).
- To forfeit $_____ pay per month for _____ month(s).

RESTRAINT AND HARD LABOR

- To be restricted for _____ (days) (months) to the limits of:

_____

- To perform hard labor without confinement for _____ [day(s)] [month(s)].
- To be confined for _____ [day(s)] [month(s)].

PUNITIVE DISCHARGE

- To be discharged from the service with a bad conduct discharge

_____
(Signature of President)

Table D-3: Sample Sentencing Worksheet –General Court-Martial (Noncapital)

UNITED STATES	)	
	)	
v.	)	**SENTENCE WORKSHEET**
	)	
JONES, James D.,	)	
Specialist, U.S. Army,	)	
A Company, 1st Battalion,	)	
1st Brigade Combat Team,	)	
8th Infantry Division,	)	
Fort Swampy, Georgia	)	

[NOTE: After the members have reached their sentence, the President shall strike out all inapplicable language.]

Specialist James D. Jones, this Court-Martial sentences you:

NO PUNISHMENT

- To no punishment.

REPRIMAND

- To be reprimanded.

REDUCTION

- To be reduced to the grade of _____.

FINE AND FORFEITURES

- To pay the United States a fine of $_____ (and to serve (additional) confinement of _____ [day(s)] [month(s)] if the fine is not paid).
- To forfeit $_____ pay per month for _____ month(s).
- To forfeit all pay and allowances.

RESTRAINT AND HARD LABOR

- To be restricted for _____ (days) (months) to the limits of:

_____

- To perform hard labor without confinement for _____ [day(s)] [month(s)].
- To be confined for _____ [day(s)] [month(s)] [year(s)] [life with eligibility for parole] [life without eligibility for parole].

PUNITIVE DISCHARGE

- (To be discharged from the service with a bad conduct discharge.
- To be dishonorably discharged from the service.)
- (To be dismissed from the service)

_____
(Signature of President)

Table D-4: Sample Sentencing Worksheet –General Court-Martial (Capital Case)

UNITED STATES	)	
	)	
v.	)	**SENTENCE WORKSHEET**
	)	
JONES, James D.,	)	
Specialist, U.S. Army,	)	
A Company, 1st Battalion,	)	
1st Brigade Combat Team,	)	
8th Infantry Division,	)	
Fort Swampy, Georgia	)	

[NOTE: If the court-martial adjudges a death sentence, the court shall indicate below which aggravating factor(s) have been proven. The factors 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 those portions.]

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:

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.]

_____ President	_____ CSM Sally Member
_____ COL Joyce Member	_____ CSM Sam Member
_____ LTC Jack Member	_____ SGM Steven Member
_____ LTC Jane Member	_____ SGM Shirley Member
_____ MAJ John Member	_____ MSG Susan Member
_____ MAJ Josephine Member	_____ SFC Scott Member

EXTENUATING AND MITIGATING CIRCUMSTANCES

Specialist James D. Jones, this court-martial unanimously finds that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstance(s), including the aggravating factor(s) 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.]

_____ President	_____ CSM Sally Member
_____ COL Joyce Member	_____ CSM Sam Member
_____ LTC Jack Member	_____ SGM Steven Member
_____ LTC Jane Member	_____ SGM Shirley Member
_____ MAJ John Member	_____ MSG Susan Member
_____ MAJ Josephine Member	_____ SFC Scott Member

[NOTE: After the members have reached their sentence, the President shall strike out all inapplicable language.]

Specialist James D. Jones, this Court-Martial, (all) (three-fourths) of the members concurring, sentences you:

REPRIMAND

- To be reprimanded.

REDUCTION

- To be reduced to the grade of _____.

FINE AND FORFEITURES

- 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).
- To forfeit $_____ pay per month for _____ month(s).
- To forfeit all pay and allowances.

RESTRAINT AND HARD LABOR

- To be confined for _____ [day(s)] [month(s)] [year(s)] [life with eligibility for parole] [life without eligibility for parole].

PUNITIVE DISCHARGE

- (To be discharged from the service with a bad conduct discharge.
- To be dishonorably discharged from the service.)
- (To be dismissed from the service)

DEATH

- To be put to death.

_____
(Signature of President)

[NOTE: If the sentence includes death, all members must sign the Sentence Worksheet below.]

_____ President	_____ CSM Sally Member
_____ COL Joyce Member	_____ CSM Sam Member
_____ LTC Jack Member	_____ SGM Steven Member
_____ LTC Jane Member	_____ SGM Shirley Member
_____ MAJ John Member	_____ MSG Susan Member
_____ MAJ Josephine Member	_____ SFC Scott Member

APPENDIX E: CONTEMPT PROCEDURE

NOTE: Article 48, UCMJ, and RCM 809 outline the contempt of court rules and procedures.

NOTE: Procedure prior to 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: 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: 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: (State the name of the Respondent), I am considering whether you should be held in contempt for (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 that you are not in contempt of this court.)

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) (willfully disobedience of the lawful (writ) (process) (order) (rule) (decree) (command) of the court-martial).

(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: Disposition upon Notice and Hearing. If the military judge did not personally 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) (may have willfully disobeyed the lawful (writ) (process) (order) (rule) (decree) (command) of the court-martial). 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), or who willfully disobeys the lawful (writ) (process) (order) (rule) (decree) (command) of the court-martial may be punished for contempt. The maximum punishment is a fine of $1000, confinement for 30 days, or both. 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?

(**MJ: Trial Counsel, the Government must ensure the presence of the following witness(es) at the contempt proceeding: (list name(s) of witness(es) the Court desires to present evidence**).)

[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 proceeding, 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.

DC: (I) (All members of the defense) 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).

MILITARY COUNSEL FOR RESPONDENT: (I) (All counsel for the respondent) have been detailed to this proceeding by _____. (I am) (All counsel for he respondent are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No counsel for the respondent has) acted in any manner which might tend to disqualify (me) (us) in this proceeding.

CIVILIAN COUNSEL FOR RESPONDENT: 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.

[The MJ should administer the oath to the civilian counsel found in Chapter 2 of this Benchbook]

MJ: (State the name of the counsel for respondent), 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) (may have willfully disobeyed the lawful (writ) (process) (order) (rule) (decree) (command) of the court-martial). 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.

> ***NOTE: The Military Judge should determine whether either party to the court-martial raised the allegation of contemptuous behavior. If so, that party should be given an opportunity to make a statement and offer evidence. If neither party raised the allegation, and the Military Judge determines that neither party has an interest in the contempt proceedings, the Military Judge may decline to give the parties an opportunity to make opening statements or present evidence. The Military Judge may independently call witnesses and introduce documentary evidence. In all cases, the Military Judge must give the Respondent's Counsel an opportunity to make an opening statement and present evidence.***

MJ: Trial Counsel, do you desire to make an opening statement?

TC: (Responds with opening statement, if desired.)

MJ: Defense Counsel, do you desire to make an opening statement?

DC: (Responds with opening statement, if desired.)

MJ: Respondent's Counsel, do you desire to make an opening statement now or do you wish to reserve?

RESPONDENT'S COUNSEL: (Responds with opening statement, if desired.)

> ***NOTE: The hearing proceeds with evidence being presented. If the Military Judge determines that the Trial Counsel or Defense Counsel, or both, have an interest in the contempt proceedings, they should be given an opportunity to examine witnesses and offer evidence. Otherwise, the Military Judge may call witnesses and introduce evidence. The Respondent's Counsel should be given an opportunity to cross-examine witnesses. After the evidence regarding contemptuous behavior is***

presented, the Respondent's 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: Trial Counsel, do you desire to offer any evidence on this matter?**

TC: (Responds.)

MJ: Trial Counsel, you may call your first witness.)

(**MJ: Defense Counsel, do you desire to offer any evidence on this matter?**

DC: (Responds.)

MJ: You may call you first witness.)

(**MJ: The Court calls (<u>state the name of witness</u>).**)

(**MJ: Respondent's Counsel, do you wish to make an opening statement?**)

MJ: Respondent's Counsel, you may present evidence.

RESPONDENT'S COUNSEL: (Responds.)

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.))

MJ: Respondent's Counsel, you may present argument.

RESPONDENT'S COUNSEL: (Argument or waiver.)

NOTE: The military judge may close to deliberate, or immediately enter findings.

(MJ: The Court is closed.

MJ: The contempt proceeding is called to order. All parties present when the contempt proceeding closed are again present.)

MJ:((State the name of the Respondent), I find that you were not in contempt of this court.)

((State the name of the Respondent), 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) (willful disobedience of the lawful (writ) (process) (order) (rule) (decree) (command) of the court-martial). 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: Sentence. If confinement is imposed, the judicial officer designates the place of confinement. See RCM 809(e). The immediate commander of the person held in contempt, or, in the case of a civilian, the convening authority should be notified immediately so that the necessary action on the sentence may be taken. See Discussion to RCM 809(e)(4)(B) and RCM 1102.

NOTE: 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 for review by either the convening authority IAW RCM 809(d)(2) or by a court of criminal appeals IAW RCM 809(d)(3). (As stated in the NOTE immediately above, when the sentence includes confinement, the immediate commander or the convening authority should be immediately notified; however, the notification need not consist of a complete record of the proceedings.)

NOTE: 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 announced unless the circumstances described in RCM 809(e)(4) apply. 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 above, about removing an accused from the court-martial proceedings.

REFERENCES: Article 48, UCMJ; RCM 801, 804, 809, and RCM 809 analysis at Appendix 15, MCM; US v. Burnett, 27 MJ 99 (CMA 1988); Hasan v. Gross, 71 MJ 416 (CAAF 2012).

APPENDIX F: GENERAL AND SPECIAL FINDINGS

F–1. GENERAL FINDINGS.

NOTE: 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(f)(5), 311(d)(7), and 321(d)(7). This is a sua sponte responsibility.

NOTE: Requested special findings. Under RCM 918(b), an MJ in a court-martial composed of an MJ alone 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 before entry of judgment.

NOTE: 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(d), UCMJ).

NOTE: 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. SPECIAL FINDINGS.

NOTE: 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 B, as an aid in guarding against inadvertent omissions of crucial matters.

NOTE: 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: 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: 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.

NOTE: 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: 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 2020, 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 2020.

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 2020, 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 PFC 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: Written special findings. 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.***

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 at or near Fort Blank, Missouri, in September 2020, the accused placed his hand on Thomas 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 2020, 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 2020 (R. 75), and while there, grabbed Jones' penis through Jones' clothing (R. 76). The accused visited Jones at Jones' home in early January 2021 (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

REFERENCES: RCM 918; US v. Gerard, 11 MJ 446 (CMA 1982); US v. Orben, 28 MJ 172 (CMA 1989); US v. Martinez, 38 MJ 82 (CMA 1993); US v. Clark, 75 MJ 298 (CAAF 2016); US v. Rodriguez, 79 MJ 1 (CAAF 2019)..

APPENDIX G: REHEARINGS AND POST-TRIAL PROCEEDINGS

NOTE: Rehearings are governed by Article 63, UCMJ, and RCM 810. Post-trial proceedings are governed by RCM 1104. While many of the procedures are the same as in an original trial, rehearings and post-trial proceedings require certain modifications to the "standard" court-martial procedures.

G–1. SENTENCE REHEARING

NOTE: The MJ 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: Please be seated. 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 aforementioned Appellate Exhibits, have been furnished to the military judge, counsel, and the accused, and will be inserted in the record.

(TC: The following corrections are noted in the convening orders _____.)

NOTE: The MJ should examine the convening order(s) and any amendments for accuracy. Only minor changes may be made at trial to the convening orders. Any correction that affects the identity of the individual concerned must be made by an amending or correcting order. If a CAPITAL CASE, go to Chapter 8.

(TC: (An) Article 30a proceeding(s) (was) (were) held in connection with this case on _____.)

NOTE: A record of every pre-referral proceeding conducted pursuant to Article 30a, UCMJ shall be prepared and such record shall be included in the record of trial. See RCM 309(e).

TC: The prosecution is ready to proceed in the sentence rehearing in the case of *United States versus (Private) (___)* _____.

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).

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: If any trial counsel needs to be sworn, the MJ will provide the following oath: "Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) counsel in the case now in hearing (so help you God)?"

G–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 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: 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: If the accused elects pro se representation, see paragraph 2- 7-2, PRO SE REPRESENTATION. The MJ must be aware of any possible conflict of interest by counsel, and if a conflict exists, the MJ must obtain a waiver from the accused or order new counsel appointed for the accused. See paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.***
>
> ***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 (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, please announce your detailing and 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.

> ***NOTE: If any defense counsel needs to be sworn, the MJ will provide the following oath: "Do you swear or affirm that you will faithfully perform all the duties of defense counsel in the case now in hearing (so help you God)?"***

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: In <u>all</u> cases with a civilian defense counsel, the MJ will provide the following oath: "Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?"***

MJ: I have been properly certified and sworn, and detailed (myself) (by _____) to this hearing. I am not aware of any matter that might be a ground for challenge against me (I was the judge for the _____ portion of this case.) (I was not the 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 for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn.

MJ: Defense Counsel, do you have any challenges to the jurisdiction of this sentence rehearing?

DC: (Responds.)

G–1–2. MAXIMUM PUNISHMENT

NOTE: See RCM 810(d) for sentence limitations in a rehearing. The MJ 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. See US v. Cruse, 53 MJ 805, 809 (ACCA 2000).

NOTE: Article 63, UCMJ covers rehearings. Effective 1 January 2019, the Military Justice Act of 2016 amended Article 63. Prior to the amendment, "no sentence in excess of or more severe than the original sentence may be approved, unless the new sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory." After the amendment, see RCM 810(d)(1) and (2) for the six exceptions to the general rule that the adjudged sentence may not exceed the one included in the original judgment entered pursuant to RCM 1111. Per Executive Order 13825, the amendments to Article 63 only apply to cases in which all specifications allege offenses committed on or after 1 January 2019. The MJ must be aware of these changes and carefully tailor the instructions as required.

MJ: Government, what do you calculate to be the maximum punishment for the offense(s) of which the accused stands convicted?

TC: (Responds.)

MJ: Defense, do you agree?

DC: (Responds.)

MJ: _____, the maximum punishment for the offense(s) of which you stand convicted is _____. However, because this is a sentence rehearing, [the punishment for (that) (those) offense(s) that the convening authority may approve as a result of this rehearing cannot exceed the punishment that was approved by the convening authority at your original trial.] [the new adjudged sentence may not exceed or be more severe than the original sentence as set forth in the entry of judgment from your original trial.] [_____.] Do you understand that?

ACC: (Responds.)

G–1–3. INQUIRY ON PRESENTATION OF EVIDENCE

NOTE: 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 MJ should establish that the parties understand the special rules regarding evidence from the prior trial as set forth in RCM 810(a)(2). The MJ 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 MJ 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 the Court; or 3) read aloud to the fact finder from the original case's record of trial. After considering the views of the parties, the MJ 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 offense(s) and the background of the accused?

TC: (Responds.)

MJ: Defense Counsel, do you object to the government's proposal?

DC: (Responds.)

G–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.

NOTE: The MJ must advise the accused of his/her forum rights using the appropriate procedural guides contained in Chapter 2, paragraphs 2-1-2 through 2-1-5. After doing so, continue below.

MJ: Again, I want to stress that you are not limited in exercising any of these forum 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: If the accused elects trial before members, proceed to paragraph G-1-6 below. If accused elects trial by judge alone, continue with paragraph G-1-5 below:

G–1–5. SENTENCE REHEARING 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: 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: Go to Chapter 2, Section IV, JUDGE ALONE (SENTENCING) and complete the script, as in an original trial.

G–1–6. SENTENCE REHEARING 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 offense(s) 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?

DC: (Responds.)

MJ: Defense Counsel, 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 will 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: 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 the sentence rehearing in the case of *United States versus (Private) (___)* _____.

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.

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 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 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 (an) offense(s). (That) (Those) offense(s) appear on the flyer you have in the folder in front of you, which you should now review.

MBRS: (Comply.)

MJ: These proceedings are being held so that you may determine an appropriate sentence for the accused for the commission of the offense(s) on the flyer. 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 (this) (these) offense(s) 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: Go to Chapter 2, Section VI (COURT MEMBERS SENTENCING ONLY), paragraph 2-6-1 (PRELIMINARY INSTRUCTIONS), beginning with the third paragraph, then complete the script as in an original trial.

G–2. FULL REHEARING

NOTE: The MJ 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: Please be seated. 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 (flapped) (newly referred) 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.

(TC: The following corrections are noted in the convening orders _____.)

NOTE: The MJ should examine the convening order(s) and any amendments for accuracy. Only minor changes may be made at trial to the convening orders. Any correction that affects the identity of the individual concerned must be made by an amending or correcting order. If a CAPITAL CASE, go to Chapter 8.

(TC: (An) Article 30a proceeding(s) (was) (were) held in connection with this case on _____.)

NOTE: A record of every pre-referral proceeding conducted pursuant to Article 30a, UCMJ shall be prepared and such record shall be included in the record of trial. See RCM 309(e).

TC: The prosecution is ready to proceed in the full rehearing in the case of *United States versus (Private) (___)* _____.

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).

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: If any trial counsel needs to be sworn, the MJ will provide the following oath: "Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) counsel in the case now in hearing (so help you God)?"

G–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 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: 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: If the accused elects pro se representation, see paragraph 2- 7-2, PRO SE REPRESENTATION. The MJ must be aware of any possible conflict of interest by counsel, and if a conflict exists, the MJ must obtain a waiver from the accused or order new counsel appointed for the accused. See paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.***
>
> ***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 (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, please announce your detailing and 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.

> ***NOTE: If any defense counsel needs to be sworn, the MJ will provide the following oath: "Do you swear or affirm that you will faithfully perform all the duties of defense counsel in the case now in hearing (so help you God)?"***

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: In all cases with a civilian defense counsel, the MJ will provide the following oath: "Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?"***

MJ: I have been properly certified and sworn, and detailed (myself) (by _____) to this hearing. I am not aware of any matter that might be a ground for challenge against me (I was the judge for the _____ portion of this case.) (I was not the 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 for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn.

MJ: Defense Counsel, do you have any challenges to the jurisdiction of this full rehearing?

DC: (Responds.)

G–2–2. 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.

NOTE: The MJ must advise the accused of his/her forum rights using the appropriate procedural guides contained in Chapter 2, paragraphs 2-1-2 through 2-1-5. After doing so, continue below.

MJ: Again, I want to stress that you are not limited in exercising any of these forum 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: If the accused elects trial by judge alone, continue with paragraph G-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 G-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 G-2-5 below.

G–2–3. FULL REHEARING 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: 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: 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.***

G-2-4. FULL REHEARING BEFORE MEMBERS (CONTEST)

> ***NOTE: 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 offense(s) 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: 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.***

The prosecution is ready to proceed with the rehearing in the case of *United States versus (Private) (___)* _____.

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 military judge is to ensure that the 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 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 offense(s) 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 offense(s) on the flyer, and if guilty, to 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: Continue with Chapter 2, Section V, paragraph 2-5, PRELIMINARY INSTRUCTIONS, beginning with the paragraph that begins with "Under the law…", through completion of the script, as in an original trial.

G–2–5. FULL REHEARING BEFORE MEMBERS (FOLLOWING GUILTY PLEA)

NOTE: Insert the following paragraphs in place of the instructions and NOTEs beginning with Chapter 2, Section VI (COURT MEMBERS SENTENCING ONLY), 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: Trial Counsel, has the flyer been marked as an appellate exhibit?

TC: (Responds.)

MJ: Trial Counsel, does the flyer reflect only the offense(s) 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?

DC: (Responds.)

MJ: Defense Counsel, do you have any objections to the Sentence Worksheet?

DC: (Responds.)

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: _____, 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: 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 the rehearing in the case of the *United States versus (Private) (___)* _____.

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.

MJ: Members of the Court, it is appropriate that I give you some preliminary instructions. My duty as military judge is to ensure that the 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 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: Continue with Chapter 2, Section VI, paragraph of 2-6-1, PRELIMINARY INSTRUCTIONS, beginning with the second paragraph ("At a session held earlier…"), through completion of the script, as in an original trial.***

G–3. COMBINED REHEARING

NOTE: Combined Rehearing. 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 MJ 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) and (4)); (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, 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: Please be seated. 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 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 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 (flapped) (newly referred) 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.

(TC: The following corrections are noted in the convening orders _____.)

> ***NOTE: The MJ should examine the convening order(s) and any amendments for accuracy. Only minor changes may be made at trial to the convening orders. Any correction that affects the identity of the individual concerned must be made by an amending or correcting order. If a CAPITAL CASE, go to Chapter 8.***

(TC: (An) Article 30a proceeding(s) (was) (were) held in connection with this case on _____.)

> ***NOTE: A record of every pre-referral proceeding conducted pursuant to Article 30a, UCMJ shall be prepared and such record shall be included in the record of trial. See RCM 309(e).***

TC: The prosecution is ready to proceed in the combined rehearing in the case of *United States versus (Private) (___)* _____.

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).

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: If any trial counsel needs to be sworn, the MJ will provide the following oath: "Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) counsel in the case now in hearing (so help you God)?"***

G–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 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.)

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: If the accused elects pro se representation, see paragraph 2- 7-2, PRO SE REPRESENTATION. The MJ must be aware of any possible conflict of interest by counsel, and if a conflict exists, the MJ must obtain a waiver from the accused or order new counsel appointed for the accused. See paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.***
>
> ***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 (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, please announce your detailing and 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.

NOTE: If any defense counsel needs to be sworn, the MJ will provide the following oath: "Do you swear or affirm that you will faithfully perform all the duties of defense counsel in the case now in hearing (so help you God)?"

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: In <u>all</u> cases with a civilian defense counsel, the MJ will provide the following oath: "Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?"

MJ: I have been properly certified and sworn, and detailed (myself) (by _____) to this hearing. I am not aware of any matter that might be a ground for challenge against me (I was the judge for the _____ portion of this case.) (I was not the 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 for both sides appear to have the requisite qualifications, and all personnel required to be sworn have been sworn.

MJ: Defense Counsel, do you have any challenges to the jurisdiction of this rehearing?

DC: (Responds.)

G–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.

> ***NOTE: The MJ must advise the accused of his/her forum rights using the appropriate procedural guides contained in Chapter 2, paragraphs 2-1-2 through 2-1-5. After doing so, continue below.***

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: If the accused elects trial before MJ alone, go to G-3-3 below. If the accused elects trial before members, go to Chapter 2, Section I, paragraph 2-1-6 ARRAIGNMENT. At the conclusion of the arraignment, if the accused pleaded not guilty, go to G-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 G-3-5 below.***

G–3–3. COMBINED REHEARING 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: 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: For judge alone cases, go to Chapter 2, Section I, paragraph 2-1-6, ARRAIGNMENT, and follow the instructions in the NOTE at the end of that paragraph, based on the plea.***

G-3-4. COMBINED REHEARING BEFORE MEMBERS (CONTEST)

> ***NOTE: 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 paragraph of that instruction beginning with the phrase "As court members,…". 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: 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. See 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: 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 the rehearing in the case of the *United States versus (Private) (___)* _____.

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 military judge is to ensure that the trial is conducted in a fair, orderly, and impartial manner in accordance with the law. I preside over 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. (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: Continue with Chapter 2, Section V, paragraph 2-5, PRELIMINARY INSTRUCTIONS, beginning with the third paragraph (that begins with "As court members…"), and continue with the script to the end of Chapter 2, Section V, paragraph 2-5-16.***

G–3–5. PRESENTATION OF SENTENCING EVIDENCE

NOTE: The following should be inserted in place of the NOTE and instructions at the end of Chapter 2, Section V, paragraph 2-5-16 (after, "Please retrieve the exhibits from the president.").

NOTE: The MJ must determine the sentencing forum. See RCM 902A, 903. Further, if members will sentence the accused, and 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. In case of member sentencing, continue below.

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.

(Recess)

MJ: All parties are present, except the members. 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: 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 MJ should establish that the parties understand the special rules regarding evidence from the prior trial as set forth in RCM 810(a)(2). The MJ 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 MJ 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.)

G–3–6. ADDITIONAL CHALLENGES AND PRELIMINARY INSTRUCTIONS ON SENTENCING

NOTE: In the 2016 MCM, RCM 810(a)(3) provided for additional challenges for cause prior to the sentencing portion of a combined rehearing. In the 2019 MCM, RCM 810(a)(3) does not explicitly allow for additional challenges prior to the sentencing portion of a combined rehearing, but RCM 912(d) and (f) give the MJ discretion with respect to the questioning of members. Add the following appropriately tailored instructions immediately following the first line of Chapter 2, Section V, paragraph 2-5-17. Note that this instruction must also 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) (pleaded guilty at an earlier session to) (an) offense(s) 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 (this) (these) earlier guilty finding(s) until after you had determined findings for the contested offenses. (This) (These) earlier guilty finding(s) 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 offense(s) 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 the offense(s) 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.

Counsel will 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.)

> ***NOTE: If any of the new offenses on the revised flyer are of a different nature or type of crime, then the MJ should consider re-asking some of the standard preliminary group voir dire questions in paragraph 2-5-1 (e.g., "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?). If the sentence only portion of a combined***

rehearing involves new named victim or sentencing only witnesses, then the MJ should consider including those names in Question 3 of the MJ's original voir dire questions (2-5-1).

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: Trial Counsel and Defense Counsel will conduct voir dire if desired, and individual voir dire will be conducted if required.

G–3–7. INDIVIDUAL VOIR DIRE

MJ: Members, 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.)

G–3–8. CHALLENGES

NOTE: If appropriate, the MJ should follow the appropriately tailored procedures for challenges as outlined in Chapter 2. Then, the MJ should continue with Chapter 2, Section V, paragraph 2-5-17, to the conclusion of the script.

G–3–9. COMBINED REHEARING BEFORE MEMBERS (FOLLOWING GUILTY PLEA)

NOTE: Insert the following paragraphs in place of the instructions and NOTEs beginning with Chapter 2, Section VI, and prior to the second paragraph of 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 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: 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: 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 the sentence rehearing in the case of the *United States versus (Private) (___) _____*.

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 military judge is to ensure that the trial is conducted in a fair, orderly, and impartial manner in accordance with the law. I preside over 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: Continue with Chapter 2, Section VI, paragraph 2-6-1, PRELIMINARY INSTRUCTIONS, beginning with the second paragraph (beginning with "At

a session held earlier…"), through completion of the script, as in an original trial.

G–4. POST-TRIAL ARTICLE 39(A) SESSION

NOTE: Upon motion of either party or sua sponte, the MJ may direct a post-trial session at any time prior to entry of judgment. See Article 60, UCMJ and RCM 1104.

MJ: This Article 39(a) session is called to order.

TC: All parties present when the court last adjourned are once again present(, with the following exceptions: _____, _____). There have been no changes in the convening orders since the last date of trial, _____.

NOTE: New parties must account for their detailing and qualifications.

MJ: In accordance with Article 60 of the Uniform Code of Military Justice and Rule for Court-Martial 1104, the purpose of this post-trial session is (to clarify the record in this case) (_____). We will follow, insofar as applicable, the procedural guide for this type of hearing contained in The Military Judges' Benchbook. This post-trial Article 39(a) session has been undertaken by the court (on its own motion pursuant to RCM 1104) (pursuant to the following communication: _____ which will be included in the record as Appellate Exhibit ___).

NOTE: What follows are some examples of matters that may be the subject of a post-trial session: (1) prior omission of discussion of maximum punishment, (2) error in announcement of findings, (3) alleged misconduct by a panel member, party, or witness.

NOTE: <u>Procedures when the error was in the discussion of the maximum punishment</u>:

MJ: The purpose of this post-trial session is to correct an unintended omission in my discussion with the accused of (the maximum punishment in this case) (_____). I determined that this matter does not involve a substantive error which would preclude this hearing, and, in accordance with RCM 1104, I 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) (_____).

MJ: (PVT) (___) _____, do you recall our discussion of the maximum punishment at the prior session of your court-martial?

ACC: (Responds.)

MJ: At a 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 (_____)?

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: <u>Procedures when the error was in the announcement of the findings</u>:

MJ: The purpose of this post-trial session is to correct an error in the announced findings. I determined that this matter does not involve a substantive error which would preclude such revision, and, in accordance with RCM 1104 of the Manual, I point out the following information:

1. The Accused pled guilty to The Specification of Charge III, in violation of Article 92, UCMJ, by exceptions and substitutions.

2. The Government charged the Accused with failing to obey the order by wrongfully "refusing to provide a urine sample and leaving the company area."

The Accused pled guilty by excepting out the quoted language and substituting the language "leaving the company without providing a urine sample."

3. The Accused was provident to The Specification of Charge III as pled, and the Court accepted her plea.

4. However, when the court announced findings, the Court found the Accused guilty of the charge and its specification without excepting out the excepted language and substituting in the substituted language as the accused pled, was provident of, and the court accepted. The only error was in the announcement of the findings.

5. Rather than announcing a finding of guilty to all charges and specifications, the Court should have announced a finding of guilty by exceptions and substitutions to The Specification of Charge III.

6. The Court finds that the appropriate remedy is to re-announce the Court's findings, reflecting the excepted and substituted language in The Specification of Charge III.

MJ: Any objection to the court doing so?

TC/DC: (Responds.)

MJ: Do the parties agree with the Court's interpretation of the issue?

TC/DC: (Responds.)

MJ: PVT _____, did you counsel discuss the reason for this proceeding with you?

ACC: (Responds.)

MJ: Did you understand everything I just said when I summarized the issue?

ACC: (Responds.)

MJ: Do you have any questions about what I just said, or about anything your counsel told you, or about the reason for this proceeding?

ACC: (Responds.)

MJ: Accused and Defense Counsel, please rise.

PVT _____, in accordance with your plea of guilty, this Court finds you:

Of the Specification of Charge I and Charge I: GUILTY.

Of the Specification of Charge II and Charge II: GUILTY.

Of the Specification of Charge III and Charge III: GUILTY, except the words: "refusing to provide a urine sample and leaving the company area;" substituting

therefor the words: "leaving the company without providing a urine sample." Of the excepted words: NOT GUILTY; Of the substituted words, GUILTY.

As re-written to include the excepted and substituted language The specification of Charge III reads as follows:

In that Private _____, U.S. Army, having knowledge of a lawful order issued by _____ to take a urinalysis, an order which it was her duty to obey, did, at or near _____, on or about _____, fail to obey the same by wrongfully leaving the company without providing a urine sample.

Of the Specifications of Charge IV and of Charge IV, GUILTY.

Please be seated.

MJ: PVT _____, do you have any questions about what just happened?

ACC: (Responds.)

MJ: Counsel, are there any other matters to take up before the court adjourns?

TC/DC: (Responds.)

MJ: This court is adjourned.

NOTE: <u>Procedures when there is an allegation of misconduct by a panel member, party, or witness</u>:

MJ: The issue to be resolved in this hearing is (alleged misconduct by a (panel member) (party)) (alleged post-trial statements by the victim that would tend to impeach the verdict)(_____).

(Conduct hearing in manner similar to a pre-trial motions hearing, calling witnesses if necessary. Exhibits, if any, should be marked as appellate exhibits).

MJ: Counsel, are there any other matters to take up before this post-trial Article 39(a) session is terminated?

TC/DC: (Responds.)

MJ: This post-trial Article 39(a) session is terminated.

APPENDIX H: DUBAY HEARING PROCEDURES

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." US 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 _____. (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: If any trial counsel needs to be sworn, the MJ will provide the following oath: "Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) counsel in the case now in hearing (so help you God)?"

TC: _____ has been detailed reporter for this court and (has been previously sworn) (will now be sworn).

MJ: _____, you have the right to be represented by _____, your detailed military defense counsel. (He) (She) is a lawyer, certified by The Judge Advocate General as qualified to act as your defense counsel (and (he) (she) is a member of the Army's Trial Defense Service). (His) (Her) services are provided at no expense to you.

You also have the right to be represented by a military counsel of your own selection, provided that the counsel you request is reasonably available. If you were represented by military counsel of your own selection, then your detailed defense counsel would normally be excused. However, you could request that your detailed counsel continue to represent you, but your request would not have to be granted. Do you understand that?

ACC: (Responds.)

MJ: In addition to your military defense counsel, you have the right to be represented by a civilian counsel at no expense to the government. Civilian counsel may represent you along with your military defense counsel or you could excuse your military counsel and be represented only by your civilian counsel. Do you understand that?

ACC: (Responds.)

MJ: Do you have any questions about your rights to counsel?

ACC: (Responds.)

MJ: By whom do you wish to be represented?

ACC: (Responds.)

MJ: And by (him) (her) (them) alone?

ACC: (Responds.)

NOTE: If the accused elects pro se representation, see paragraph 2- 7-2, PRO SE REPRESENTATION. The MJ must be aware of any possible conflict of interest by counsel, and if a conflict exists, the MJ must obtain a waiver from the accused or order new counsel appointed for the accused. See paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.

MJ: Defense Counsel, please announce your detailing and qualifications.

DC: (I) (All detailed members of the defense) have been detailed to this court-martial by _____. (I am) (All detailed members of the defense are) qualified and certified under Article 27(b) and sworn under Article 42(a), Uniform Code of Military Justice. (I have not) (No member of the defense has) acted in any manner that might tend to disqualify (me) (us) in this court-martial.

> ***NOTE: If any defense counsel needs to be sworn, the MJ will provide the following oath: "Do you swear or affirm that you will faithfully perform all the duties of defense counsel in the case now in hearing (so help you God)?"***

Civilian DC: I am an attorney and licensed to practice law in the state(s) of _____. I am a member in good standing of the (_____) bar(s). I have not acted in any manner which might tend to disqualify me in this court-martial.

> ***NOTE: In all cases with a civilian defense counsel, the MJ will provide the following oath: "Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?"***
>
> ***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: 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

CAAF
Court of Appeals for the Armed Forces

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

CR
court reporter

DC
Defense Counsel

DD
Dishonorable Discharge

GCM
General Court-Martial

IMC
Individual Military Defense Counsel

MCM
Manual for Courts-Martial

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