

Section I
Initial Session Through Arraignment

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

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

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

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

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

NOTE: Only minor changes may be made at trial to the convening orders. Any correction that affects the identity of the individual concerned must be made by an amending or correcting order.

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

NOTE: The MJ must pay attention to the date of service. In peacetime, if less 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, a suggested guide can be found at paragraph 2-7-1, WAIVER OF STATUTORY WAITING PERIOD.

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

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

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

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

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

“Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?”

2-1-1. RIGHTS TO COUNSEL

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

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

ACC: (Responds.)

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

Do you understand that?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: By whom do you wish to be represented?

ACC: (Responds.)

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

ACC: (Responds.)

NOTE: If the accused elects pro se representation, see applicable inquiry at paragraph 2- 7-2, PRO SE REPRESENTATION. The MJ must be aware of any possible conflict of interest by counsel, and if a conflict exists, the MJ must obtain a waiver from the accused or

order new counsel appointed for the accused. See applicable inquiry at paragraph 2-7-3, WAIVER OF CONFLICT-FREE COUNSEL.

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

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

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

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

(OATH FOR CIVILIAN COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?

MJ: I have been properly certified and sworn, and detailed (myself) (by _____) to this court-martial. I am not aware of any matter that might be a ground for challenge against me (_____). Does either side desire to question or challenge me?

TC/DC: (Respond.)

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

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

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

2-1-2. FORUM RIGHTS

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

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

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

ACC: (Responds.)

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

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

(IN NONCAPITAL CASE:) MJ: You also may request to be tried by military judge alone. If your request is approved there will be no court members and the military judge alone will decide whether you are guilty, and if found guilty, the military judge alone will determine your sentence. Do you understand the difference between trial before members and trial before military judge alone?

ACC: (Responds.)

MJ: Do you understand the choices that you have?

ACC: (Responds.)

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

ACC: (Responds.)

NOTE: If accused elects enlisted court members and the request is written, mark it as an appellate exhibit. Proceed to paragraph 2-1-3, ARRAIGNMENT. If accused elects officer members, proceed to paragraph 2-1-3, ARRAIGNMENT. If accused elects trial by judge alone, continue below:

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

DC: There is (not).

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

DC: (Responds.)

MJ: _____, Appellate Exhibit __ is a request for trial by military judge alone.

Is that your signature on this exhibit?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

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

MJ: The court is assembled.

2-1-3. ARRAIGNMENT

MJ: The accused will now be arraigned.

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

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

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

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

MJ: Accused and Defense Counsel, please rise. _____, how do you plead?

Before receiving your plea, I advise you that any motions to dismiss or to grant other appropriate relief should be made at this time. Your defense counsel will speak for you.

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

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

DC: The accused, _____, pleads as follows:

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

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

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

When the accused is arraigned but trial on the merits is postponed to a later date, give paragraph 2-7-26, Advice on Consequences of Voluntary Absence.

Section II
Guilty Plea Inquiry

2-2-1. GUILTY PLEA INTRODUCTION

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

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

ACC: (Responds.)

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

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

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

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

Do you have any questions about any of these rights?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.))

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

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

ACC: (Responds.)

MJ: Is there a stipulation of fact?

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

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

2-2-2. STIPULATION OF FACT INQUIRY

MJ: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure the accused has a copy. _____, I have before me Prosecution Exhibit ___ for Identification, a stipulation of fact. Did you sign this stipulation?

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

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

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

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

ACC: (Responds.)

MJ: Do both counsel also agree to these uses?

TC/DC: (Responds.)

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

Do you understand that?

ACC: (Responds.)

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

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

MJ: Have you finished reading it?

ACC: (Responds.)

MJ: _____, is everything in the stipulation true?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

DC: (Responds.)

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

2-2-3. GUILTY PLEA FACTUAL BASIS

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

ACC: (Responds.)

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

MJ: Please look at (The) Specification (___) of (The) (Additional) Charge (___), in violation of Article ___ of the Uniform Code of Military Justice. The elements of that offense, _____, are:

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

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

MJ: At this time, I want you to tell me why you are guilty of the offense listed in (The) Specification (___) of (The) (Additional) Charge (___). Tell me what happened.

ACC: (Responds.)

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

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

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

MJ: Does either counsel believe any further inquiry is required?

TC/DC: (Respond.)

2-2-4. MAXIMUM PUNISHMENT INQUIRY

NOTE: For sex-related offenses occurring on or after 24 June 2014, include the parenthetical language in the following inquiries with the trial counsel and accused. Qualifying sex-related offenses include Article 120(a) or (b); Article 120b(a) or (b); Forcible Sodomy, Article 125; or an attempt to commit any of the foregoing offenses under Article 80, UCMJ.

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

TC: (Responds.)

MJ: Defense Counsel, do you agree?

DC: (Responds.)

MJ: _____, the maximum punishment authorized in this case based solely on your guilty plea is _____. (The mandatory minimum punishment is (a dishonorable discharge) (a dismissal) (and) (confinement for life with eligibility for parole)). (A fine may also be adjudged.)

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

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

ACC: (Responds.)

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

ACC: (Responds.)

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

TC: (Responds.)

NOTE: If no pretrial agreement exists, continue below. If a pretrial agreement exists and trial is by Judge Alone: Go to paragraph 2-2-6, PRETRIAL AGREEMENT (JUDGE ALONE). If a pretrial agreement exists and trial is with court members: Go to paragraph 2-2-7, PRETRIAL AGREEMENT (MEMBERS).

2-2-5. IF NO PRETRIAL AGREEMENT EXISTS

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

TC/DC: (Respond.)

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

ACC: (Responds.)

NOTE: Go to paragraph 2-2-8, ACCEPTANCE OF GUILTY PLEA.

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

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

TC: (Complies.)

MJ: _____, I have before me what has been marked as Appellate Exhibit __, which is the offer portion of your pretrial agreement, and your defense counsel is showing to you Appellate Exhibit __, the quantum portion of your pretrial agreement. Did you sign this pretrial agreement?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

MJ: _____, did anyone force you in any way to enter into this agreement?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Responds.)

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

ACC: (Responds.)

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

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

Dismissal of charge: paragraph 2-7-4

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

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

Suspension without deferment: paragraph 2-7-7

Waiver of Article 32 investigation: paragraph 2-7-8

Waiver of members: paragraph 2-7-9

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

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

ACC: (Responds.)

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

TC/DC: (Responds.)

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

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

ACC: (Responds.)

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

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

ACC: (Responds))

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Respond.)

NOTE: Go to paragraph 2-2-8, ACCEPTANCE OF GUILTY PLEA.

2-2-8. ACCEPTANCE OF GUILTY PLEA

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

DC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

MJ: And are you satisfied with your defense counsel?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

NOTE: If the accused has pleaded guilty to an offense listed in DoD Instruction 1325.7, Appendix 4 of Enclosure 2: Listing of Offenses Requiring Sex Offender Processing, the MJ must ask the following question:

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

DC: (Responds.)

MJ: Are you a citizen of the United States?

ACC: (Responds.)

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

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

ACC: (Responds.)

MJ: Have you discussed this with your defense counsel?

ACC: (Responds.)

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

ACC: (Responds.)

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

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

DC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

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

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

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

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

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

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

Section III
Judge Alone (Contested Findings)

MJ: Does the government have an opening statement?

TC: (Responds.)

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

DC: (Responds.)

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

2-3-1. TRIAL PROCEEDS WITH GOVERNMENT CASE

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

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

TC: The government rests.

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

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

MJ: Defense Counsel, you may proceed.

DC: (Responds.)

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

DC: The defense rests.

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

MJ: Trial Counsel, any rebuttal?

TC: (Responds / presents case.)

MJ: Defense Counsel, any surrebuttal?

DC: (Responds / presents case.)

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

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

ACC: (Responds.)

MJ: Trial Counsel, you may present argument.

TC: (Argument.)

MJ: Defense, you may present argument.

DC: (Argument.)

MJ: Trial Counsel, rebuttal argument?

TC: (Responds.)

MJ: The court is closed.

2–3–4. ANNOUNCEMENT OF FINDINGS

MJ: _____, this court finds you: _____.

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

Section IV
Judge Alone (Sentencing)

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

ACC: (Responds.)

MJ: Is the personal data on the front page of the charge sheet correct?

TC/DC: (Respond.)

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

DC: (Responds.)

MJ: _____, is that correct?

ACC: (Responds.)

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

TC/DC: (Respond.)

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

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

TC: The government rests.

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

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.)

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

MJ: Trial Counsel, you may present argument.

TC: (Argument.)

MJ: Defense Counsel, you may present argument.

DC: (Argument.)

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

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

MJ: Before I close to deliberate on an appropriate sentence, I would like to discuss the accused's post-trial and appellate rights. Defense Counsel, have you advised the accused orally and in writing of (his) (her) post-trial and appellate rights?

DC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

MJ: Did your defense counsel explain to you that the convening authority is going to review the findings and sentence in your case and has the discretion to take action that may be favorable to you?

ACC: (Responds.)

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

ACC: (Responds.)

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

you desire for the convening authority to consider before taking action on your case?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

NOTE: If more than one DC, the MJ should determine which counsel will be responsible for post-trial actions and upon whom the staff judge advocate's post-trial recommendation is to be served.

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

DC: (Responds.)

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

NOTE: If a pretrial agreement exists, continue below. The MJ must ensure that all parties have the same understanding concerning the operation of the quantum portion on the sentence of the court; otherwise, the plea may be improvident. For offenses committed on or after 24 June 2014, the MJ must ensure the convening authority has not exceeded the limits on his/her authority to alter the findings or sentence. For such offenses, the convening authority can neither dismiss an offense nor reduce an offense to a LIO if: 1) the offense carries an authorized maximum sentence of greater than two years confinement, or; 2) the adjudged sentence includes either a punitive discharge or confinement for more than six months, or; 3) the offense is Rape or Sexual Assault under Article 120(a) or (b); Rape, Sexual Assault or Sexual Abuse of a Child under Article 120b; or Forcible Sodomy or Bestiality under Article 125, UCMJ. Additionally, if the offense carries a mandatory minimum sentence, the convening authority may not disapprove, commute or suspend the sentence unless the trial counsel has recommended such action in recognition of substantial assistance by the accused in the investigation or prosecution of another person. However, if the mandatory minimum sentence for an offense is a dishonorable discharge, the convening authority may reduce it to a bad conduct discharge pursuant to terms of the PTA. If no pretrial agreement exists, see next NOTE below.

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

ACC: (Responds.)

MJ: Counsel, do you agree?

TC/DC: (Respond.)

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

TC/DC: (Responds.)

MJ: _____, is that also your understanding?

ACC: (Responds.)

NOTE: 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.

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2-7-1. WAIVER OF STATUTORY WAITING PERIOD

MJ: _____, you have a right to a delay of (three) (five) days between the day charges are served on you and the day of trial, not counting the day of service and the day of trial. Unless you consent, you may not be tried on these charges until _____. Do you understand this right?

ACC: (Responds.)

MJ: Have you discussed this with your defense counsel?

ACC: (Responds.)

MJ: Do you consent to the trial proceeding today?

ACC: (Responds.)

MJ: Has anyone forced you to consent to proceeding today?

ACC: (Responds.)

MJ: Trial Counsel, you may proceed.

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2-7-2. PRO SE REPRESENTATION

MJ: _____, you have indicated that you wish to represent yourself at this trial. If I permit you to represent yourself, then you will be expected to conduct your defense just as if you were a qualified lawyer. Do you understand that?

ACC: (Responds.)

MJ: Have you ever studied law or had any legal training?

ACC: (Responds.)

MJ: What education do you have? (Do you understand English?)

ACC: (Responds.)

MJ: Do you suffer from any physical or mental ailments?

ACC: (Responds.)

MJ: Are you presently taking any medication?

ACC: (Responds.)

MJ: Have you ever represented yourself or someone else in a criminal trial?

ACC: (Responds.)

MJ: Do you know with what offenses you are charged?

ACC: (Responds.)

MJ: Are you familiar with the MRE?

ACC: (Responds.)

MJ: Do you realize that the MRE govern what evidence may be introduced and those rules must be followed even though you are representing yourself?

ACC: (Responds.)

MJ: Let me give you an example of what could occur at trial. If the trial counsel offers some evidence that normally would not be admissible, a trained lawyer would object to the evidence and the evidence would be kept out of the trial. If you are acting as your own lawyer and you do not recognize that the evidence is

inadmissible and fail to object, then the evidence will come in. Do you understand that?

ACC: (Responds.)

MJ: Are you familiar with the Rules for Courts-Martial?

ACC: (Responds.)

MJ: Do you realize the Rules for Courts-Martial govern how this case will be tried?

ACC: (Responds.)

MJ: Do you understand that you would be better off with a trained lawyer who would know the procedures, the rules of evidence, the Rules for Courts-Martial, and the rules of law?

ACC: (Responds.)

MJ: Also, when you represent yourself, you are personally involved in the case and it is very difficult for you to have an objective view of the proceedings. In fact, sometimes, you may become so involved that you harm yourself by what you say and do in court. Whereas, a lawyer whose duty is to represent you can act more objectively, can follow correct procedures, and is less likely to do you harm and is more likely to do you good. Do you understand this?

ACC: (Responds.)

MJ: As a general rule, acting as your own lawyer is not a good policy. Even if you are legally trained, it is not a good idea. If you are not legally trained, it is even worse. Do you understand that?

ACC: (Responds.)

MJ: Do you realize that representing yourself is not a matter of merely telling your story? And if you testify, you cannot just give a statement. You must ask yourself questions and then give answers, according to the MRE and the Rules for Courts-Martial?

ACC: (Responds.)

MJ: Have you discussed the idea of representing yourself with your detailed defense counsel?

ACC: (Responds.)

MJ: Do you realize that the maximum punishment in this case if you are convicted of all charges and specifications is _____?

ACC: (Responds.)

MJ: Have you tried to talk to any other lawyer about your case?

ACC: (Responds.)

MJ: Would you like to talk to another lawyer about this?

ACC: (Responds.)

MJ: Have you understood everything I have said to you?

ACC: (Responds.)

MJ: Let me advise you further that I think it is unwise for you to represent yourself. I strongly urge that you not represent yourself. Knowing all that I have told you, do you still want to act as your own lawyer?

ACC: (Responds.)

NOTE: If accused persists, continue.

MJ: Is this decision made as a result of any threats or force against you? Is it a decision you make of your own free will?

ACC: (Responds.)

MJ: Even though you desire to represent yourself, I recommend that you have counsel sit with you at the counsel table and be available to assist you. Do you want counsel to remain at counsel table?

ACC: (Responds.)

NOTE: RCM 506(d) requires that the MJ be satisfied that the accused is mentally competent to make the decision and understand the disadvantages of self-representation. The MJ should make factual findings regarding the accused's ability to appreciate the nature of a

criminal trial; its possible consequences; and the ability of the accused to communicate, to express himself or herself, and whether the decision is a voluntary one. Once the MJ is satisfied that the accused may proceed pro se, the MJ should inform the accused that:

MJ: I am going to have your detailed counsel stay (either at counsel table, if the accused elected, or in the spectator section) throughout your trial and be available. Counsel may provide you with advice and procedural instructions. Counsel will not do anything without your agreement; however, (she) (he) is available to act as your lawyer or assist you at any time. If at any time during the trial, you feel that you could benefit from advice and you want to take a break to talk to counsel about something, let me know, and I will permit it. Do you understand this?

ACC: (Responds.)

REFERENCES: [United States v. Mix, 35 MJ 283 \(CMA 1992\).](#)

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2-7-3. WAIVER OF CONFLICT-FREE COUNSEL (DC REPRESENTING MULTIPLE ACCUSED)

MJ: _____, do you understand that you have a constitutional right to be represented by counsel who has undivided loyalty to you and your case?

ACC: (Responds.)

MJ: Do you understand that a lawyer ordinarily should not represent more than one client when the representation involves a matter arising out of the same incident?

ACC: (Responds.)

MJ: For a lawyer to represent more than one client concerning a matter arising out of the same incident, you have to consent to that representation. Do you understand that?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: After discussing this matter with (her) (him), did you decide for yourself that you would like to have (her) (him) still represent you?

ACC: (Responds.)

MJ: Do you understand that when a defense counsel represents two or more clients regarding a matter arising out of the same incident, then the lawyer may have divided loyalties, that is, for example, the defense counsel may be put in a position of arguing that one client is more at fault than another client?

ACC: (Responds.)

MJ: Understanding that even if an actual conflict of interest does not presently exist between your defense counsel representing you and (her) (his) other client(s), but that one could possibly develop, do you still desire to be represented by _____ ?

ACC: (Responds.)

MJ: Do you understand that you are entitled to be represented by another lawyer where no potential conflict of interest would ever arise?

ACC: (Responds.)

MJ: Knowing this, please tell me why you want to give up your right to conflict-free counsel and be represented by _____?

ACC: (Responds.)

MJ: Do you have any questions about your right to conflict-free counsel?

ACC: (Responds.)

MJ: I find that the accused has knowingly and voluntarily waived (his/her) right to conflict-free counsel and may be represented by _____ at this court-martial.

REFERENCES: [United States v. Smith, 36 MJ 455 \(CMA 1993\)](#); [United States v. Hurtt, 22 MJ 134 \(CMA 1986\)](#); [United States v. Breese, 11 MJ 17 \(CMA 1981\)](#).

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2-7-4. PRETRIAL AGREEMENT: DISMISSAL OF CHARGE CLAUSE

MJ: Your pretrial agreement indicates that the convening authority has directed the trial counsel to move to dismiss (charge(s) ___ and (its) (their) specification(s) after I accept your plea of guilty. In other words, if I accept your plea of guilty, the government will not prosecute the remaining charge(s) provided your plea of guilty remains in effect until the imposition of sentence, at which time I would grant the motion. Do you understand that?

ACC: (Responds.)

MJ: However, if for some reason your plea of guilty at any time becomes unacceptable, the trial counsel would be free to proceed on (all) (The) (Additional) Charge(s) and (its) (their) specification(s). Do you understand that?

ACC: (Responds.)

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2-7-5. PRETRIAL AGREEMENT: TESTIFY IN ANOTHER CASE

MJ: In your pretrial agreement, you have offered to testify truthfully as to the facts and circumstances of this case, as you know them, in the trial of United States v. _____. If you are called as a witness in that case and either refuse to testify or testify untruthfully, the convening authority will no longer be bound by the sentence limitations contained in Appellate Exhibit _____. Do you understand that?

ACC: (Responds.)

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2-7-6. PRETRIAL AGREEMENT: OPERATION OF ARTICLE 58a ON A SUSPENDED SENTENCE

MJ: Did you realize at the time you made the agreement, and do you understand now that, under the provisions of Article 58a, UCMJ, if a (dishonorable discharge) (bad-conduct discharge) (confinement for 6 months or 180 days) is adjudged and approved, but suspended by the convening authority as provided in your agreement, you will automatically be reduced to the lowest enlisted pay grade, E-1?

ACC: (Responds.)

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2-7-7. PRETRIAL AGREEMENT: SUSPENSION WITHOUT DEFERMENT

MJ: Your pretrial agreement provides that the convening authority will suspend for ____ (years) (months) any sentence to confinement which is adjudged. However, the agreement makes no reference to deferment. Did you realize at the time you made the agreement, and do you understand now that the effect of this provision is that you will begin serving any sentence to confinement when adjudged and the convening authority will suspend the (unexecuted) (unserved) portion of any confinement when (she) (he) takes action in your case and you will then be released from confinement?

ACC: (Responds.)

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2-7-8. PRETRIAL AGREEMENT: ARTICLE 32 WAIVER

Note: Article 32, UCMJ, was amended by the FY 2014 NDAA, section 1702, changing, *inter alia*, the investigation to a preliminary hearing, altering the purposes of the hearing, and limiting the evidence and witnesses the accused can present. The FY 2015 NDAA, section 531(g)(1), made those changes effective 26 December 2014, and applicable to any Article 32 preliminary hearings conducted on or after that date. Additionally, the FY 2014 NDAA, section 1705, restricted subject matter jurisdiction over alleged violations of Article 120(a) and (b), Article 120b(a) and (b), and Article 125 (Forcible Sodomy), and attempts to commit any of these offenses to general courts-martial and made that change applicable to any such offenses that occurred on or after 24 June 2014. The language below applies to Article 32 preliminary hearings waived on or after 26 December 2014 for alleged violations of Article 120(a) and (b), Article 120b(a) and (b), and Article 125 (Forcible Sodomy), and attempts to commit any of these offenses occurring before 24 June 2014. The inquiry for an Article 32 (Pretrial Investigation) waiver for cases not affected by the FY 2014 NDAA amendment to Article 32 follows this new inquiry and will eventually be eliminated.

Use this version for Article 32 preliminary hearings waived on or after 26 December 2014.

MJ: _____, your pretrial 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 the purpose of the Article 32 preliminary hearing is 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, to consider the form of charges, and to recommend the disposition that should be made of the case?

ACC: (Responds.)

MJ: Do you also understand that you have the right to be present at the Article 32 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.)

MJ: (Do you also understand that one possible strategy for you and your counsel at the Article 32 preliminary hearing could have been an attempt to have the Article 32 officer recommend a disposition of the charge(s) other than trial by general court-martial?) (If an Article 32 preliminary hearing officer found probable cause to believe you committed the offense(s) listed in [name the Specification(s) and Charge(s) alleging violations of Article 120(a) or (b), Article 120b(a) or (b) or Article 125], only a general court-martial would have jurisdiction to try (that) (those) offense(s). However, if a preliminary hearing officer did not find probable cause with regard to the offense(s) I just named, 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 a disposition of the charges other than trial by general court-martial. Do you understand that?)

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.)

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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.)

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Note: Use the following inquiry only for Article 32 Investigations waived before 26 December 2014.

MJ: _____, your pretrial agreement states that you agreed to waive the Article 32 investigation. Have you discussed what an Article 32 investigation is with your defense counsel?

ACC: (Responds.)

MJ: Do you understand that no charge against you may be tried at a general court-martial without first having an Article 32 investigation concerning that charge unless you agree otherwise?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

MJ: Do you understand that you could call witnesses, cross-examine government witnesses, and present documents for the investigating officer to consider in arriving at his or her recommendations?

ACC: (Responds.)

MJ: Do you understand that you could have provided sworn or unsworn testimony at the Article 32 investigation?

ACC: (Responds.)

MJ: (Do you also understand that one possible strategy for you and your counsel at the Article 32 investigation could have been an attempt to have the Article 32 officer recommend a disposition of the charge(s) other than trial by general court-

martial?) (If an Article 32 investigating officer found probable cause to believe you committed the offense(s) listed in [name the Specification(s) and Charge(s) alleging violations of Article 120(a) or (b), Article 120b(a) or (b) or Article 125], only a general court-martial would have jurisdiction to try (that) (those) offense(s). However, if an Article 32 investigating officer did not find probable cause with regard to the offense(s) I just named, one possible strategy for you and your counsel at the Article 32 investigation could have been an attempt to have the Article 32 officer recommend a disposition of the charges other than trial by general court-martial. Do you understand that?)

ACC: (Responds.)

MJ: Did you know about all these rights that you would have at the Article 32 investigation at the time you elected to give up the right to have the Article 32 investigation?

ACC: (Responds.)

MJ: Do you freely and willingly agree to proceed to trial by general court-martial without an Article 32 investigation occurring in your case?

ACC: (Responds.)

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MJ: Defense Counsel, if the accused's plea of guilty is determined to be improvident will the accused be afforded an Article 32 investigation or is it permanently waived?

DC: (Responds.)

MJ: Trial Counsel, do you agree?

TC: (Responds.)

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

MJ: Your pretrial agreement states that you agree to waive, that is give up, trial by members and to select trial by military judge alone.

ACC: (Responds.)

MJ: Do you understand the difference between trial before members and trial before military judge alone, as I explained to you earlier?

ACC: (Responds.)

MJ: Did you understand the difference between the various types of trials when you signed your pretrial agreement?

ACC: (Responds.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

NOTE 1: Waiver of motions in a pretrial agreement. RCM 705 prohibits any term in a pretrial agreement that is not voluntary or deprives the accused of the right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights. Thus, a term to “waive all motions” is overbroad and cannot be enforced. However, if the pretrial agreement includes a term to waive a particular motion not precluded by RCM 705 or a term to “waive all waiveable motions” or words to that effect, proceed along the lines of the instruction below. See paragraph 2-7-11, WAIVER OF MOTION FOR ILLEGAL PRETRIAL PUNISHMENT (ARTICLE 13) SENTENCING CREDIT.

MJ: Defense Counsel, what motions are you not making pursuant to this provision of the pretrial agreement?

DC: (Responds.)

MJ: (To accused) Your pretrial agreement states that you waive, or give up, the right to make a motion regarding (state the specific motion(s) waived by the pretrial agreement). I advise you that certain motions are waived, or given up, if your defense counsel does not make the motion prior to entering your plea. Some motions, however, such as motions to dismiss for a lack of jurisdiction or failure to state an offense, for example, can never be given up. Do you understand that this term of your pretrial agreement means that you give up the right to make (this) (any) motion which by law is given up when you plead guilty?

ACC: (Responds.)

MJ: In particular, do you understand that this term of your pretrial agreement precludes this court or any appellate court from having the opportunity to determine if you are entitled to any relief based upon (this) (these) motion(s)?

ACC: (Responds.)

MJ: When you elected to give up the right to litigate (this) (these) motion(s), did your defense counsel explain this term of your pretrial agreement and the consequences to you?

ACC: (Responds.)

MJ: Did anyone force you to enter into this term of your pretrial agreement?

ACC: (Responds.)

MJ: Defense Counsel, which side originated the waiver of motion(s) provision?

DC: (Responds.)

NOTE 2: Unlawful Command Influence. The government may not require waiver of an unlawful command influence motion to obtain a pretrial agreement. The accused, however, may offer to waive an unlawful command influence motion if the unlawful command influence involves issues occurring only during the accusatory phase of the court-martial (i.e., during preferral, forwarding, and referral of charges), as opposed to the adjudicative process (i.e., which includes interference with witnesses, judges, members, and counsel). See United States v. Weasler, 43 MJ 15 (CAAF 1995). If a waiver of an unlawful command influence motion originated with the prosecution, the judge should declare the term void as a matter of public policy. For other motions not falling within the prohibited terms of RCM 705, regardless of their origination, and for unlawful command influence motions originated by the defense which involve issues only during the accusatory phase, continue as set forth below:

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

ACC: (Responds.)

MJ: Defense Counsel, what do you believe to be the factual basis of any motions covered by this term of the pretrial agreement?

DC: (Responds.)

MJ: (To the accused) Do you understand that if (this) (these) motion(s) were made and granted by me, then a possible ruling could have been that (all charges against you would be dismissed) (the statement you gave to (your command) (law

enforcement authorities) (_____) could not be used as evidence against you at this court-martial) (_____)?

ACC: (Responds.)

MJ: (To the accused) Knowing what your defense counsel and I have told you, do you want to give up making (this) (these) motion(s) in order to get the benefit of your pretrial agreement?

ACC: (Responds.)

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

ACC: (Responds.)

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

MJ: Your pretrial agreement indicates that you agree to waive, or give up, your right to make a motion about whether you have suffered from illegal pretrial punishment. Article 13 of the Uniform Code of Military Justice essentially prohibits anyone from imposing pretrial punishment upon you except for the minimum amount of restraint necessary to ensure your presence for trial. In addition, your chain of command may not publicly humiliate or degrade you as a form of punishment. Do you understand what I have said?

ACC: (Responds.)

MJ: What was the nature of the pretrial restraint, if any, that you have undergone pending this trial?

ACC: (Responds.)

MJ: (If accused had been in pretrial restraint:) What is it about this pretrial restraint that you believe may have been illegal?

ACC: (Responds.)

MJ: Tell me about other illegal pretrial punishment, if any, you may have suffered.

ACC: (Responds.)

MJ: (If accused has been in pretrial confinement:) Do you understand that the law requires that I award you day for day credit against the sentence for any lawfully imposed pretrial confinement imposed in this case?

ACC: (Responds.)

MJ: Do you also understand that if you convinced me that more likely than not you suffered from illegal pretrial punishment, then you would be entitled to (additional) credit against any sentence which you may receive in this case?

ACC: (Responds.)

MJ: Do you understand that, by this term of your pretrial agreement, you are giving up the right for this court, or any court considering an appeal of your case, to determine if you actually suffered from illegal pretrial punishment to include a claim for (additional) credit against your sentence for illegal pretrial punishment?

ACC: (Responds.)

MJ: Defense Counsel, have you considered the amount of credit you would have asked for if this issue were to be litigated?

DC: (Responds.)

MJ: (To the accused) Do you understand that the amount of credit for illegal pretrial punishment, if any, would be subject to my discretion depending on the seriousness of the illegal pretrial punishment? (If you succeeded on this issue, do you understand that you may have received the credit sought by your defense counsel, or possibly more or less than that amount?)

ACC: (Responds.)

MJ: Do you understand that by not litigating this issue, you will never know what credit for illegal pretrial punishment, if any, that you would be entitled to, and that you will receive no credit against your sentence for illegal pretrial punishment?

ACC: (Responds.)

MJ: When you elected to give up the right to litigate the illegal pretrial punishment issue, did your defense counsel explain this issue and the consequences to you?

ACC: (Responds.)

MJ: Did anyone force you to enter into this term of your pretrial agreement?

ACC: (Responds.)

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

DC: (Responds.)

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

ACC: (Responds.)

MJ: Knowing what I have now told you, do you still desire to give up the right to litigate the issue of illegal pretrial punishment as long as your pretrial agreement continues to exist?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: As I have stated, if I accept your waiver of the Article 13 issue, I will not order any credit to be applied against your sentence for illegal pretrial punishment. You may, however, bring to the court's attention (the conditions of your pretrial restraint) (and) (your perceived pretrial punishment) in the sentencing phase of the trial so that the court can consider such matters in deciding upon an appropriate sentence for you. Do you understand that?

ACC: (Responds.)

REFERENCES: [United States v. McFadyen, 51 MJ 289 \(CAAF 1999\).](#)

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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.

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2-7-21. CREDIT FOR ARTICLE 15 PUNISHMENT

NOTE 1: Using this instruction. When an accused has previously received nonjudicial punishment for the same offense of which the accused stands convicted at the court-martial, the defense has the option to introduce evidence of the prior nonjudicial punishment for the sentencing authority to consider. If the defense introduces the Article 15 in mitigation in a trial with members, the judge must instruct as to the specific credit (see NOTE 2) that will be given for the prior nonjudicial punishment unless the defense requests that the judge merely instruct that the members consider the prior punishment (see NOTE 3) when adjudging the sentence. The judge should obtain the defense's election regarding the desired instruction at the Article 39(a) session on sentencing instructions. The defense also has the right to have the judge determine the proper credit to be given by the convening authority without making the members aware of the prior Article 15 or the specific credit to be given (see NOTE 4). In a judge alone trial, the judge must state on the record the specific credit to be awarded for the prior punishment. See United States v. Gammons, 51 MJ 169 (CAAF 1999).

NOTE 2: Instruction on specific credit. When the judge instructs on specific credit to be given for a prior Article 15 punishment, the judge must ensure the accused receives "day-for-day, dollar-for-dollar, stripe-for-stripe" credit for any prior nonjudicial punishment suffered for the same offense(s) on which the accused was convicted at the court-martial. United States v. Pierce, 27 MJ 367 (CMA 1989). The judge should address this issue when discussing proposed sentencing instructions with counsel to arrive at a fair and reasonable credit on which to instruct. Because the types of punishment administered nonjudicially and judicially are not always identical, and because no current guidelines exist for equivalent punishments except those contained in RCM 1003(b) (6) and (7), which provide an equivalency for restriction and hard labor without confinement{ XE "Hard labor, with or without confinement, effect of" } to that of confinement, the judge is responsible to ensure that the accused receives proper credit for the prior punishment. (Judges may want to look to the 1969 MCM's Table of Equivalent Punishments as a guide. That Table indicated that one day of confinement equals one and one-half days of hard labor without confinement, or two days' restriction, or one day's forfeiture of pay.) Once the judge determines the appropriate credit (see, e.g., United States v. Edwards, 42 MJ 381 (CAAF 1995)), the judge should give an instruction substantially as follows:

When you decide upon a sentence in this case, you must consider that punishment has already been imposed upon the accused under Article 15, UCMJ, for the offense(s) of _____ of which (he) (she) has also been convicted at this court-martial. The accused will receive specific credit for the prior nonjudicial punishment which was imposed and approved. After trial and when the case is presented to the convening authority for action, the convening authority must credit the accused with the prior punishment from the Article 15 proceeding against any sentence you may adjudge. The convening authority, therefore, must [state the specific credit to be given by stating words to the effect of: (disapprove any adjudged reprimand) (and) (reduce any adjudged forfeiture of pay by \$ _____ pay per month for _____ month(s)) (and) (credit the accused with already being reduced in grade to E- _____) (and) (reduce any adjudged restriction by _____ days, or reduce any adjudged hard labor without confinement by _____ days, or reduce any adjudged confinement by _____ days)].

NOTE 3: General consideration of prior Article 15. When the defense desires that the judge only instruct that consideration, without stating any specific credit, be given to the prior Article 15 punishment, then the judge should instruct as follows (with the caveat that, if the defense counsel requests it, the judge must determine and announce the specific credit to be awarded outside the presence of the court members; see NOTE 4.):

When you decide upon a sentence in this case, you must consider that punishment has already been imposed upon the accused under Article 15, UCMJ, for the offense(s) of _____ of which (he) (she) has also been convicted at this court-martial. This prior punishment is a matter in mitigation which you must consider.

NOTE 4. When evidence of the Article 15 or the amount of specific credit for the Article 15 is not presented to the court members. The defense not only has the election not to make the court members aware of the specific credit to be given for the prior Article 15 for the same offense of which the accused stands convicted (see NOTE 3), but also can elect not to bring any evidence of the prior Article 15 to the attention of the members. In either situation, however, the defense has a right, at an Article 39(a) session, to have the judge determine the credit which the convening authority must give to the accused. In this situation, it is suggested that the judge defer

determining the actual credit for the convening authority to give until after the sentence has been announced. This procedure will ensure that the judge awards the proper equivalent credit. The judge may adapt the instruction following NOTE 2 to announce what credit the convening authority must apply. The defense also has the option to not raise the credit issue at trial, and can raise it for the first time before the convening authority after trial.

REFERENCES: [United States v. Gammons, 51 MJ 169 \(CAAF 1999\)](#); [United States v. Pierce, 27 MJ 367 \(CMA 1989\)](#).

**Table 2–6
Table of Equivalent Punishments**

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

**Table 2–7
Table of Equivalent Nonjudicial Punishments**

Kind of Punishment	Upon commissioned and warrant officers (to be used only by an officer with GCM jurisdiction, or by a flag officer in command or his delegate)	Upon other personnel
Arrest in Quarters	1 day	-----
Restriction	2 days	2 days
Extra Duties	-----	1 1/2 days*
Correctional Custody	-----	1 day
Forfeiture of pay	1 day's pay	1 day's pay

*The factor designated by asterisk in the table above is 2 instead of 1 1/2 when the punishment is imposed by a commanding officer below the grade of major or lieutenant commander. The punishment of forfeiture of pay may not be substituted for the other punishments listed in the table, nor may those other punishments be substituted for forfeiture of pay.

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2-7-24. STIPULATIONS OF FACT AND EXPECTED TESTIMONY (NOT IAW A PRETRIAL AGREEMENT)

NOTE: Whenever the prosecution or defense offers a stipulation into evidence, the MJ should conduct an inquiry with the accused outside the presence of the court members along the following lines:

MJ: _____, before signing the stipulation, did you read it thoroughly?

ACC: (Responds.)

MJ: Do you understand the contents of the stipulation?

ACC: (Responds.)

MJ: Do you agree with the contents of the stipulation?

ACC: (Responds.)

MJ: Before signing the stipulation, did your defense counsel explain the stipulation to you?

ACC: (Responds.)

MJ: Do you understand that you have an absolute right to refuse to stipulate to the contents of this document?

ACC: (Responds.)

MJ: You should enter into this stipulation only if you believe it is in your best interest to do so. Do you understand that?

ACC: (Responds.)

MJ: _____, I want to ensure that you understand how this stipulation is to be used.

(IF STIPULATION OF FACT:) MJ: When counsel for both sides and you agree (to a fact) (the contents of a writing), the parties are bound by the stipulation and the stipulated matters are facts in evidence to be considered along with all the other evidence in the case. Do you understand that?

ACC: (Responds.)

(IF STIPULATION OF EXPECTED TESTIMONY:) MJ: When counsel for both sides and you agree to a stipulation of expected testimony, you are agreeing that if _____ were present in court and testifying under oath, (she) (he) would testify substantially as set forth in this stipulation. The stipulation does not admit the truth of the person's testimony. The stipulation can be contradicted, attacked, or explained in the same way as if the person was testifying in person. Do you understand that?

ACC: (Responds.)

MJ: _____, knowing now what I have told you and what your defense counsel earlier told you about this stipulation, do you still desire to enter into the stipulation?

ACC: (Responds.)

MJ: Do counsel concur in the contents of the stipulation?

TC/DC: (Respond.)

MJ: The stipulation is admitted into evidence as _____.

NOTE: Stipulations of expected testimony are admitted into evidence, but only read to the court members. They are not to be given to them for use in deliberations.

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2-7-25. CONFESSIONAL STIPULATION OF FACT INQUIRY

NOTE: The following inquiry is required by United States v. Bertelson, 3 MJ 314 (CMA 1977), whenever a stipulation “practically amounts to a confession” as set forth in the discussion following RCM 811(c).

MJ: Please have the stipulation marked as a Prosecution Exhibit, present it to me, and make sure the accused has a copy.

TC: (Complies.)

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

ACC: (Responds.)

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

ACC: (Responds.)

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

TC/DC: (Respond.)

MJ: _____, a stipulation of fact is an agreement among the trial counsel, the defense counsel, and you that the contents of the stipulation are true, and if entered into evidence are the uncontradicted facts in this case. No one can be forced to enter into a stipulation, and no stipulation can be accepted without your consent, so you should enter into it only if you truly want to do so. Do you understand this?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: _____, the government has the burden of proving beyond a reasonable doubt every element of the offense(s) with which you are charged. By stipulating

to the material elements of the offense(s), as you are doing here, you alleviate that burden. That means that based upon the stipulation alone, and without receiving any other evidence, the court can find you guilty of the offense(s) to which the stipulation relates. Do you understand that?

ACC: (Responds.)

(IF JUDGE ALONE TRIAL:) MJ: If I admit this stipulation into evidence it will be used in two ways.

First, I will use it to determine if you are, in fact, guilty of the offense(s) to which the stipulation relates. And second, I will use it in determining an appropriate sentence for you.

(IF MEMBERS TRIAL:) MJ: If I admit this stipulation into evidence it will be used in two ways.

First, members will use it to determine if you are, in fact, guilty of the offense(s) to which the stipulation relates. And second, the trial counsel may read it to the court members and they will have it with them when they decide upon your sentence.

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

ACC: (Responds.)

MJ: Do both counsel also agree to these uses?

TC/DC: (Respond.)

MJ: _____, a stipulation of fact ordinarily cannot be contradicted. You should, therefore, let me know now if there is anything whatsoever in the stipulation that you disagree with or feel is untrue. Do you understand that?

ACC: (Responds.)

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

NOTE: The MJ should read the stipulation and be alert to resolve inconsistencies between what is stated in the stipulation and what

the accused will say during the inquiry establishing the factual basis for the stipulation.

MJ: Have you finished reading it?

ACC: (Responds.)

MJ: _____, is everything in the stipulation the truth?

ACC: (Responds.)

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

ACC: (Responds.)

MJ: _____, have you consulted fully with your counsel about the stipulation?

ACC: (Responds.)

MJ: After having consulted with your counsel, do you consent to my accepting the stipulation?

ACC: (Responds.)

MJ: _____, at this time I want you to tell me what the factual basis is for this stipulation. Tell me what happened.

NOTE: At this point the military judge must personally question the accused to develop information showing what the accused did or did not do and what he/she intended, where intent is pertinent. The aim is to make clear the factual basis for the recitations in the stipulation. The military judge must be alert to the existence of any inconsistencies between the stipulation and the explanations of the accused. If any arise they must be discussed thoroughly with the accused, and the military judge must resolve them or reject the stipulation.

MJ: Does either counsel believe that any further inquiry is required into the factual basis for the stipulation?

TC/DC: (Respond.)

MJ: _____, has anybody made any promises or agreements with you in connection with this stipulation?

ACC: (Responds.)

MJ: Counsel, are there any written or unwritten agreements between the parties in connection with the stipulation?

NOTE: Should this inquiry reveal the existence of an agreement not to raise defenses or motions, the stipulation will be rejected as inconsistent with Article 45(a).

TC/DC: (Respond.)

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

DC: (Responds.)

MJ: Prosecution Exhibit ____ for Identification is admitted into evidence.

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2-7-26. ADVICE ON CONSEQUENCES OF VOLUNTARY ABSENCE

NOTE: The following inquiry is suggested when the accused is arraigned, but trial on the merits is postponed to a later date. See RCM 804(c)(1).

MJ: _____, what has just happened is called an arraignment. An arraignment has certain legal consequences, one of which I'd like to explain to you now. Under ordinary circumstances, you have the right to be present at every stage of your trial. However, if you are voluntarily absent on the date this trial is scheduled to proceed, you may forfeit the right to be present. The trial could go forward on the date scheduled even if you were not present, up to and including sentencing, if necessary. Do you understand this?

ACC: (Responds.)

MJ: It is important that you keep your defense counsel and your chain of command apprised of your whereabouts at all times between now and the trial date. Do you have any questions about what I've told you?

ACC: (Responds.)

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2-7-27. ARGUMENT OR REQUEST FOR A PUNITIVE DISCHARGE

NOTE 1: Argument or a request for a punitive discharge. It is improper for defense counsel to argue for a discharge or dismissal against the client's desires and if a dishonorable discharge is possible, the defense counsel may only argue for a bad-conduct discharge. *United States v. Dresen*, 40 MJ 462 (CMA 1994); *United States v. McMillan*, 42 CMR 601 (ACMR 1970). If the defense or the accused requests, argues for, or concedes the appropriateness of, a punitive discharge or dismissal, the military judge should conduct an inquiry with the accused outside of the presence of the court members. *United States v. McNally*, 16 MJ 32 (CMA 1983). But see *United States v. Lyons*, 36 MJ 425 (CMA 1993). The focus of the inquiry is to ensure that the accused consents to the argument and fully understands the ramifications of a punitive discharge or dismissal. Ordinarily, before argument or the accused's making a request for a discharge or dismissal, the defense counsel should inform the military judge outside the presence of the court members of the planned argument or request. This procedure will ensure that the inquiry is done before the members hear the argument or request. If the argument is made before the inquiry below is conducted, the inquiry should be made before the court closes to deliberate on the sentence. If the accused did not wish the argument to be made, the military judge should instruct the members to disregard that portion of the defense's argument. The following inquiry may be appropriate:

MJ: _____, do you understand that the only discharge(s) this court can adjudge (is) (are) a bad-conduct discharge (and a dishonorable discharge) (is a dismissal)?

ACC: (Responds.)

MJ: Do you understand that a (bad-conduct discharge) (dismissal) will forever adversely stigmatize the character of your military service and it will limit your future employment and schooling opportunities?

ACC: (Responds.)

MJ: Do you understand that a (bad-conduct discharge) (dismissal) may adversely affect your future with regard to legal rights, economic opportunities, and social acceptability?

ACC: (Responds.)

MJ: Do you understand that by (receiving a bad-conduct discharge) (being dismissed), you will lose substantially all benefits from the Department of Veterans Affairs and the Army establishment, as well as other benefits normally given by other governmental agencies?

ACC: (Responds.)

(IF RETIREMENT ELIGIBLE: MJ: Do you understand that a (bad-conduct discharge) (dismissal) terminates your military status and will deprive you of any retirement benefits, to include retired pay?

ACC: (Responds.)

MJ: Have you thoroughly discussed your desires with your defense counsel?

ACC: (Responds.)

MJ: Do you believe you fully understand the ramifications of a (bad-conduct discharge) (dismissal)?

ACC: (Responds.)

MJ: Are you aware that if you do not receive a punitive discharge from this court-martial, then your chain of command may very well try to administratively separate you from the service?

ACC: (Responds.)

MJ: Are you also aware that an administrative separation is considered much less severe than a discharge from a court-martial and will not stigmatize you with the devastating and long term effects of a discharge from a court-martial?

ACC: (Responds.)

MJ: _____, knowing all that I and your defense counsel have explained to you, is it your express desire to be (discharged from the service with a bad-conduct discharge) (dismissed from the service) (if, as you indicate, it will preclude (your going to confinement) (an extended period of confinement) (_____))?

ACC: (Responds.)

MJ: Do you consent to your defense counsel stating an argument that you desire to be (discharged with a bad-conduct discharge) (dismissed from the service) (if it will preclude (your going to confinement) (an extended period of confinement) (_____))?

ACC: (Responds.)

NOTE 2: Sentence Appropriateness. The sentencing authority should not adjudge a bad-conduct discharge or a dismissal merely based upon a request for one. The discharge or dismissal must be an appropriate punishment for the accused and the offenses of which the accused stands convicted before it can be adjudged. United States v. Strauss, 47 MJ 739 (NMCCA 1997).

NOTE 3: Requesting a Dismissal. Although no case specifically holds that counsel may argue for a dismissal, appellate courts have implicitly recognized such arguments as proper. See United States v. Worrell, 3 MJ 817 (AFCMR 1977) (arguing for a dismissal is not ineffective assistance of counsel); United States v. Nunes, 39 MJ 889 (AFCCA 1994) (argument held not to be a request for dismissal); United States v. Perry, 48 MJ 197 (CAAF 1998) (argument for dismissal implicitly approved; alleged error was failure to instruct on the impact of a dismissal).

NOTE 4: Title 10, United States Code, Section 1161(b) (2) authorizes the President to “drop from the rolls of any armed force any commissioned officer...who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court-martial.” Section 1167 provides that “a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member’s armed force at any time after the sentence to confinement has become final...and the member has served in confinement for a period of six months.”

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2-7-28. GUILTY PLEA - ADVICE TO ACCUSED WHEN RAISED: MENTAL RESPONSIBILITY, EVIDENCE NEGATING MENS REA, OR COMPETENCE

NOTE 1: If the accused has pled guilty and the issue of the accused's mental responsibility, lack of mens rea, or competence to stand trial is raised during trial, the military judge should conduct one or more of the following inquiries, as appropriate. See Article 50a, UCMJ; Ellis v. Jacob, 26 MJ 90 (CMA 1988); United States v. Berri, 33 MJ 337 (CMA 1991); Benchbook Instructions 6-1 through 6-5 (Sanity and Partial Mental Responsibility) and 5-17 (Evidence Negating Mens Rea). During a Care inquiry, to distinguish between the "mere possibility of a defense" (which does not require further inquiry by the military judge) and a "possible defense" (which does), see United States v. Hayes, 70 MJ 454 (CAAF 2012).

NOTE 2: Lack of mental responsibility or lack of mens rea due to partial mental responsibility raised. If the issue of the accused's lack of mental responsibility or lack of mens rea due to partial mental responsibility at the time of the offenses charged has been raised during the providence inquiry, conduct the following inquiry. If necessary, the military judge may sua sponte order an inquiry under RCM 706 to occur during or after the trial.

MJ: Defense counsel, (during my inquiry into the providence of the accused's guilty plea) (during your sentencing case) (____), the issue of the accused's (lack of mental responsibility) (partial mental responsibility) at the time of the offense(s) charged (in (the) specification(s) (____) of (the) (Additional) Charge (____)) was raised. Specifically, (the accused stated _____) ((Doctor)(____) testified that _____) (____). (Do you believe the accused has a defense based upon lack of mental responsibility) (Do you believe the accused, because of partial lack of mental responsibility, was unable to (entertain the premeditated design to kill) (form the specific intent to _____) (know that _____) (act willfully) (____)) with respect to (the) (those) charged offense(s)?

DC: (Responds.)

MJ: Have you fully investigated potential mental responsibility defenses by reviewing the facts in this case and speaking with the accused? (Have you spoken with the accused's doctor(s)?) (Have you obtained assistance from mental health professionals in evaluating this issue?)

DC: (Responds.)

MJ: Has a mental responsibility inquiry been conducted under RCM 706? (If not, do you believe there is reason to believe the accused lacked mental responsibility for any offense charged?)

DC: (Responds.)

(MJ: Do you desire a continuance in order to further investigate this issue?

DC: (Responds.)

NOTE 3: Defense states no lack of mental responsibility defense. If defense counsel states that no mental responsibility defenses exist, the MJ should conduct the following inquiry of the accused.

MJ: _____, military law recognizes a defense of lack of mental responsibility. This lack of mental responsibility defense would be a complete defense to the offense(s) charged (in (the) specification(s) (___) of (the) (Additional) Charge (___)). The defense of lack of mental responsibility has two parts. First, at the time of (the) (those) charged offense(s), you must have been suffering from a severe mental disease or defect. Second, as a result of that severe mental disease or defect, you must have been unable to appreciate the nature and quality or wrongfulness of your conduct. Do you understand this?

ACC: (Responds.)

MJ: _____, has your defense counsel explained to you the defense of lack of mental responsibility?

ACC: (Responds.)

MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were suffering from a severe mental disease or defect?

ACC: (Responds.)

MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were unable to appreciate the nature and quality or wrongfulness of your actions?

ACC: (Responds.)

MJ: Did you understand what you were doing at the time of (the) (those) charged offense(s)? Why?

ACC: (Responds.)

MJ: Did you understand what you were doing at the time of (the) (those) charged offense(s) was wrong? Why?

ACC: (Responds.)

MJ: _____, based on what I have told you and what your defense counsel told you, do you believe the defense of lack of mental responsibility applies in your case?

ACC: (Responds.)

MJ: Defense counsel, are you affirmatively disclaiming the defense of lack of mental responsibility?

DC: (Responds.)

MJ: _____, do you agree?

ACC: (Responds.)

NOTE 4: Defense states no partial lack of mental responsibility for specific mens rea offense. If any offense includes a specific mens rea element, ask the following additional questions.

MJ: Defense counsel, based on your investigation, do you believe the accused suffered from a mental (disease) (defect) (impairment) (condition) (deficiency) (character or behavior disorder) (_____) that prevented him/her from (entertaining the premeditated design to kill) (forming the specific intent to _____) (knowing that _____) (acting willfully) (_____) at the time he/she committed (the) (those) charged offense(s)?

DC: (Responds.)

MJ: _____, has your defense counsel explained to you that partial lack of mental responsibility can negate certain mental states required for (the) (those) charged offense(s)?

ACC: (Responds.)

MJ: (The military judge should describe the offense(s) to which partial lack of mental responsibility might apply, and the affected elements, as follows:) I advised you earlier that one of the elements of the offense(s) charged (in (the) specification(s) (____) of (the) (Additional) Charge (____)) is that you (had a premeditated design to kill) (had the specific intent to _____) (knew that _____) (acted willful) (_____). You may have been sane at the time of the charged offense(s), yet, because of some underlying mental disease, defect, impairment, condition, deficiency, or character or behavior disorder, you may have been incapable of (entertaining the premeditated design to kill) (forming the specific intent to _____) (having knowledge that _____) (acting willfully) (_____). Do you understand this?

ACC: (Responds.)

MJ: What, if any, mental disease, defect, impairment, condition, deficiency, or character or behavior disorder, were you suffering from at the time you committed (the) (those) charged offense(s)? Were you seeing a doctor? What medications were you taking at that time? What effects, if any, did the mental disease, defect, impairment, condition, deficiency, or character or behavior disorder and these medications have on you? At the time you committed (the) (those) charged offense(s), did you continue to perform military duties?

ACC: (Responds.)

MJ: Do you believe that, at the time of (the) (those) charged offense(s), you were suffering from a mental disease, defect, impairment, condition, deficiency, or character or behavior disorder that would have prevented you from (entertaining the premeditated design to kill) (forming the specific intent to _____) (having knowledge that _____) (acting willfully) (_____)? Why?

ACC: (Responds.)

MJ: Defense counsel, are you affirmatively disclaiming the defense of partial mental responsibility with respect to (the) (those) charged offense(s)?

DC: (Responds.)

MJ: _____, do you agree?

ACC: (Responds.)

NOTE 5: Lack of competence to stand trial raised. To the extent that the accused's competence to stand trial is raised, the military judge should conduct the following inquiry.

MJ: Defense counsel, have you fully investigated the issue of whether the accused suffers from a mental disease or defect that prevents him/her from understanding the nature of these proceedings or from cooperating intelligently with you in the preparation of the defense?

DC: (Responds.)

MJ: Based on your investigation, do you believe the accused suffers from a mental disease or defect that prevents him/her from understanding the nature of these proceedings or prevented him/her from cooperating intelligently with you in the preparation of the defense?

DC: (Responds.)

MJ: Has a mental responsibility inquiry been conducted under RCM 706? (If not, does defense counsel believe there is reason to believe the accused lacks competence to stand trial?)

DC: (Responds.)

MJ: Do you desire a continuance in order to further investigate this issue?

DC: (Responds.)

MJ: _____, are you currently suffering from any mental disease or defect such that you cannot understand these proceedings?

ACC: (Responds.)

MJ: Have you been diagnosed with any condition that would affect your ability to understand these proceedings or cooperate with your defense counsel?

ACC: (Responds.)

MJ: Have you understood everything we've talked about today?

ACC: (Responds.)

MJ: Do you understand the roles of all the participants? Do you understand the trial counsel represents the government and has the responsibility to present evidence tending to establish your guilt of these offenses?

ACC: (Responds.)

MJ: Do you understand the defense counsel represents you and has the responsibility to challenge the evidence presented against you, cross-examine witnesses, and make legal arguments on your behalf?

ACC: (Responds.)

MJ: Do you understand I am the military judge in your case and I rule on all objections, preside over all open sessions of court, and, if you select trial by judge alone, determine your guilt or innocence and, if found guilty, will impose sentence upon you?

ACC: (Responds.)

MJ: Are you taking any medication? What medication are you taking? Are you feeling the effects of any medication? Within the last 24 hours have you taken

the medication in the prescribed dosage and at the times ordered by the doctor? Does taking this medication in the prescribed manner make it difficult for you to understand these proceedings or have you understood everything we've talked about today?

ACC: (Responds.)

MJ: How long have you been taking (this) (these) medication(s)? Have you continued to perform military duties while you are taking your medication(s)? Do you have a profile limiting your military duties? Have you been assigned to quarters?

ACC: (Responds.)

MJ: I note that during my discussion with the accused today for the past ____ hours, the accused (has been engaged and attentive) (has responded appropriately to my questions) (has maintained eye contact with me) (has not slurred his word nor stuttered, stumbled, or otherwise given me any indication that he is anything but fully coherent) and (has demonstrated appropriate affect for these proceedings) (_____). It appears to me that from his participation and demeanor throughout the proceedings, the accused is not impaired and that he understands the proceedings that have taken place today and is able to participate in his defense. Have you understood the proceedings that have taken place today?

ACC: (Responds.)

MJ: Are you able to assist your defense counsel in preparing your defense?

ACC: (Responds.)

MJ: I find that the accused is not presently suffering from a mental disease or defect rendering him/her mentally incompetent to stand trial under RCM 909. The accused is able to understand the nature of these proceedings and able to (conduct) (cooperate intelligently in) the defense of this case.

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2-7-29. SPECIAL VICTIM ADVOCATE

MJ: _____, you have indicated you are appearing as the (Special Victim Counsel) (civilian counsel) for (state the alleged victim's name). Please state your qualifications for the record.

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

(OATH FOR COUNSEL:) MJ: Do you, _____, (swear) (affirm) that you will faithfully perform the duties of (Special Victim Counsel)(civilian counsel) for (name of alleged victim) in the case now in hearing (so help you God)?

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