

presented, he can plan the prosecution with a view to lessening or negativing the effect of the defense evidence.

As a general rule, therefore, unless the pretrial counsel believes that the new defense matter if presented at the investigation may influence official action on the case to the benefit of the accused, he should not present such matter. The same considerations apply in advising the accused whether to make a statement or remain silent.

*d. Suspected insanity of the accused.* If any facts come to the attention of the pretrial counsel which would indicate either that the accused does not possess sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense or that the accused lacked mental responsibility at the time of the commission of the offense, those facts should be brought to the attention of the investigating officer for action pursuant to paragraph 121 of the Manual. See 63f.

*e. After investigation.* The pretrial counsel should make full and complete notes covering such matters as the demeanor of the witnesses for and against the accused, their attitude toward the accused, and the legal defects, if any, in the documentary evidence considered by the investigating officer. If the case ultimately is referred for trial and the pretrial counsel represents the accused as his defense counsel, these notes will be valuable in his preparation of the case. In those cases before courts-martial where the pretrial counsel does not also serve as defense counsel for the accused, the notes and any other information concerning the case in the possession of the pretrial counsel should be given to the defense counsel for his information and use.

## **Appendix I**

### **CHECKLIST FOR TRIAL COUNSEL\***

ACCUSED (Last Name—First name—Middle initial)	Service number	Rank or grade	Organization

#### **INSTRUCTIONS**

To indicate completion of the items listed, place a checkmark in the box to the right of the checklist item; if an item is inapplicable, place a diagonal mark in the box.

References are to paragraphs and appendixes of this handbook, Articles of the Uniform Code of Military Justice, and paragraphs and appendixes of the Manual for Courts-Martial, United States, 1951.

#### **SECTION A—DUTIES PRIOR TO TRIAL**

1. Check the charges and allied papers when they are received to assure that the file is complete (30).	
2. Ascertain from the indorsement on the charge sheet and the order appointing the court whether the charges are in the hands of the trial counsel of the proper court.	
3. Examine the charges and allied papers to determine whether any member of the prosecution is disqualified because of prior participation in the same case (2; MCM, 6, 44b). If so, the disqualified member may not act in the case, and the matter will be reported immediately to the convening authority (30).	
4. Note any discrepancies in the report of investigation (33a; MCM, 44f).	
5. a. Make certain that the data on the charge sheet is free from errors of substance or form (30; MCM, 44f).	
b. Compare the name and description of the accused in each specification with the corresponding data on page one of the charge sheet.	
c. Compare the charges and specifications in the charge sheet with the pertinent forms set forth in appendix 6c of the Manual to determine if they are in proper form (30).	

\*The use of this checklist is optional. If used, it may be locally reproduced.

## CHECKLIST FOR TRIAL COUNSEL\*—Continued

### SECTION A—DUTIES PRIOR TO TRIAL—Continued

6. a. Note any discrepancies in the orders appointing the court.	
b. Examine the orders appointing all courts to which the case has been referred, the charge sheet, and the accompanying papers to determine whether the law officer and counsel for the prosecution and the defense have the necessary legal qualifications and whether any facts appear which would disqualify the law officer or any of the counsel from acting in the case (2; MCM, 4e, 6).	
c. If, with respect to the qualifications of the law officer or counsel, the court is not legally constituted, notify the convening authority.	
7. If errors of a substantial nature are found in the charge sheet, in the orders appointing the court, or in the report of investigation, refer such matters to the convening authority (30; MCM, 44f).	
8. Examine the record of previous convictions for completeness, admissibility, and freedom from errors of form or substance. If any previous convictions would not be admissible in the case, obtain a new record of convictions showing only those which are admissible (52b; MCM, 44f and 75b).	
9. a. Serve or cause to be served a copy of the charge sheet and all allied papers on the accused (31).	
b. Complete and sign the certificate of service (bottom of page 3 of charge sheet (DD Form 458)).	
10. a. Notify the defense counsel without delay that charges have been served.	
b. Deliver copies of the papers that accompanied the charge sheet to the defense counsel (except as otherwise directed by the convening authority) (31; MCM, 44h).	
c. Determine from the defense counsel whether the data shown on the first page of the charge sheet is correct.	
d. Inform defense counsel of any papers accompanying the charges that were withheld from him by order of the convening authority.	
11. Determine from appointed defense counsel whether the accused desires to be represented by individual counsel, civilian or military. If so, initiate necessary action (4a, 62e; MCM, 46d, 48a).	

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## CHECKLIST FOR TRIAL COUNSEL\*—Continued

### SECTION A—DUTIES PRIOR TO TRIAL—Continued

12. a. If the accused is an enlisted person, ascertain from defense counsel whether he desires enlisted members on the court. If so, obtain a signed request therefor and advise the convening authority (34e).	
b. If the accused requests enlisted members, make certain that none of the enlisted persons who will sit as members of the court are members of the same unit as the accused or are junior in grade to the accused; insure that one-third of the membership who will sit on the court will be enlisted persons (Art. 25e; MCM, 4a, 6).	
13. Determine if possible from defense counsel how accused intends to plead (4a). If the accused offers to plead guilty under a pretrial agreement (64c), his signed offer in writing should be brought to the attention of the convening authority.	
14. Ascertain from the defense counsel what witnesses he will need and the earliest date he will be ready for trial.	
15. Prepare any necessary depositions in conjunction with the defense counsel (22).	
16. Study the elements of proof of each offense charged (36).	
17. Study the law relating to each offense charged (32b, MCM, ch. XXVIII).	
18. Interview prosecution witnesses and take notes (5c-g).	
19. Interview defense witnesses and take notes (5c-g).	
20. Arrange to have all material witnesses available for trial; take action to insure that such witnesses will not be transferred or allowed leave so as to make them unavailable.	
21. Examine any documentary evidence pertaining to the case for accuracy, completeness, admissibility, and form (21; MCM, 143-146).	
22. Arrange to have any real evidence, such as knives, guns, money, clothing, etc., available for the trial; be prepared to establish chain of custody, if necessary.	
23. If, during the preparation of the case, new information is discovered that affects the feasibility of proceeding with the trial, advise the convening authority (33; MCM, 44f(5)).	
24. If a question arises as to the sanity of the accused, refer the matter to the convening authority (33b; MCM, 121).	

\*The use of this checklist is optional. If used, it may be locally reproduced.

## CHECKLIST FOR TRIAL COUNSEL\*—Continued

### SECTION A—DUTIES PRIOR TO TRIAL—Continued

25. a. Prepare proof analysis sheet (App. III (A)).	
b. Plan the order in which the evidence will be placed before the court at the trial (36).	
26. Obtain and study legal authorities concerning any possible questions of law likely to arise at the trial, particularly in connection with instructions (43, 44).	
27. Note any lesser offenses included in each specification and carefully analyze the expected evidence to determine which lesser offenses might be in issue (46).	
28. Prepare proposed instructions as to the elements of each principal offense charged, each lesser included offense, defenses that may be in issue, and definitions of words of special legal connotation (44-48; MCM 76c(2)).	
29. Prepare an outline of any opening statement or final argument to be made at the trial (41, 51).	
30. Examine the order appointing the court, the charge sheet, and the accompanying papers for possible grounds for challenge (39; MCM, 62f).	
31. Consider whether the defense may make any motions or objections and, if so, make the necessary preparation to oppose them (MCM, ch. XII).	
32. Have necessary photographs, maps, charts, etc., prepared (19, 32).	
33. Obtain official copies of price lists, regulations, orders, etc., of which the court will be requested to take judicial notice (MCM, 147a).	
34. Determine the strong points in the probable defense case and prepare to counteract them if possible.	
35. Outline the expected testimony of each prosecution witness and the expected cross-examination of each defense witness.	
36. Prepare an outline for the cross-examination of the accused in the event he elects to take the stand to testify (10).	
37. Prepare trial notes (37; App. III(A)).	
38. If possible, stipulate with the defense counsel and the accused as to unimportant or uncontested matters (App. VIII).	

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## CHECKLIST FOR TRIAL COUNSEL\*—Continued

### SECTION A—DUTIES PRIOR TO TRIAL—Continued

39. a. If a court reporter is to be used, ascertain the dates that he will be available.	
b. Ascertain from the law officer the dates he will be available for trial.	
c. Confer with the president of the court as to the date and time of trial and the uniform to be worn (34).	
40. Notify all persons concerned of the meeting of the court and the uniform to be worn, i.e., personnel of the court, counsel, reporter, interpreter, (34b).	
41. Arrange for the presence of civilian witnesses; if necessary, subpoena witnesses for the prosecution and witnesses requested by the defense (35; MCM, 115a). Arrange for the presence of military witnesses (35c; MCM, 115b).	
42. Arrange for the presence of the accused at the trial (34d; MCM, 60).	
43. Inspect the courtroom and see that proper furniture is provided and is properly arranged (34a; MCM, App. 8a).	
44. Secure necessary stationery items; submit proposed findings and sentence worksheets, etc., to the law officer for use by members of the court-martial and furnish copies to the defense counsel (34a).	
45. Have typewritten copies of the charges and specifications prepared for the law officer, each member of the court, the accused and reporter (34b).	
46. Go to the courtroom early and make final arrangements (34).	

### SECTION B—DUTIES DURING TRIAL

47. At all times during the trial, utilize your trial notes and the procedural guide for trials before general and special courts-martial (App. III (A); MCM, app. 8).	
48. Check with the reporter as to the time of each convening or opening, and recess, adjournment, or closing.	
49. Account for the "parties to the trial" when the court opens after closing, adjourning, or recessing (49d).	

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## CHECKLIST FOR TRIAL COUNSEL\*—Continued

### SECTION C—DUTIES AFTER TRIAL

50. Arrange for proper disposition of accused, to include an armed guard if necessary (MCM, 21d, 44e).	
51. Notify, in writing, the accused's commanding officer, the commanding officer of the confinement facility in which the accused is confined, and the convening authority of the outcome of the trial (58).	
52. Complete witness vouchers and assist witnesses in securing payment as prescribed by departmental regulations (35f).	
53. If original documents are to be returned, see that certified true copies or other authorized reproductions of such documents are prepared for substitution in the record of trial (MCM, app. 8a (p. 513)).	
54. Prepare proper descriptions or photographs of items of real evidence for inclusion in the record (MCM, 138c).	
55. Determine the number of copies of the record of trial to be prepared (59).	
56. Turn over to the reporter, if one was present, exhibits and allied papers in the case to be attached to the record of trial.	
57. If a reporter was not present, prepare the record of trial (59c).	
58. a. Check the record of trial as it is being transcribed, and, when the record has been completed, carefully review it and see that all papers are arranged and bound in the manner prescribed by appendix 9e or 10b, whichever is appropriate, of the Manual.	
b. Note, correct, and initial errors in the record of trial.	
c. Submit the record of trial to the defense counsel for his examination and signature prior to authentication (78).	
d. If a special court-martial record, sign and thereafter submit to the president for his signature (59d; MCM, 83e and app. 9b(2) (p. 528)).	
e. Submit the record of trial of a general court-martial to the president of the court and the law officer for authentication (59d; MCM, 82f and app. 9b(1) (p. 528)).	
f. If a civilian reporter was employed, check the reporter's voucher and sign it if it is correct.	

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## CHECKLIST FOR TRIAL COUNSEL\*—Continued

### SECTION C—DUTIES AFTER TRIAL—Continued

g. Supply each accused with a copy of the record of trial from which any classified material has been deleted; obtain a receipt for each copy so provided and attach it to the record of trial (59e; MCM, 82g).

h. Complete the Court-Martial Data Sheet (DD Form 494).

i. If appropriate, include in the record a signed letter containing reasons why declassification of classified matter in the allied papers was not accomplished prior to the dispatch of the record.

j. Include immediately following the chronology sheet in all records of trial by general courts-martial in which a sentence has been adjudged and in those records of trial by special courts-martial in which a bad conduct discharge has been adjudged a statement of the accused that he does or does not desire appellate defense counsel or, in lieu thereof, a certificate of the defense counsel that he advised the accused of his appellate rights (79e).

k. Forward the record of trial to the convening authority (59e).

59. Retain all reporter's notes and other records from which the record of trial was prepared, until receipt of the record of trial is acknowledged by the Office of the Judge Advocate General of the Army or appellate review is completed, whichever occurs first.

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## Appendix II

### CHECKLIST FOR DEFENSE COUNSEL\*

ACCUSED (Last name—First name—Middle initial)	Service number	Rank or grade	Organization

#### INSTRUCTIONS

To indicate completion of the items listed, place a checkmark in the box to the right of the checklist item; if an item is inapplicable, place a diagonal mark in the box.

References are to paragraphs and appendixes of this handbook, Articles of the Uniform Code of Military Justice, and paragraphs and appendixes of the Manual for Courts-Martial, United States, 1951.

#### SECTION A—DUTIES PRIOR TO TRIAL

1. Check the charges and allied papers received from the trial counsel to assure that they are complete.
2. Ascertain from the indorsement to the charges and the orders appointing the court whether the charges have been properly furnished to you as defense counsel.
3. Examine the charges and allied papers to determine whether any member of the defense has acted as accuser, investigating officer, law officer, court member, or for the prosecution in the same case (2). If any member of the defense has previously acted for the prosecution, he may not act in the case, and the convening authority will be notified immediately (2, 62b; Art. 27(a); MCM, 6a).
4. If, because of prior participation, a member of the defense can serve only if the accused expressly requests him to do so, advise the accused of his rights in this respect and, if he wants the member to act in the case, have him sign a statement to that effect; otherwise, notify the convening authority (2, 62d; MCM, 6a).
5. Interview the accused and advise him that you have been detailed as defense counsel, of your general duties, and of the confidential relationship which exists between the defense counsel and the accused (61a, 62f).

\*The use of this checklist is optional. If used, it may be locally reproduced.

# CHECKLIST FOR DEFENSE COUNSEL\*—Continued

## SECTION A—DUTIES PRIOR TO TRIAL—Continued

6. a. Determine whether the accused desires individual counsel—civilian or military (62e).  
b. Advise the accused that civilian counsel cannot be provided at Government expense (MCM, 48a).  
c. If the accused desires individual military counsel, submit an immediate written request therefor (62e; MCM, 46d).
7. Explain to the accused that he should not discuss the case without approval of the defense counsel, (62g).
8. Check the accuracy of the data on page one of the charge sheet concerning the accused's restraint, record of service, and personal data.
9. Advise the accused of his rights, as follows:
  - a. Right to have enlisted personnel on the court (if accused is an enlisted person) (64b).
  - b. Right to challenges for cause and peremptorily (64c).
  - c. Right to assert any defense or objection, such as the statute of limitations in a proper case (64d; MCM, ch. XII).
  - d. Right to plead not guilty (64e; MCM, 70a).
  - e. Meaning and effect of a guilty plea (including the maximum punishment) and his right to introduce evidence in extenuation and mitigation after such plea (64c; MCM, 70b).
  - f. Right, before findings, to testify as a witness or to remain silent (64f; MCM, 53h, 148e).
  - g. Right, after findings, to introduce evidence in extenuation and mitigation and to testify, make an unsworn statement personally and/or through counsel, or remain silent (64f(5); MCM, 75c).
  - h. If appropriate, advise the accused about pretrial agreements concerning guilty pleas (64e).
10. Unless the accused has requested individual counsel and, in addition, states that he desires that appointed counsel refrain from preparation, commence the preparation of the case for trial (62e; MCM, 46d).
11. Analyze the charges, specifications, and pretrial investigation report (63a).

\*The use of this checklist is optional. If used, it may be locally reproduced.

# CHECKLIST FOR DEFENSE COUNSEL\*—Continued

## SECTION A—DUTIES PRIOR TO TRIAL—Continued

12. Study the discussion contained in chapter XXVIII of the Manual relating to each offense charged (63a).	
13. Determine the essential elements of each offense charged (63b).	
14. Impress the accused with the necessity for a full disclosure of all the facts and circumstances surrounding the offense charged (63b).	
15. In the event co-accused are to be defended, advise them of any conflicting interests in the conduct of their defense which would warrant a request for other counsel (62c; MCM, 48c).	
16. Obtain from the accused the names and addresses of witnesses who may have helpful information concerning the case (63b). Contact each of these witnesses personally or write to them and obtain their version of the events that occurred (63d, e).	
17. Learn from the accused the location of any documentary or real evidence applicable to the case, such as check stubs, canceled checks, letters, etc., and have such evidence available for use at the trial (63b).	
18. If the accused has made a confession or admission as to any of the offenses charged, determine the circumstances surrounding such confession or admission (63c; MCM, 140a).	
19. a. Interview the witnesses for the defense and for the prosecution (63d).	
b. Be familiar with all witnesses and know what their expected testimony will be.	
c. Determine which prosecution witnesses probably should be, or should not be, cross-examined (63d).	
20. a. Have accused elect whether he desires to plead guilty, not guilty, or guilty of a lesser included offense (64e; MCM, 70a).	
b. If the accused desires to enter into a pretrial agreement, reduce the offer to writing, have accused sign it and bring the matter to the attention of the convening authority through the trial counsel (64e).	
21. If the accused is an enlisted person, and he desires to have enlisted personnel on the court, prepare the necessary request for his signature and submit it to the trial counsel (64b; MCM, 48e).	
22. Arrange a tentative date of trial with the trial counsel.	

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## CHECKLIST FOR DEFENSE COUNSEL\*—Continued

### SECTION A—DUTIES PRIOR TO TRIAL—Continued

23. a. Determine whether the law officer or any member of the court may be subject to challenge for cause (64c; MCM, 62f).

b. Determine whether it will be advantageous for the accused to exercise his right to one peremptory challenge against any member of the court (64c).

c. Discuss the membership of the court with the accused and determine what his wishes are with respect to challenges.

24. Determine whether there is any doubt as to accused's sanity at the time of the alleged offenses, or his mental capacity now to stand trial, and advise trial counsel accordingly (63f; MCM, ch. XXIV).

25. Prepare trial notes (App. III (B)) and take other appropriate action to prepare the case for trial (65).

26. a. Outline the essential elements of each offense charged (63a).

b. Study and make appropriate notes concerning the rules of evidence applicable in the case (6-28; MCM, ch. XXVII).

c. Determine whether each specification properly states an offense under the Uniform Code (63a; MCM, app. 6).

d. (1) Review and outline the expected prosecution evidence (65f).

(2) Note weaknesses in the prosecution's evidence.

(3) Determine whether such expected evidence is sufficient to establish all elements of each offense charged beyond a reasonable doubt.

(4) If the expected evidence does not appear to substantiate the offenses charged, determine whether the evidence substantiates any lesser included offense.

e. Ascertain and carefully outline any defenses available to the accused (65b).

f. Advise the trial counsel of the names and addresses of witnesses which the defense desires to have present at the trial (65c).

g. (1) Plan the order in which evidence will be introduced (65f).

(2) Outline the testimony of each defense witness (65f).

\*The use of this checklist is optional. If used, it may be locally reproduced.

## CHECKLIST FOR DEFENSE COUNSEL\*—Continued

### SECTION A—DUTIES PRIOR TO TRIAL—Continued

(3) Outline cross-examination of each prosecution witness (65f, 73).	
h. Arrange with the trial counsel for the taking of necessary depositions (22, 65d).	
i. Depending on the desire of the accused, stipulate with the trial counsel as to unimportant or uncontested matters (App. VIII).	
j. If appropriate, prepare a tentative outline of the opening statement (65f(7), 72).	
k. If any motions are to be made, prepare the motions in detail and outline supporting legal authorities and supporting evidence (43, 65f(3), 70; MCM, ch. XII).	
l. Have necessary photographs, maps, charts, etc., prepared (19, 65f).	
m. Obtain official copies of price lists, regulations, orders, etc., of which the court will be requested to take judicial notice (MCM, 147a).	
n. Prepare a tentative final argument (65f(9), 75).	
o. (1) Prepare a detailed summary of accused's civilian and military background (65f(11)).	
(2) Outline available evidence in extenuation and mitigation to be presented in the event findings of guilty are announced (65f, 76).	
p. Check for accuracy and admissibility any evidence of previous convictions (65f(11); MCM, 75b).	
q. Note the lesser offenses included in each specification and analyze the expected evidence to determine which lesser offenses might be in issue (46).	
r. Determine requested instructions and supporting legal authorities and furnish same to the law officer (or president of the special court-martial) and furnish copies to trial counsel (48, App. III(B)).	
s. Instruct accused as to his appearance and the manner in which he should conduct himself during the trial and make certain that he has proper uniform (66).	
t. Obtain and prepare an outline of such legal authorities as may be necessary to support defense contentions (48).	

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## CHECKLIST FOR DEFENSE COUNSEL\*—Continued

### SECTION B—DUTIES DURING TRIAL

27. The defense counsel will follow his trial notes and will utilize at all times during the trial the approved procedure for trials before general and special courts-martial set forth in appendix 8 of the Manual.

### SECTION C—DUTIES AFTER TRIAL

28. If the accused is found guilty and is sentenced, consider preparing and presenting to the court a clemency petition (77; MCM, 48j).

29. Examine the record of trial to see if it correctly reflects all of the proceedings before the court (78).

30. As appropriate, advise the accused of his appellate rights and submit to the trial counsel a signed statement of the accused that he does or does not desire appellate defense counsel or, in lieu thereof, a certificate that you advised the accused of his appellate rights (79e, App. XIII; MCM, 48j).

31. If appropriate, prepare and submit an appellate brief (79d; MCM, 48j(2)).

32. Examine post trial review and action of covening authority.

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**Appendix III**  
**ILLUSTRATIVE TRIAL NOTES**

**(A) Trial Counsel**

**1. Preliminary matters (prior to arraignment).** (The information contained under this heading must be supplied by the trial counsel as he follows appendix 8 of the Manual. This information may be penciled in the margin of appendix 8 or written on a separate sheet of paper clipped to appendix 8. Regardless of which method the trial counsel adopts, he should never have to delay the proceedings while he searches for this information among the papers on his desk.)

a. Orders: Court convened by par. 3, SO 61, Hq Camp St. Cloud, 20 Jun 61; amended by par. 1, SO 69, same Hq, 2 Jul 61.  
b. Law officer and members (to be completed in order of rank as court convenes):

**PRESENT**

Lt Col Purple, Law Officer

Col Silver

Lt Col Brown

Major Green

Major Pink

Capt Blue

1st Lt Orange

2d Lt Gold

2d Lt White

Capt Victor, TO

1st Lt Helper, Asst TO

Capt Winner, DC

1st Lt Aider, Asst DC

This listing may be used by the trial counsel when he swears the court.

**ABSENT**

Major Pink (Excused by the convening authority)

2d Lt White (Excused by the convening authority)

c. Accused: Sergeant Peter Arnold, Btry A, 56th Bn.

d. Court reporter: Rapid Wright.

e. Legal qualifications of prosecution are correctly stated in appointing orders.

f. Prosecution counsel not disqualified.

g. Accused did not submit written request for enlisted court members.

h. General nature of charges:

(1) Desertion on 4 Jun 60 from Camp St. Cloud until apprehension 18 May 61 at Minneapolis, in violation of Article 85.

- (2) Preferred by Capt Michael Coyle.
- (3) Investigated by Maj Roger Fox.
- (4) Forwarded by Lt Col Morton Beale, who recommended trial.
- (5) Records disclose no grounds for challenge.
- (6) No member or LO to be called as witness for prosecution.

4. Challenges by prosecution:

- (1) For cause: None.
- (2) Peremptory: None.

j. Charges served on accused on 2 Jul 61.

2. *Anticipated defense pleas and motions.*

- a. Pleas: Not guilty, but guilty of the lesser included offense of AWOL.
- b. Motions: None.

3. *Proof analysis sheet.*

*Elements To Be Proved (184, 185, MCM,  
1951; UCMJ, Arts, 85, 86)*

*Evidence To Prove*

(a) Accused went AWOL from Btry Authenticated Extract Copy of Morning A, 56th FA Bn, at Camp St. Cloud, on Report of Btry A, 56th FA Bn for 4 Jun 4 Jun 60.

(b) Accused intended at time of absenting himself or at some time during absence to remain away permanently from his organization.

Pete Jones will identify accused and will testify that he hired accused on 30 Jun 60, as a mechanic, that accused told him he had "gone over the hill" and would never return to the Army, and that accused to his knowledge always wore civilian clothing.

See stipulated testimony of Policeman John Smith. Judicial notice that Minneapolis is 70 miles from Camp St. Cloud.

(c) Deserter terminated on 13 May Authenticated Extract Copy of Morning Report of Btry A, 56th FA Bn, for 13 May 61. Written stipulation of testimony of Policeman John Smith to the effect that he took accused into custody at Jones' garage on 13 May 61.

4. *Opening statement.* The prosecution will show that on or about 4 Jun 60, accused, Sergeant Peter Arnold, went AWOL from his unit, Btry A, 56th FA Bn, Camp St. Cloud, Minn., and that he remained absent until he was apprehended by civilian police at Minneapolis, Minn., and returned to military control on 13 May 61—an absence of over 11 months. The evidence also will show that at the time Sergeant Arnold was apprehended he was dressed in civilian clothing and had been gainfully employed as a mechanic for an automobile agency in the City of Minneapolis for practically the entire period of his absence.

5. *Evidence (in order of introduction).*

a. Offer in evidence, as Prosecution Exhibit 1, authenticated extract copy of morning report of Btry A, 56th FA Bn, for 4 Jun 60. (This exhibit shows accused, Sergeant Arnold, "Dy to AWOL, 0600.")

b. Peter Jones, shop foreman, Jones Motor Co., Minneapolis, Minn. Jones will testify as follows: "He knows accused, Arnold . . . identifies him . . . met accused 30 Jun 60 . . . accused wanted mechanic's job . . . hired accused 30 Jun 60 . . . accused worked for him since that date . . . conversation with accused, 12 May 61 . . . accused said he had been in Army . . . became disgusted, gone over hill . . . said he wanted no part of Army and would never return to it . . . called police station 13 May 61 because he did not want some-

one who was AWOL working for him . . . policeman came . . . took Arnold away . . . heard Arnold say to policeman he was AWOL . . . Arnold to his knowledge always wore civilian clothes."

c. Offer in evidence, as Prosecution Exhibit 2, the written stipulation of the testimony which John Smith, policeman, Minneapolis, Minn., would give if he were present.

d. Offer in evidence, as Prosecution Exhibit 3, authenticated extract copy of morning report of Btry A, 56th FA Bn, for 18 May 61.

e. Request court to take judicial notice that Minneapolis is 70 miles from Camp St. Cloud.

f. Proposed cross-examination of accused. "Absent himself 4 Jun 60 . . . did not have authority to be absent . . . remained AWOL until apprehended on 18 May 61 . . . did not contact Army authorities during absence . . . wore civilian clothes . . . did not contact Red Cross or chaplain . . . knew Red Cross representative and chaplain were on post at Camp St. Cloud.

6. *Argument.* The prosecution has produced competent evidence showing that on 4 Jun 60 the accused, Arnold, deserted the service of the United States and remained absent until he was apprehended by the civilian police and turned over to the MP's at Minneapolis, Minn., on 18 May 61. Prosecution Exhibit 1, the extract of the morning report of the accused's unit, shows that he absented himself without authority from that unit on 4 Jun 60. The facts and circumstances surrounding the apprehension of the accused and his return to military control at Minneapolis, Minn., on 18 May 61, were proved by the stipulation concerning the testimony of Policeman Smith and by the testimony of Pete Jones. As to the question of whether the accused intended to remain absent permanently from his place of service, the record clearly shows that such an intent was in his mind. This intent may be inferred by the court from these facts in the record: (1) Accused remained absent from his organization for a long period of time without turning himself in at a military installation. (2) He secured private employment almost immediately after he absented himself. (3) He worked at a civilian job during his absence. (4) In addition, the conversation between the accused and Pete Jones, the shop foreman, in which Arnold said that he "wanted no part of the Army and would never return" clearly indicates the intent not to return to military service.

7. *Instructions.* (To be attached as separate inclosures.)

a. Prosecution's proposed instruction on the elements of desertion in the case of *United States v. Peter Arnold*, Btry A, 56th FA Bn:

The specification charges the accused with desertion, in violation of Article 85, which provides, in part, that any member of the armed forces of the United States who, without proper authority, goes or remains absent from his organization with intent to remain away therefrom permanently is guilty of desertion.

The court is advised that, to find the accused guilty of the specification and charge, it must be satisfied by legal and competent evidence beyond a reasonable doubt:

- (i) That, at the time and place alleged, the accused absented himself from his organization without proper authority, as alleged;
- (ii) That the accused intended at the time of absenting himself or at some time during his absence to remain away permanently from his organization; and
- (iii) That the accused's desertion, if any, was of a duration and was terminated by apprehension, as alleged.

b. Prosecution's proposed instruction on the lesser included offense of absence without leave in the case of *United States v. Peter Arnold*, Btry A, 56th FA Bn:

The court is further advised that included within desertion as alleged in the specification is the lesser offense of absence without leave, in violation of Article 86, which provides, in part, that any member of the armed forces who, without proper authority, absents himself or remains absent from his organization shall be punished as a court-martial may direct. The elements of absence without leave are as follows:

- (1) That, at the time and place alleged, the accused absented himself from his organization, as alleged, and
- (2) That such absence was without proper authority from anyone competent to give him leave and was of the duration alleged.

You are further advised that if you have a reasonable doubt that the accused is guilty of desertion, but you are satisfied by legal and competent evidence beyond a reasonable doubt that the accused is guilty of the lesser included offense of absence without leave, you may nevertheless reach a finding of guilty, but in this event it will be necessary for you to modify the specification and the charge by exceptions and substitutions so that they will reflect findings as to which you have no reasonable doubt.

### **(B) Defense Counsel**

#### **1. Preliminary matters.**

##### **a. Accused.**

- (1) Name and grade: Peter Arnold, Sergeant.
- (2) Organization: Btry A, 56th FA Bn.
- (3) Station: Camp St. Cloud, Minn.

b. Accused to be defended by appointed defense counsel and appointed assistant defense counsel.

c. Legal qualifications of appointed members of defense correctly stated in appointing orders.

d. No member of the defense is disqualified.

**2. Charge.** Violation of the Uniform Code of Military Justice, Article 85.

**Specification.** Desertion (with intent to remain absent permanently); 4 Jun 60 to 13 May 61 (11 months, 10 days), terminated by apprehension.

**3. Lesser included offenses.** Absence without leave.

**4. Elements of offenses charged.**

a. Accused went AWOL from Btry A, 56th FA Bn at Camp St. Cloud, on 4 Jun 60.

b. Accused intended at time of absenting himself, or at some time during absence, to remain away permanently from his organization.

c. Desertion terminated by apprehension by civilian police at Minneapolis, Minn. Accused returned to military control on 13 May 61.

**5. Challenges by defense.**

a. For cause: None.

b. Peremptory: Lt John C. Orange, 1st Infantry.

**6. Motion to dismiss.** None.

**7. Pleas.**

a. To the specification: Guilty, except the words "and with intent to remain away therefrom permanently," "in desertion," and "he was apprehended." To the excepted words "not guilty."

b. To the charge: Not guilty, but guilty of a violation of Article 86.

**8. Prosecution witnesses.** Refer to section 11, *infra*.

**9. Motion for finding of not guilty.** None.

**10. Opening statement.** The accused, by his pleas in this case, admits that he was absent without proper authority from his organization at Camp St. Cloud, Minn. Hence, the only disputed question in this case is whether the accused intended to remain absent permanently from his organization. The defense will show that this was not his intent. In fact, a contrary intent will be shown by the testimony of accused, his wife, and the stipulated testimony of his father-in-law. As to the admitted offense of AWOL, the defense will show, for the consideration of the court, the existence of extenuating and mitigating circumstances.

**11. Evidence.**

**a. Cross-examination of Pete Jones:** That accused was a good and reliable worker; that accused told him several times of his need for money to meet medical and hospital expenses.

**b. Offer in evidence, as Defense Exhibit A, a written stipulation of the testimony which Mr. John Johnson, Minneapolis, Minn., would give if he were present.**

**c. Mrs. Irma Arnold of Mankato, Minn., the wife of accused, will testify as follows:** "Wife of Peter Arnold . . . resided with father in Minneapolis . . . husband in Army at Camp St. Cloud . . . husband only able to come home one week-end each month . . . married 8 years . . . has 3 children . . . she became very ill on 15 May 60 . . . on 20 May 60 she became worse . . . taken to hospital . . . emergency operation . . . on 3 Jun 60 husband visited her at hospital in Minneapolis . . . in hospital 8 weeks . . . special nurse 4 weeks . . . after return from hospital it was necessary to have help at home . . . care for her, children, father . . . husband said he was AWOL . . . accused worried about his status . . . said many times that he would return to his battery as soon as he paid bills . . . planned to return after payday 1 Jun 61."

**d. Accused, Private Peter Arnold, Btry A, 56th FA Bn, Camp St. Cloud, Minn., will testify as follows:** "He is the accused in the case . . . on 4 Jun 60 went AWOL from his unit at Camp St. Cloud, Minn. . . on 15 May 60 wife taken ill . . . asked one of the medical aid men in battalion dispensary if wife could be cared for in station hospital and the medical aid man told him the station hospital had no facilities for treatment of dependents except those who lived on the post . . . previously had tried to get quarters on the post but they were unavailable . . . asked battery commander for leave . . . not granted . . . was worried . . . on 20 May 60 wife's condition became worse . . . she was taken to hospital . . . again requested leave . . . no success . . . could only get one week-end pass each month . . . left Camp St. Cloud on pass on 2 Jun . . . went to Minneapolis intending to return to camp in time for reveille on 4 Jun . . . found wife very ill . . . wife in hospital 8 weeks . . . expenses high . . . help needed for care of children and father-in-law . . . thought it necessary to get a job, stay home and save the cost of a maid at night . . . no intent to desert . . . intended to return when wife well . . . bills paid . . . hospital and doctor bills totaled \$800 . . . last of bills paid 1 May 61 . . . likes Army career . . . never told Pete Jones he wanted no part of the Army and would never return to it . . . told him that there are times when a person feels that he wants no part of the Army."

**e. Offer in evidence an oral stipulation as follows:** On 21 May 60, an emergency operation was performed at the Minneapolis General Hospital on Mrs. Irma Arnold, the wife of the accused in this case; that Mrs. Arnold was in a civilian hospital for 8 weeks after the operation and required a special nurse for 4 weeks of this time; that the hospital bill was \$600 and the doctor bill was \$200; that these bills have been paid by the accused at the rate of approximately \$75 per month, the last payment on the hospital bill having been made on 1 May 61. The expenses incident to the illness and hospitalization of Mrs. Arnold were not covered by the Dependents Medical Care Act (10 U.S.C. 1071-1085).

**12. Argument.** Before the court properly can find an accused guilty of a charge of desertion the prosecution must show beyond a reasonable doubt that the accused intended to absent himself permanently from his organization. What does the evidence show in this case? There is prosecution testimony by the shop foreman, Pete Jones, to the effect that accused told him he was AWOL from his unit at Camp St. Cloud, Minn., and that he wanted no part of the Army and would never return. Arnold has denied the making of this statement. In support of his contention that he at all times intended to return to his organization, accused has testified as to his intent to return and has introduced to the court the corroborating testimony of his wife and, by stipulation, the corroborating testimony of his father-in-law. The court will recall that these corroborating witnesses both stated that on numerous occasions accused discussed his problems with them and clearly indicated that as soon as the family was out of debt he would return to his battery. The uncontradicted defense evidence shows that the accused made regular monthly payments on the indebtedness and had paid his medical bills in full by the first of May. The expected time of his return was thus based upon the happening of a certain event—the payment of his bills. In fact, according to the testimony of the defense witnesses, the accused, having accomplished his purpose in accordance with his plans, was preparing to return to Camp St. Cloud on 1 Jun 61. Accused has admitted that he went AWOL. He now realizes that the procedure he adopted was wrong. However, his action was motivated solely by a genuine and worthy concern for the welfare of his wife and family. The court has heard the uncontested evidence of the defense concerning the serious and lengthy illness of Mrs. Arnold and may properly take these extenuating matters into consideration. Note also that the accused is a good worker, a mechanic, and wants to make the Army a career.

**13. Instructions.** (To be attached as separate inclosures.)

Defense's proposed instruction in the case of *United States v. Peter Arnold*, Btry A, 56th FA Bn:

You are instructed that the accused's plea of guilty of the lesser included offense of absence without leave will warrant a finding of guilty of that offense without further proof, but that a plea of guilty of absence without leave to a charge of desertion is not itself a sufficient basis for a conviction of desertion. The court is instructed that no inference of an intent to remain absent permanently arises from any admission involved in the plea of guilty to the lesser included offense of absence without leave, and to warrant a conviction of desertion the evidence must establish this intent beyond reasonable doubt. (This instruction is modeled after instruction in appendix VII, DA Pam 27-9, The Law Officer. In an Air Force case, follow model instruction "Effect of Plea of Guilty" and appropriate note thereto.)

**14. Matters in mitigation.**

a. Accused will testify as follows: "Served from 19 Aug 42 to 21 Nov 45 with honorable discharge . . . tank mechanic . . . corporal in Jun 43 . . . sergeant in Dec 43 . . . overseas in Europe from Jan 44 to Sep 45 . . . in Normandy on D-plus-24 . . . ETO ribbon with three battle stars . . . good conduct medal . . . never court-martialed . . . reenlisted in Jul 50 because of Korean conflict."

b. Argument as to sentence: Prior spotless record . . . his misconduct was caused by temporary disregard of possible consequences when he was faced with overwhelming difficulties . . . no reason to believe accused requires confinement to assure his rehabilitation to perform honorable and valuable service . . . if confinement or punitive discharge is imposed, it will result in severe punishment of a man for taking care of his family; it will punish his family more than it will punish the accused . . . recommend that any punishment imposed not extend to confinement or punitive discharge.

**15. Visual aids.** None.

## Appendix IV

### MOTIONS

**(A) Motion to dismiss because of former punishment.** At the trial of Private Jones for leaving his post as a sentinel before he was regularly relieved, in time of peace, in violation of Article 118, the defense, after arraignment but before pleas were entered, moved that the charges be dismissed on the ground of former punishment. At the hearing the defense showed through the testimony of the accused's company commander that on the morning after the alleged offense the company commander restricted the accused to the limits of the company area, that thereafter he did not permit the accused to participate in the regular training of the company, that the accused remained in such restriction for a period of 7 days, that on each of these days the accused performed kitchen police duties from about 0500 hours to about 2000 hours, and that the company commander would not have so restricted the accused had he not been found off his sentinel post. The duty roster of the company was introduced to show that the accused had received no credit on the roster for performing kitchen police duties during the period of restriction. On cross-examination the company commander testified that he had not intended to punish the accused under Article 15, that he had not advised the accused that he was so doing, that he made no entry in the company punishment book pertaining to the accused, and that he felt it necessary to restrict the accused pending trial. To keep the accused occupied, the company commander directed that the accused be assigned to kitchen police duties. The defense argued that the accused had in fact been informally punished for his alleged offense by the company commander under Article 15. The prosecution argued that the testimony of the company commander indicated that the accused was not punished under Article 15. The prosecution also argued that, even assuming the accused was so punished, the offense charged was not a minor offense under the provisions of paragraph 128b of the Manual, as it carried a maximum punishment of confinement for 1 year, and that, therefore, former punishment could not be asserted.

As it appears clear that the offense charged was not a minor offense as defined by paragraph 128b of the Manual and that disciplinary punishment therefor, if administered, would not bar a subsequent trial for the offense, the law officer would deny the motion.

**(B) Motion for severance.** The accused were arraigned at a common trial upon the following charges and specifications:

CHARGE: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Private *Robert D. Crosley*, U.S. Army, Battery B, 45th Field Artillery Battalion, did, at Camp Chatka, California, on or about 17 March 1961, wrongfully have in his possession five ounces, more or less, of a habit-forming narcotic drug, to wit: heroin.

CHARGE: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Private *Rufus Black*, U.S. Army, Battery B, 45th Field Artillery Battalion, did, at Camp Chatka, California, on or about 17 March 1961, wrongfully have in his possession two ounces, more or less, of a habit-forming narcotic drug, to wit: heroin.

Each accused was represented by his own individual defense counsel. Before the pleas were entered, accused Crosley, through his counsel, moved for a severance "on the ground that his defense is antagonistic to the defense of accused Black."

To determine whether the defenses are in fact antagonistic and, at the same time, to protect the rights of each accused from prejudice, the law officer should call for an in-court (side-bar) conference or an out-of-court hearing in which to confer with counsel for both sides and the accused. For instance, if he should determine that an out-of-court hearing would be appropriate, the law officer should take the action indicated below:

LO: The court will recess for a few minutes so that defense counsel may present certain additional matters to the law officer outside the presence of the court. The two accused, counsel for both sides, and the reporter will remain in the courtroom for the hearing. If the court members will remain in the vicinity of the courtroom, I shall advise them when the hearing has ended. (Note. The president of a special court-martial cannot hold a side-bar conference.)  
The court recessed at 1400 hours, 8 April 1961.

After the members of the court leave the courtroom, the law officer may proceed as follows:

LO: The Reporter will record these proceedings. Let the record show that it is now 1400 hours, 8 April 1961, and that the two accused and their counsel, trial counsel, the law officer, and the reporter are present for a conference outside the presence of the members of the court. Will defense counsel state the substance of the antagonistic defenses.

DC: (For Crosley) It is the contention of accused Crosley that the heroin alleged to have been found in his possession was given to him by accused Black for safe-keeping several days before it was found in Crosley's duffel bag by the battery commander. It is also Crosley's contention that the heroin was wrapped in a small package and that he was not informed by Black as to the contents of the package and did not know that the package contained heroin until after it had been found by the battery commander. On the other hand, accused Black denies ever having had possession of heroin and contends that the heroin found in a similar package in the glove compartment of his jeep had been placed there without his knowledge.

LO: The motion for severance is granted. Has trial counsel a suggestion as to which accused should be tried first?

TC: The prosecution would like to proceed now with the trial of accused Black.

LO: Is this satisfactory to defense counsel?

DC: (for Black) It is.

LO: These proceedings will be transcribed by the reporter and included in the record of trial. It is now 1405 hours, 8 April 1961. Will the trial counsel advise the president of the court that we are ready to proceed.

(C) *Motion for appropriate relief because of misleading defect in specification.*  
The accused was arraigned on 11 March 1961 on the following charge and specification:

CHARGE: Violation of the Uniform Code of Military Justice, Article 111.

Specification: In that Private Frank D. Black, U.S. Army, Company D, 326th Infantry, did, at Camp Arlington, Virginia, on or about 1 March 1961,

in the motor pool area operate a vehicle to wit: a truck, in a reckless manner while drunk and did thereby cause said vehicle to strike and injure Donald E. Carter.

Before the accused's pleas were entered, the defense counsel made a motion for appropriate relief, stating that the specification did not fairly apprise the accused of the particular offense charged, in that drunken driving and reckless driving are separate offenses and the specification might be interpreted as alleging either or both. The defense counsel contended further that if it was intended to charge the accused with reckless driving, the specific acts or omissions of the accused constituting reckless driving should be alleged in the specification.

As the specification is duplicitous and misleading in the manner indicated by defense counsel, the law officer should take the action indicated below:

LO: The motion for appropriate relief is sustained. Is trial counsel prepared to propose an appropriate amendment to the Specification?

TC: I propose that the Specification be amended to allege drunken driving by deleting the words "in a reckless manner."

LO: Let the record show that the Specification is formally amended by striking out the words "in a reckless manner." Is defense counsel now prepared to defend the accused on the Specification as amended?

DO: The accused requests a continuance to 15 March 1961 to prepare the defense.

LO: Is a continuance to 15 March 1961 satisfactory to trial counsel?

TC: It is.

LO: The trial will be continued to 15 March 1961. Has the prosecution any other cases to try at this time?

TC: I have nothing further.

The court adjourned at 0930 hours, 11 March 1961.

(D) *Motion for mistrial.* Accused was tried for assault with intent to commit rape. After the court was convened, the trial counsel inquired whether the law officer or any member of the court was aware of facts which might form the basis for a challenge against him. This colloquy followed:

MEMBER: I was a member of a court which tried the accused for an offense which related to the type of offense involved today. I was one of the first officers in the battalion approached by the CID on another charge generally in the area of the type of offense involved today. I was consulted by a psychiatrist who interviewed the accused—

LO: That is sufficient.

MEMBER: I am aware of certain polygraph examinations which established that the accused is a liar.

LO: That is sufficient.

Defense counsel should move for a mistrial asserting that the disclosures made by the member precluded the possibility of a fair and impartial trial. This results from a belief on the defense counsel's part that the harmful effect of the disclosures cannot be obliterated by an instruction by the law officer and a fair and impartial hearing cannot be given the accused.

## **Appendix V**

### **DESCRIBING WITNESSES' GESTURES\***

\* \* \* \* \*

**A. I would say it was about as far as from here to the door in the rear of the courtroom.**

**TC: Will the defense agree that the distance indicated by the witness is about 30 feet?**

**DC: I would agree that it is between 25 and 30 feet.**

**TC: Let the record show that the distance indicated by the witness is between 25 and 30 feet.**

**A. Then he reached in his pocket like this, and took out a knife. He opened it, held it like this and began to walk toward the top kick, like this.**

**TC: Let the record show that as the witness testified, he put his right hand in his right front trousers pocket and then withdrew his right hand from his pocket, held his hand at his right side about belt high, assumed a slightly crouching position, and walked slowly forward. Is this agreeable to the defense?**

**DC: No objection.**

**LO: The record may so indicate.**

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\* See 18.

## **Appendix VI**

### **INTRODUCTION OF DOCUMENTARY AND REAL EVIDENCE**

(A) The following are examples of the manner in which the more common types of documentary evidence may be introduced in evidence by the trial counsel and the defense counsel. Note the difference in form between rulings by the law officer of a general court-martial and rulings by the president of a special court-martial.

*1. Authenticated extract copies of morning reports.* See paragraphs 148 and 144 of the Manual.

TC: Request that the reporter mark this exhibit for identification.

REPORTER: This will be Prosecution Exhibit 1 for identification.

TC: (Offering Prosecution Exhibit 1 for identification to DC.) Does the defense care to examine this?

DC inspects the document.

TC: Prosecution Exhibit 1 for identification is offered in evidence as Prosecution Exhibit 1.

DC: (No objection.) (I object because. . . .)

LO (PRES): (Subject to objection by any member of the court), the objection of defense counsel is overruled (sustained). Prosecution Exhibit 1 for identification is (is not) admitted in evidence as Prosecution Exhibit 1.

*Note.* This procedure is applicable to a duly authenticated copy of any official record. For example, confinement could be shown by an authenticated extract copy of the guard report; previous convictions could be shown by an authenticated extract copy of the accused's service record.

#### **2. Checks.**

TC: After accused bought the radio, what did he do then, if anything?

A. He wrote a check in payment for it and gave it to me.

TC: Request that the reporter mark this exhibit for identification.

REPORTER: This will be Prosecution Exhibit 2 for identification.

TC: (Offering Prosecution Exhibit 2 for identification to DC.) Does the defense care to examine this?

DC inspects the document.

TC (TO WITNESS): I hand you Prosecution Exhibit 2 for identification. Do you recognize this exhibit?

A. Yes, that's the check the accused gave me.

Q. Do you know who signed the check?

A. Yes.

Q. Who signed it?

A. The accused did.

Q. Referring to the reverse side of the check, Prosecution Exhibit 2 for identification, do you know whose signature appears there?

A. Yes, mine. I indorsed the check before I deposited it to my account in the bank.

Q. Did you ever see the check, Prosecution Exhibit 2 for identification, after you deposited it in the bank?

A. Yes, it was returned to me by the bank a few days later.

Q. Did you ever receive payment on the check?

A. No.

TC: Prosecution Exhibit 2 for identification is offered in evidence as Prosecution Exhibit 2.

DC: (No objection.) (I object because. . . .)

LO (PRES): (Subject to objection by any member of the court), the objection of defense counsel is overruled (sustained). Prosecution Exhibit 2 for identification is (is not) admitted in evidence as Prosecution Exhibit 2.

**3. Letters.** See paragraph 143b of the Manual.

TC: After the check, Prosecution Exhibit 2, had been returned to you by the bank, what, if anything, did you do?

A. I wrote a letter to accused advising him that his check had been returned to me by the bank. A few weeks later I received a letter from the accused in answer to my letter.

TC: Request that the reporter mark this exhibit for identification.

REPORTER: This will be Prosecution Exhibit 3 for identification.

TC: (Offering Prosecution Exhibit 3 for identification to DC). Do you care to examine this exhibit?

DC inspects the document.

TC (TO WITNESS). I hand you Prosecution Exhibit 3 for identification. Do you recognize this exhibit?

A. Yes.

TC: How do you recognize it?

A. It's the letter I received from the accused concerning his check. I am familiar with his handwriting and recognize his signature.

Q. How did you receive that letter, Prosecution Exhibit 3 for identification?

A. It came through the regular mail.

TC: Prosecution Exhibit 3 for identification is offered in evidence as Prosecution Exhibit 3.

DC: (No objection.) (I object because. . . .)

LO (PRES): (Subject to objection by any member of the court), the objection of defense counsel is overruled (sustained). Prosecution Exhibit 3 for identification is (is not) admitted in evidence as Prosecution Exhibit 3.

**4. Photographs.** See paragraph 144e of the Manual for the rules concerning the admissibility of photographs.

DC: On 16 June 1961, did you go to the motor pool of the 56th Field Artillery Battalion?

A. Yes, sir.

Q. What did you do there, if anything?

A. I took a photograph of a jeep in the parking lot there.

DC: Request that the reporter mark this exhibit for identification.

REPORTER: This will be Defense Exhibit A for identification.

DC: (Offering Defense Exhibit A for identification to TC.) Does the prosecution care to examine this?

TC inspects the exhibit.

DC (TO WITNESS): I hand you Defense Exhibit A for identification.

Do you recognize it?

A. Yes, sir. I do.

Q. What is it?

A. That is the photograph which I took on 16 June 1961 of a jeep that was parked in the motor pool of the 56th Field Artillery Battalion.

Q. Is Defense Exhibit A for identification an accurate representation of the jeep as it looked to you at the time the picture was taken?

A. Yes, sir.

DO: Defense Exhibit A for identification is offered in evidence as Defense Exhibit A.

TC: I object because it has not been shown that this jeep, photographed on 16 June 1961, is the same jeep which was involved in the accident on the evening of 15 June 1961.

LO (PRES): (Subject to objection by any member of the court), the objection of trial counsel is overruled (sustained). Defense Exhibit A for identification is (is not) accepted in evidence as Defense Exhibit A.

**5. Maps, sketches, and charts.** Counsel must keep in mind at every stage of the trial that while the court is present and can see what occurs, the reviewing authorities are limited to what appears in the record. Therefore, if a sketch appears on a blackboard or easel, and thus cannot be attached to the record of trial, an accurate reproduction of the matter shown thereon must be made and included in the record of trial. The following illustrates the proper use of a small sketch which has been introduced in evidence:

TC (TO WITNESS): Can you point out on Prosecution Exhibit 5 where you were standing at the time you say you saw the accused?

A. Yes, sir. Right here at the corner of this building.

Q. Take this red pencil and mark the spot with the capital letter "A."

A. (Witness takes pencil and marks exhibit.)

Q. Can you point out on Prosecution Exhibit 5 the place where the accused was when you first saw him?

A. Yes, sir. He was right about here, walking north.

Q. Mark that spot "B" with the red pencil.

A. (Witness marks exhibit.)

Q. Now will you draw a line with the red pencil indicating the route you saw the accused take and indicate with an arrow on that line the direction of travel.

A. (Witness marks exhibit.) Well, he went along the side of this building; then he crossed over this field and entered this building by the side door.

Q. Mark with the letter "C" the place where he entered the door.

A. (Witness marks exhibit.)

(B) Items of real evidence, such as clothing, weapons, and jewelry, are introduced in evidence in the same way as documents are introduced, that is, they must be identified, shown to be relevant and material, and then offered in evidence. Unless the testimony in the case has developed a full and accurate description of such objects, marks, or wounds, the record of trial should include such a description, since it is ordinarily either impossible or impractical to attach them to the record. For example:

TC: What did you do after signing in?

A. After signing in at the orderly room, I went to my quarters.

Q. What was the condition of your quarters?  
A. I found my personal belongings scattered all over the room.  
Q. What did you do then?  
A. I checked to see if anything was missing.  
Q. Was anything missing?  
A. Yes. My radio.  
Q. Can you describe this radio?  
A. Yes. It is a Zenith, four-tube, table-model radio.  
Q. If you were to see this radio again, would you be able to distinguish it from other radios of the same make and type?  
A. Yes. My radio has a black plastic case. The dial hand is bent toward the left, and one of the numbers on the dial is blurred.

TC: Request that the reporter mark this exhibit for identification.

REPORTER: This will be Prosecution Exhibit 4 for identification.

TC: (Offering Prosecution Exhibit 4 for identification to DC.) Does the defense care to examine this?

DC inspects the exhibit.

TC (TO WITNESS): I hand you Prosecution Exhibit 4 for identification. Have you seen it before?

A. Yes, it's mine. It is the radio that I told you was missing from my room.

Q. After you discovered it to be missing from your room, when did you next see the exhibit?

A. I saw it the following morning.

Q. Where did you see it?

A. I saw the radio in the accused's wall locker.

TC: Prosecution Exhibit 4 for identification is offered in evidence as Prosecution Exhibit 4, and permission is requested to withdraw it at the conclusion of the trial and substitute a written description therefor.

DC: No objection.

LO (PRES.): (Subject to objection by any member of the court), Prosecution Exhibit 4 for identification is admitted in evidence as Prosecution Exhibit 4, and a description may be substituted.

## Appendix VII

### DEPOSITIONS\*

#### (A) Request to take oral deposition

#### HEADQUARTERS, FORT SAINT CLOUD, MINNESOTA OFFICE OF THE STAFF JUDGE ADVOCATE

FSCJA-MJ-A250 8 February 1962  
SUBJECT: Request to take Deposition, United States v. Thomas Sublet,  
RA12345678, Headquarters Company, 59th Quartermaster Battalion  
Fort Saint Cloud, Minnesota  
TO: Commanding General  
Fort Saint Cloud, Minnesota

1. Pursuant to the provisions of paragraph 117a, MCM, 1951, request permission to take the oral deposition of Master Sergeant Henry J. Simms, Headquarters Company, 59th Quartermaster Battalion, at the Office of the Staff Judge Advocate, Fort Saint Cloud, Minnesota, at 0900 10 February 1962. Said deposition is to be taken in connection with the charges and specifications in the pending General Courts-Martial against Private Thomas Sublet, Headquarters Company, 59th Quartermaster Battalion, alleging the willful disobedience of Master Sergeant Simms' order.

2. Master Sergeant Simms has been ordered to depart his present station on 12 February 1962 and to proceed to Headquarters, European Command, APO 408, New York, N.Y., on a permanent change of station. The pretrial investigation indicates that he will be a necessary prosecution witness concerning the specifications and charge, alleging willful disobedience of orders. It is anticipated that on oral deposition Master Sergeant Simms will testify that:

On the afternoon of 6 February 1962, while he was First Sergeant of Headquarters Company, 59th Quartermaster Battalion, he gave an order to Private Sublet to mow the lawn in front of the Company Dayroom (Bldg. T-400). This order was given in the presence of Lieutenant Ferguson. He and Lt Ferguson then left the accused who said nothing concerning the order. When he returned about five minutes later Private Sublet had disappeared without mowing the lawn. He did not see Private Sublet again until the following day.

HIRAM TRUST  
Capt, JAGC  
Trial Counsel

\*Counsel should carefully read paragraphs 115, 117, MCM, 1951, and paragraph 22 of this pamphlet before using any of the forms contained in this appendix.

Copy—Sublet

Tort

Pleas

1st Ind.

FSCCS A-250

9 February 1962

SUBJECT: Taking of Deposition, United States v. Thomas Sublet, Pvt E-2, RA12845678, A Company, 59th Quartermaster Battalion, Fort Saint Cloud, Minnesota.

1. Pursuant to the provision of Paragraph 117, Manual for Courts-Martial, United States, 1951, Captain Omar Pleas, JAGC, Office of the Staff Judge Advocate, Fort Saint Cloud, Minnesota, is directed to cause to be taken the deposition of the following named person, to be used in evidence in the trial by court-martial entitled United States v. Private (E-2) Thomas Sublet, Headquarters Company, 59th Quartermaster Battalion, Fort Saint Cloud, Minnesota:

M/Sgt Henry J. Simms, Headquarters Company, 59th Quartermaster Battalion, Fort Saint Cloud, Minnesota.

2. Captain Hiram Trust, JAGC, and Captain Roger Tort, JAGC, this headquarters, each certified in accordance with Article 27b, Uniform Code of Military Justice, are directed to represent the prosecution and the defense, respectively, in the taking of the subject deposition to be used in the court-martial of Private (E-2) Thomas Sublet.

FOR THE COMMANDER:

BARTIL H. BOTCH

Captain, AGC

Asst Adjutant General

*(B) Suggested form for deposition on oral examination*

UNITED STATES

v8  
Pvt E-2 Thomas SUBLET, JR., RA12845678, Headquarters, Company, 59th Quartermaster Battalion, Fort St. Cloud, Minnesota

*DEPOSITION*

TC: Let the record reflect that this deposition proceeding commenced at 0900 hours, 10 February 1962, at the Office of the Staff Judge Advocate, Fort St. Cloud, Minnesota, pursuant to authority attached hereto as Inclosure 1. Present at the taking of the depositions are:

Captain Omar Pleas, Officer Taking Deposition.

Captain Hiram Trust, Trial Counsel.

Captain Roger Tort, Appointed Defense Counsel.

Pvt. E-2 Thomas Sublet, Accused.

M/Sgt Henry J. Simms, Deponent.

Let the record further reflect that Sergeant Simms is present to testify as a witness for the prosecution in the forthcoming general court-martial appointed by paragraph 22, Special Orders No. 18, Headquarters, Fort Saint Cloud, Minnesota, dated 23 January 1962, case of United States vs Thomas Sublet, Pvt E-2.

Let the record reflect that the trial counsel administered the necessary oath to the reporter, Mrs. Norine Scribble, and that the deponent, Master Sergeant Simms, was likewise sworn.

**DIRECT EXAMINATION**

TC: Will you state your full name, grade, organization, and armed force?  
A. Henry J. Simms, Master Sergeant, RA13691284, Headquarters Company, 59th Quartermaster Battalion, United States Army, Fort Saint Cloud, Minnesota, sir.

Q. Do you know the accused in this case?

A. I do, sir.

Q. If you see him present, will you point him out and identify him by name?

A. Private Thomas Sublet, sir (indicating accused).

TC: Let the record reflect that the deponent indicated the accused as he identified him by name. (To witness) Directing your attention to 6 February 1962, what were your military duties on that day?

A. I was First Sergeant of Headquarters Company, 59th Quartermaster Battalion.

TC: On 6 February 1962, about an hour after you gave the accused an order to mow the lawn, what did Lieutenant Ferguson relate to you concerning the accused?

DC: I object to the last question as calling for hearsay.

Officer Taking Deposition: The objection of the defense counsel will be noted and made part of this record.\*\*

TC: Will the reporter mark this document as Deposition Exhibit (1) for identification. Sergeant Simms, do you recognize Deposition Exhibit No. (1)?

A. Yes, this is an informal receipt we use in the unit. The amount of tools and the date of the transaction was written on it by me and it was signed by Private Sublet.

TC: Let the record reflect that defense counsel was shown and examined Deposition Exhibit No. (1) for identification.

**CROSS EXAMINATION**

DC: I have no further questions.

TC: Will you state where you can be located on 14 February, the proposed date of this trial?

A. I am being transferred on a permanent change of station. My address on 14 February will be Headquarters, European Command, APO 408, New York, N.Y.

TC: The witness will be transferred before this deposition is typed. Will the defense waive the deponent's signature on the deposition?

DC: We will.

TC: Let the record reflect that these proceedings terminated at 1650 hours this date.\*\*\*

\*\*The officer taking the deposition makes no ruling on objections. The objections made at the taking of the deposition are ruled on by the law officer (President of special courts-martial) at the trial.

\*\*\*The officer taking the deposition should not conduct an independent examination of the witness. The appropriate certificate of the officer taking the deposition appears following this point (see DD Form 456 or AF JAG Reporter No. 1-1962, as appropriate).

**(C) Presentation of deposition to court.** Depositions may be presented to the court substantially as follows:

TO: I request that the reporter mark this exhibit Prosecution Number 1 for identification.

**REPORTER:** This will be Prosecution's Exhibit 1 for identification. (Exhibit is handed to the law officer.)

LO : (Examines the exhibit.) Proceed.

TC (Offering Prosecution Exhibit 1 for identification to defense counsel): Does defense counsel care to examine this?

DC: Yes, thank you. (Defense counsel inspects the exhibit.)

TC: Prosecution, Exhibit 1 for identification, the deposition of Master Sergeant Henry J. Simms is offered into evidence as Prosecution Exhibit 1. The testimony of this witness is offered by deposition because he presently resides in the European Command, APO 408, New York, N.Y.

DO: (No objection.) (I object because. . . .) \*\*\*\*

LO: The objection of the defense counsel is (overruled) (sustained).  
TC: With the permission of the court, I will now read Prosecution  
Exhibit 1 for identification.

LO: Exhibit 1 for identification.  
You may proceed. (Trial counsel reads from the deposition.)  
NOTE: Defense counsel should be allowed to read his cross-examination if he so requests.

LO: examination if he so requests.

That portion of the deposition testimony just read by the trial counsel (and the defense counsel) from Prosecution Exhibit 1 for identification is admitted in evidence. [(The deposition itself is not admitted, therefore, the court may not take it into closed session.)]

\*\*\*\*A failure to object on the ground that the deponent has not been shown to be unavailable waives the right to require such a showing.

## **Appendix VIII**

### **STIPULATIONS**

#### ***(A) Oral stipulations as to fact.***

TC: With the consent of the accused, the prosecution and the defense stipulate as follows: The accused surrendered himself to military authorities at the post guardhouse, Camp St. Cloud, Minn., on 1 November 1961. At the time of his surrender, he was dressed in an OD uniform.

#### ***(B) Oral stipulations as to expected testimony.***

TC: With the consent of the accused, the prosecution and the defense stipulate that if John Jones were present in court and sworn as a witness, he would testify substantially as follows: "My name is John Jones. I am a member of the Minneapolis, Minn., Police Department. On 1 November 1961, Private Joe James came to me at the Bryant Avenue Police Station and told me that he was AWOL from his Army unit and wanted to turn himself in. At the time, Private Joe James was dressed in an OD uniform."

#### ***(C) Written stipulations.*** Written stipulations as to fact and as to expected testimony usually are placed before the court in the form of exhibits. For example:

TC: Request that the reporter mark this exhibit for identification.

REPORTER: This will be Prosecution Exhibit 8 for identification.

TC: (Offering Prosecution Exhibit 8 for identification to DC.) Does the defense care to examine this?

DC: Yes, thank you.

DC inspects the exhibit.

TC: (After showing the exhibit to defense counsel.) Prosecution Exhibit 8 for identification, which is a stipulation (as to fact) (as to expected testimony) entered into between the trial counsel and the defense counsel and the accused, is offered in evidence as Prosecution Exhibit 8.

**(D) Form for written stipulation as to fact.**

Camp St. Cloud, Minnesota

15 November 1961

**Stipulation**

It is hereby stipulated and agreed by and between the prosecution and the defense, with the consent of the accused, that:

The accused surrendered himself to military authorities at Camp St. Cloud, Minn., on 1 November 1961.

*John J. Arthur*

JOHN J. ARTHUR

*Captain, JAGC, Trial Counsel*

*George R. Johnson*

GEORGE R. JOHNSON

*Captain, JAGC, Defense Counsel*

*Pete Smith*

PETE SMITH

*Accused*

**(E) Form for written stipulation as to expected testimony.**

Camp St. Cloud, Minnesota

15 November 1961

**Stipulation**

It is hereby stipulated and agreed by and between the prosecution and the defense, with the consent of the accused, that if John Jones, 545 Lyndale Ave. So., Minneapolis, Minn., were present in court and sworn as a witness, he would testify substantially as follows:

On 1 November 1961, I was a member of the Minneapolis, Minn., Police Department. On that date, Joe James came to me at the Bryant Avenue Police Station and told me that he was AWOL from his Army unit and wanted to turn himself in. At the time, Joe James was dressed in an OD uniform.

*John J. Arthur*

JOHN J. ARTHUR

*Captain, JAGC, Trial Counsel*

*George R. Johnson*

GEORGE R. JOHNSON

*Captain, JAGC, Defense Counsel*

*Joe James*

JOE JAMES

*Accused*

## **Appendix IX**

### **REQUEST FOR COURT TO TAKE JUDICIAL NOTICE**

A request by the trial counsel or the defense counsel that the court take judicial notice of a fact may be made substantially as follows:

TC: Request that the reporter mark this exhibit for identification.

REPORER: This will be Prosecution Exhibit 6 for identification.

TC: (Offering Prosecution Exhibit 6 for identification to DC.) Does the defense care to examine this exhibit?

DC inspects the exhibit.

TC: The prosecution requests that the court take judicial notice that the motor vehicle speed limit on Camp St. Cloud, Minn., on 28 June 1961, was 10 miles per hour. To assist the law officer and reviewing authorities the prosecution offers to the court Prosecution Exhibit 6 for identification. Prosecution Exhibit 6 for identification is a true extract copy of paragraph 8a, Post Traffic Regulations, Camp St. Cloud, Minn., dated 14 June 1961, supporting the fact to be judicially noted.

DC: It will be admitted that such regulation was in effect on the evening of 28 June 1961.

LO: The court will take judicial notice that on 28 June 1961 the motor vehicle speed limit on Camp St. Cloud, Minn., was 10 miles per hour. Prosecution Exhibit 6 for identification is admitted in evidence as Prosecution Exhibit 6.

**Appendix X**

**OFFER OF PROOF**

DO: I call your attention to 25 June 1960. Did you have a conversation with the accused, Private Robert Stark, on that date?

A. Yes, I did.

Q. Will you state the circumstances under which that conversation took place?

TC: I object to this course of questioning on the ground that whatever transpired during an alleged conversation between the accused and this witness 3 months before the alleged commission of the offense has no bearing on the issues in this case.

LO (PRES): (Subject to objection by any member of the court), the objection of trial counsel is sustained. The defense counsel will please confine himself to matters which are relevant.

DO: Let the record indicate that if Private Benedict Brown, this witness, were permitted to testify, he would state that during a conversation between the accused and Private Brown at Camp St. Cloud, Minn., on 25 June 1960, the accused stated that he had purchased a ticket to the football game which was to take place in Minneapolis, Minn., during the afternoon of 26 September 1960, the time the offense is alleged to have been committed in Rochester, Minn. During that conversation, the accused further stated that he intended to go to Minneapolis on 26 September to see the football game.

LO (PRES): The statement of the defense counsel is solely for the record, and the court is instructed that it is not evidence in this case and should not be considered as such.

*Note.* In a general court-martial case, if it appears that the offer of proof might be prejudicial to the rights of the Government, the law officer may direct that the statement be presented at an out-of-court hearing or that it be submitted in writing and attached to the record of trial as an appellate exhibit.



## Appendix XII

### SUGGESTED WEEKLY REPORT OF TRIAL COUNSEL\*

Reports Control Symbol  
JAG-3

Headquarters

Camp St. Cloud, Minnesota

1 February 1962

SUBJECT: Weekly Report of Trial Counsel.

THRU: Lieutenant Colonel Albert G. Washington, JAGC, Hq, Camp St. Cloud, Minnesota.

TO: Commanding General, Camp St. Cloud, Minnesota.

Report rendered for week ending Friday, 1 February 1962, by Captain John J. Arthur, trial counsel for the general court-martial appointed by par. 35, SO 56, Hq, Camp St. Cloud, Minn., 17 Feb 1962.

a. Cases awaiting trial more than 2 weeks from the date of reference for trial:

<u>Accused</u>	<u>Referred</u>	<u>Cause for delay**</u>	Expected date of trial
Peters, Cpl Frank E., Btry	6 Jan 62	Awaiting depositions for- warded 17 Jan 62	17 Feb 62

b. Cases tried but in which the record of trial was not forwarded within 2 weeks from the date of reference for trial:

<u>Accused</u>	<u>Referred</u>	<u>Tried</u>	<u>Cause for delay**</u>	Expected date record will be forwarded
James, Pvt Tom D., Co A, 50th Eng Bn	10 Jan 62	15 Jan 62	In hospital Jan 62	17-21 Jan 62 5 Feb 62
Potts, Pfc John W., 50th QM Co.	11 Jan 62	16 Jan 62	Reporter has back- log of 2 cases be- cause of illness.	Reporter has back- log of 2 cases be- cause of illness.

JOHN J. ARTHUR  
Captain, JAGC, Trial Counsel

\*This form is not mandatory. Local commanding officers may direct that no report is required or prescribe the form of report to be made. However, unless otherwise directed by the convening authority, this report is to be submitted weekly to the latter, through the president of a special court-martial or the law officer of a general court-martial (MOM, 446).

\*\*Use additional page if space provided is not adequate.

### **Appendix XIII**

## **STATEMENT OF ACCUSED REGARDING REPRESENTATION BY APPELLATE DEFENSE COUNSEL\***

**SUBJECT: Request for Appellate Defense Counsel**  
**THROUGH: Commanding General**

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### **GCM AUTHORITY**

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### **ADDRESS**

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**TO: The Judge Advocate General of the Army**  
**Department of the Army**  
**Washington 25, D.C.**

a. Having been advised that in the event my case is referred to a board of review I have the right to be represented before the board of review by appellate defense counsel appointed by The Judge Advocate General of the Army, or by civilian counsel provided by me, or both counsel, pursuant to the Uniform Code of Military Justice, Article 70, I

----- desire to be represented before the board of review by appellate defense counsel appointed by The Judge Advocate General of the Army; I understand that I may communicate directly with appointed military appellate defense counsel on legal matters relating to the merits of my case and that such communication should be addressed to: Office of the Defense Appellate Division, Office of The Judge Advocate General, Department of the Army, Washington 25, D.C.; ----- intend to retain at my own expense civilian counsel, whose name and address is -----

----- have retained or have taken action to retain civilian counsel whose name and address is -----

----- intend to retain civilian counsel whose name and address will be furnished the Office of The Judge Advocate General of the Army. ----- do not desire to be represented by appellate defense counsel before the board of review.

\*In Air Force cases, use AF Form 804, Request for Appellate Defense Counsel.

1009

b. The following errors or other matter are urged as grounds for relief:

Date \_\_\_\_\_

Signature of Accused

Name typed

Grade

SN

Note. This document should be prepared in quintuplet and all copies should be signed by accused. The original should be placed in the original record of trial, and a copy placed in each of the other two copies of the record of trial forwarded to The Judge Advocate General. The accused should be furnished with one copy and the Staff Judge Advocate should retain a copy.



counsel prior to the time the board of review takes its final action in the case may be regarded as a waiver of his right to appellate representation.

(3) That his request, if any, to be represented by appellate defense counsel should be accompanied by a statement of the errors or other matters to be urged as grounds for relief and that, if desired, his trial defense counsel will prepare such statement for him.

(4) That, in the event his case is reviewed by a board of review, he may, within 30 days after he is notified of the decision of the board of review, petition the United States Court of Military Appeals for a grant of review and that, if such review is granted, the court need take action only with respect to issues specified in the grant of review and only with respect to matters of law.

(5) That his right to request representation by appellate defense counsel before the United States Court of Military Appeals or the board of review includes the right to be represented by civilian defense counsel if provided by him.

(6) That, if his sentence as approved by the convening authority extends to death, dismissal, dishonorable or bad conduct discharge, or confinement for 1 year or more, and is based upon a conviction for an offense committed after 30 May 1951, he may, within 1 year after the sentence is approved by the convening authority, petition The Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court.

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JOHN C. DOE  
Captain, JAGC  
Trial Defense Counsel

By Order of the Secretaries of the Army and the Air Force:

EARLE G. WHEELER,

*General, United States Army,  
Chief of Staff.*

Official:

J. C. LAMBERT,  
*Major General, United States Army,  
The Adjutant General.*

CURTIS E. LEMAY,  
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R. J. PUGH,

*Colonel, United States Air Force,  
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12 AF (SJA), Waco, Tex	48
3 AF (SJA), APO 125, New York, NY	85
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MAAMA (SJA), Olmsted AFB, Pa	5
MOAMA (SJA), Brookley AFB, Ala	5
OOAMA (SJA), Hill AFB, Utah	4
OCAMA (SJA), Tinker AFB, Okla	8
ROAMA (SJA), Griffiss AFB, NY	8
SMAMA (SJA), McClellan AFB, Calif	7
SAAMA (SJA), Kelly AFB, Tex	2
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APCS (SJA), Orlando AFB, Fla	8
ARRC (SJA), 3800 York St, Denver 5, Colo	1
BSD (SJA), AF Unit Post Office, Los Angeles 45, Calif	5
SSD (SJA), AF Unit Post Office, Los Angeles 45, Calif	5
TUSLOG (SJA), APO 254, New York, NY	17
818 Air Div (SJA), APO 289, San Francisco, Calif	12