

Note. If the accused pleaded guilty at an Article 89(a) session held prior to assembly, and findings of guilty were entered, the MJ should announce the findings at this time. A sample announcement which may be used when the accused has pleaded guilty is as follows:

MJ (to the court): I explained to the accused the meaning and effect of his pleas. He understood them and I accepted them. Pursuant to my duty as military judge, I advise you that in accordance with the accused's plea(s) of guilty, he has been found (of all the specifications and charges) (____): Guilty. No further finding is required of the court on the charges and specifications to which a finding of guilty has been entered.

Presentation of prosecution case

TC: The prosecution has (no) (an) opening statement.

Note. An opening statement is not required, but one should be made when it will clarify the procedure to be followed by the TC. See MCM 44g(2) as to matters that may be included in this statement when one is made. In this connection, also see MCM 44f(8).

Oral stipulation

TC: With the consent of the accused, the prosecution and defense stipulate _____.

Note. Prior to the acceptance of any stipulation, the MJ should determine that the accused joins in the stipulation. See MCM 154b.

MJ: The stipulation is (not) accepted.

TC: The prosecution calls as a witness _____.

Note. The witness reports to the president. When the witness is sworn, he faces the TC, raises his right hand, and the TC administers the oath.

Introduction of witness

TC: You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. (So help you God.)

WITNESS: I do.

Note. A witness may be sworn by the oath indicated or by any oath recognized by his religion, or by such acts or ceremony as he declares binding on his conscience (MCM 112d). As to the competency of witnesses in general, see MCM 148a.

Note. The witness now takes his seat in the witness chair. Usually the first two questions asked every witness are formal and are asked by the TC, whether the witness is called by him, by the defense, or by the court.

Formal questions

TC: State your full name, (grade, organization, station, and armed force) (occupation and residence).

WITNESS: _____

TC: Do you know the accused?

WITNESS: _____

Note: If the witness states that he knows the accused, he will normally be asked to point to the accused if he sees him in the courtroom, and to state the name of the accused, if he knows. In appropriate cases, it will not be necessary to ask the second question, such as when the identity of the accused has already been established.

Direct examination

Note. Questions and answers are recorded exactly as spoken. Physical events which occur, and witnesses' identifications and illustrations given by motions, by gestures, or by reference to persons or other physical objects within the court's view, will be described as accurately as possible by the reporter, with assistance of the TC, DC, and MJ if necessary. If a witness points or gestures, the record must indicate what he points to or how he gestures.

Use of interpreter

Note. At the beginning of testimony given through an interpreter, the record will indicate that an interpreter was used and was sworn or had been previously sworn, the questions and answers are recorded in the manner indicated above. See MCM

114e as to form of oath and MCM 50b as to technique of questioning through an interpreter.

Note. At the conclusion of direct examination the TC announces:

TC: The prosecution has no further questions.

Note. After the prosecution has concluded the direct examination of a witness, the DC cross-examines or declines to cross-examine the witness. See MCM 149b(1).

DC: The defense has no (further) questions.

Note. If the defense cross-examines the witness, the TC may conduct a redirect examination; after he has concluded, the DC may conduct a recross-examination. See MCM 149b(2). When both the TC and DC have concluded their questions the TC asks the court:

TC: Are there any questions by the MJ or the court?

Note. Any member wishing to question the witness first secures the permission of the MJ. The MJ may limit questioning and may require questions to be submitted to him in writing (MCM 149b(3)). Written questions, whether or not allowed by the MJ, should be appended to the record as appellate exhibits. See MCM 54b.

If either the TC or DC wishes to ask further questions of the witness after his examination has been turned over to the court, permission of the MJ should be secured. These requests should, in general, be granted, subject to the MJ's discretionary power to limit or reject superfluous interrogation. However, if new matter, not properly the subject of cross-examination of the witness during his previous testimony, is elicited by questions of the court or its members, both parties will be permitted to cross-examine the witness upon the new matter. See MCM 149b(3).

When questioning of the witness is concluded, the MJ announces:

MJ: The witness is excused (, subject to recall).

Note. Unless expressly excused from further attendance during the trial, all witnesses will remain subject to call or recall until the trial has been concluded. In an appropriate case (MCM 58f), the witness may be instructed as follows:

MJ: You are instructed not to discuss your testimony in this case with anyone except the counsel or the accused. You will not allow any witness in this case to talk to you about the testimony he has given or which he intends to give. If anyone, other than counsel or the accused, attempts to talk to you about your testimony in this case, you should make the circumstances known to the counsel for the side originally calling you as a witness.

Recalled

Note. When a witness is recalled, the TC reminds the witness, after he has appeared before the court:

TC: You are reminded that you are still under oath.

Objections:

Note. Objections are treated as follows:

TC: What was the accused carrying?

DC: Objection. Any answer to that question is immaterial.

—argument

Note. After hearing pertinent argument, either before the members of the court or out of their presence as appropriate (MCM 57g(2)), the ruling should be made in substantially the following form:

MJ: (The objection of defense counsel is (sustained) (overruled):

Note. Any remarks or testimony ordered stricken are nevertheless *fully recorded*, if a verbatim record is authorized or summarized if no verbatim record is prepared, although they are not considered by the court as evidence (MCM 82b(2)). For example:

TC: What was the color of the shirt that the accused was wearing?

WITNESS: According to what the police officers told me, he was wearing a red shirt.

—motion

DC: I move that answer be stricken as hearsay.

—ruling

MJ: The answer will be stricken, and the court is instructed to disregard it.

Admission for limited purpose

Note. The MJ should give such further instructions in this regard as he deems appropriate. When evidence is admitted only for a limited purpose, the MJ should give appropriate limiting instructions. See MCM 57a(2), 138g, 140a, and 153b (2)(c).

Exhibits:

Note. If documentary evidence or other material things have been admitted in evidence at a previous Article 39(a) session of the trial, counsel may with the permission of the military judge simply read or show the evidence to the court members. If the documentary evidence or other material things have not previously been admitted in evidence, the following procedure should be followed:

—marking for identification

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

Note. The reporter, if authorized, or the TC, is responsible for keeping a list of exhibits marked for identification, and also as finally admitted in evidence. Prosecution exhibits should be numbered consecutively; defense exhibits should be lettered consecutively. They should not be renumbered or relettered when admitted in evidence, but should be admitted by the same number of letter they bore "for identification," even though omissions thereby appear in the sequence of numbers or letters of exhibits finally admitted. Ordinarily, the words "for identification" are lined out when the exhibit is admitted in evidence.

The reporter or TC will mark on the exhibit, or a tag affixed thereto, the appropriate number or letter and state, for example:

REPORTER: This will be Defense Exhibit C for identification.

Note. The exhibit is shown to the other side, which is given an opportunity to examine it.

—identification

DC (to witness): Do you recognize Defense Exhibit C for identification?

WITNESS: I do.

DC: What is it?

WITNESS: It is a watch I found in the accused's pocket when I searched him.

DC: How do you know it is the same one?

WITNESS: _____.

Note. When counsel is ready to offer the exhibit in evidence, he states to the court:

—offer

DC: Defense Exhibit C for identification is offered in evidence as Defense Exhibit C [and permission is requested to withdraw it at the conclusion of the trial and substitute (a written description) (true copy) (photograph) therefor].

—objection

TC: I object because _____.

Note. An exhibit need not be offered in evidence when the witness refers to it but may be held for introduction later in the trial. However, opposing counsel must be given an opportunity to examine it in order that proper cross-examination of the witness in regard to the exhibit may be conducted.

—ruling

Note. After the offer is made, cross-examination may be conducted by opposing counsel, and other evidence may be offered and arguments made by either side prior to a ruling by the MJ as to whether the exhibit will be admitted in evidence. At his discretion, with or without request by either counsel, the MJ may direct that these arguments be heard in an out-of-court hearing. See MCM 57g(2).

—description of article for the record

MF: The objection is (sustained) (overruled). [Defense Exhibit C for identification is admitted in evidence as Defense Exhibit C] [and a (description) (true copy) (photograph) may be substituted].

Note. Unless the testimony of a witness has developed a full and accurate description of an object to be withdrawn later (MCM 54d), counsel or the MJ

should at this time give a detailed verbal description of the object for the record. Any description substituted for real evidence should be accepted by both sides. If there is any disagreement, it will be resolved by a ruling of the MJ.

Note. If an exhibit is marked for identification but not admitted in evidence, either it, or a description, true copy, or photograph of it should be appended to the record (MCM 54d).

Note. If a writing which is to be attached to the record is read to the court in its entirety, the record need only state that the exhibit was read, and it is unnecessary to quote the writing verbatim in the record. However, when there are any deletions, interpolations, or alterations in the reading, or if it is interrupted by other matters, the record should reflect the exact circumstances.

Note. Properly authenticated official records and banking entries are marked by the reporter or TC and shown to the opposing counsel. See MCM 143b(2) and (8) concerning their authentication. In an appropriate case the offer may be as follows:

TC: Prosecution Exhibit 17 for identification, a duly authenticated extract copy of the morning report of _____, is offered in evidence as Prosecution Exhibit 17.

Note. Prior to the acceptance of a written stipulation the MJ should determine that the accused joins in the stipulation. See MCM 154b. A written stipulation of facts or of the content of a writing are offered and admitted in the normal manner prescribed for prosecution and defense exhibits, and they may be both read and submitted to the members of the court. When testimony contained in documentary form such as a written stipulation or a deposition, is ruled admissible the document or an appropriate part of it is read in evidence, it is marked as a prosecution or defense exhibit for appending to the record, and the document itself is not shown to the members of the court. See MCM 145 and 154b(2).

Note. Before the confession or admission of the accused can be introduced in evidence against him, there must be an affirmative showing that it was voluntary (MCM 140a). If the MJ considers it necessary, he may satisfy himself that the accused is aware of his right to testify for the limited purpose of showing the circumstances under which the statement was made or that he did not in fact make the statement without subjecting himself to cross-examination upon other issues (MCM 140b). The MJ may do this, out of the hearing of the court members, by inquiring of the DC as to whether the accused has been so advised, or by explaining the right to the accused in accordance with MCM 53h and 140a as follows:

MJ: _____, the prosecution has offered in evidence a statement allegedly made by you and has introduced evidence tending to show that it was voluntarily made by you. As the accused in the case you have the right at this time to introduce any evidence you want to about the circumstances under which the statement was obtained or whether you did or did not make the statement. You also have the right to take the stand at this time as a witness for the limited purpose of testifying as to these matters. If you do that, whatever you say will be considered and weighed as evidence by the court just as is the testimony of other witnesses. You may be cross-examined upon your testimony, but if you limit your testimony to the circumstances surrounding the taking of the statement or whether you did or did not make the statement, you cannot be cross-examined on the question of your guilt or innocence of the offense itself, nor can you be asked on cross-examination whether the statement is true or false. In other words, you can only be cross-examined upon the matters which you testify about and upon your credibility, but not upon anything else.

On the other hand, you need not take the stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand yourself will not be considered as an admission that the state-

—authenticated official records and banking entries

—written stipulations and other admissible documentary testimony

—confessions; admissions

—(explanation of accused's right to limit his testimony)

ment was voluntary or that you made it nor can your silence be commented upon in any way by the trial counsel in addressing the court. Do you understand your rights?

ACCUSED: Yes, sir. (_____.)

MJ: What do you want to do?

ACCUSED: _____.

MJ: Proceed.

Excluding members:

Note. As previously indicated, certain motions may be properly made out of the presence of the court members. Additionally, other matters should be conducted out of their presence, view, or hearing. See, for example, MCM 53h, 57d(2), 57g(2), and 73d. The procedure for an in-court conference requested by counsel may be as follows:

—in-court conference

DC (TC): I would like to confer with the military judge out of the hearing of the members of the court.

MJ: Counsel for both sides, (and) the accused (, and the reporter) will come forward.

Note. In-court conferences and any action thereon are recorded verbatim if such a record is authorized or are summarized. See MCM 89c.

—out-of-court hearing

Note. The out-of-court hearing rather than the in-court conference is appropriate for dealing with matters which will require more than a short period of time to resolve. When the MJ decides to hear a matter out of the presence of the members, he should advise them that an out-of-court hearing is required and of the approximate time that will be required to conduct it. He should then declare a recess or adjournment as may be appropriate. The hearing should be held in substantially the following manner:

(opening of hearing)

MJ: This out-of-court hearing will come to order. Let the record show that during the (adjournment) (recess), this hearing is being held out of the presence of the members of the court. It is attended by the military judge, the accused (and) counsel for both sides (, and the reporter).

(conduct and recording of hearing)

Note. The necessary proceedings are now held. They are recorded and incorporated in the record as indicated in MCM 57g(2). Prior to concluding the hearing, if he makes a ruling or decision at this time, the MJ should announce it.

(termination of hearing)

MJ: This out-of-court hearing is terminated.

Adjournment or recess

Note. In the event of adjournment (a period extending beyond the same day) or a recess, the procedure should be substantially as follows:

Reassembling

MJ: The court will (adjourn) (recess) until _____ hours (, _____ 19_____.)

MJ: The court will come to order.

Accounting for personnel after adjournment or recess

Note. If the place of trial is changed, or the court reassembles at a place other than that where it adjourned, the TC will so state for the record. See MCM 54c as to views and inspections.

TC: All parties to the trial who were present when the court (adjourned) (recessed) are again present in the court (except _____).

Note. The term "parties to the trial," as used above, includes the military judge, counsel, the accused, the reporter, if any, and, when appropriate, the members of the court and the interpreter. It also includes a witness who was not excused prior to the adjourning, recessing, or closing of the court. If a member of the court is absent from a session at which the presence of members is required after assembly, the absence must be shown to have been the result of challenge, physical disability, or the order of the convening authority (MCM 41d(4)); Article 29(a). The reason for the absence must be reflected in the record even if it resulted from removal by the convening authority (MCM 87b).

Absence of member

TC: Let the record reflect that _____ is absent because (he is seriously ill) (he has been removed from the court by order of the convening authority because _____. I request that this copy of _____ orders, Number _____, dated _____, be appended to the record).

New member

TC: Captain _____ is now present and has been appointed to the court by _____.

Note. If such a member was appointed by the same orders as convened the court, it will be so announced; if by an order not previously incorporated in the record, the trial counsel will announce:

TC: A copy of the orders appointing Captain _____ will be attached to the orders appointing the court (and which are to be) inserted in the record.

Note. Proceedings concerning excusing, swearing, and challenging of the new member are substantially as for original members. If the individual joins the court as a member and a verbatim record is not authorized, the trial shall proceed as if no evidence had previously been introduced, unless a stipulation of the evidence previously introduced is read to him in the presence of the accused, counsel and the other members of the court (MCM 41f). If a verbatim record is maintained, the trial continues:

—reading record

MJ: The record of all prior proceedings in this case which were held in the presence of the court members will be read to the new member by the reporter.

Note. After the record is read:

MJ: The proceedings have been read to date, the (trial counsel) (defense counsel) may proceed.

Note. When the prosecution has completed its case:

TC: The prosecution rests.

Note. The DC may make any motion for a finding of not guilty at this time or after the defense has rested, or both. The MJ rules finally on a motion for a finding of not guilty except one predicated on the factual issue of the accused's mental responsibility (MCM 57, 71a, 123b, Article 51(b)).

DC: The defense has (no) (an) opening statement.

Note. The defense presents an opening statement, if desired, and introduces stipulations, witnesses, and material evidence in a manner similar to that followed by the TC, except that the TC administers the otah to all witnesses and asks the first formal questions. The DC then takes over direct examination, and the further examination of the witness continues in the normal manner. See MCM 149b.

Accused as a witness:

Note. The accused may take the stand as a witness in his own behalf, but only at his own request. If he elects to remain silent, no comment can be made upon his silence. If he testifies concerning certain specifications only, cross-examination by the TC and the court must be limited accordingly. See MCM 148c, 149b(1), and 150b. When the accused elects to testify, the DC should announce:

DC: The accused elects to take the stand and testify as a witness in his own behalf. His testimony will (concern all the charges and specifications) (be limited to _____).

—explanation of rights

Note. The MJ may assume that the accused has been correctly advised of his rights to testify. However, when he considers it necessary, or when the accused is not represented by qualified counsel, he should, out of hearing of the court members, ask the DC whether the accused has been advised of his rights, or give the explanation below, or both (MCM 59b).

MJ: _____, as the accused in this case you have these rights:

First, you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the court just as is the testimony of other witnesses, and you can be cross-examined on your testimony by the trial counsel, the court and me. (The following may be used if there is more than one specification: If you testify about only some of the offenses charged against you and you do not want to or do not testify about the others, then you may be questioned about the whole subject of those offenses about which you do testify. You will not be questioned about any offenses about which you do not testify, unless the cross-examination is relevant to an offense about which you did testify.)

Second, you may remain silent, that is say nothing at all. You have a right to do this if you wish, and if you do so the fact that you do not take the witness stand yourself will not count against you in any way with the court. It will not be considered as an admission that you are guilty, nor can it be commented on in any way by the trial counsel in addressing the court. Take time to talk with your counsel and then tell the court whether you wish to testify or to remain silent.

DC: The accused _____

Note. Should the accused elect to take the stand as a witness, the TC will administer the oath and ask the following preliminary question, after which the procedure follows that of other defense witnesses:

TC: State your name, etc.

ACCUSED: _____.

TC: Are you the accused in this case?

ACCUSED: Yes, sir.

Note. When the defense has completed its case:

DC: The defense rests.

Note. The TC may call or recall witnesses in rebuttal; thereafter, the DC may call or recall witnesses in rebuttal. Upon completion of any rebuttal testimony, the TC should announce:

TC: The prosecution has no further evidence to offer. Does the defense have any further evidence to offer?

DC: It does (not).

Note. The MJ may permit or cause the recall of any witness, including the accused, and the reopening of the case by either or both sides for the introduction of testimony previously omitted (MCM 140a).

TC: Does the MJ or court wish to have any witnesses called or recalled?

MJ: It does (not).

Note. The right of the members of the court to cause the recall of a witness or to call for additional evidence is subject to an interlocutory ruling by the MJ as to the propriety thereof. See MCM 54b.

Unless the MJ directs otherwise, the TC will conduct the direct and redirect examination of witnesses called by the court in the same manner as if the witness had been called by the prosecution. However, the MJ may permit the court members to question the witness directly, or he may do so himself, at any time after the TC has asked the initial formal questions. See MCM 140b(3) for details concerning the proper examination of a witness by the court or a member and for limitations which the MJ may place on this examination.

Note. Before arguments, the MJ may hold a hearing out of the presence of the court to discuss proposed and requested instructions. See MCM 78.

TC: The prosecution waives opening argument (_____).

Note. See MCM 72. The TC has the right to make the opening argument and if any argument is made on behalf of the defense, the closing argument. Arguments are not required; they may be oral or written. Either the TC or DC may call to the attention of the court any matters likely to be overlooked by it, and make (pertinent) arguments on the facts of the case and how they relate to the law involved. Oral arguments are recorded verbatim if a verbatim record is kept. A written argument will be attached as an appellate exhibit for the side which presented it.

Note. If there are more than one accused, the counsel for each accused may make separate argument.

Conclusion of case

MJ: Has the prosecution anything further to offer?

TC: It has (not).

MJ: Has the defense anything further to offer?

DC: It has (not).

Charge to court

Note. Before the court retires into closed session the MJ will, in open session, instruct the court (Art 51(c)).

—guilty pleas

Note. If there is an accepted plea of guilty to an offense and a finding of guilty has not been entered without vote, for example, a plea of guilty to a lesser included offense, the MJ may invite the attention of the court to the fact that no further proof of the offense to which the plea relates need be introduced by the prosecution to warrant a finding of guilty of that offense (MCM 73c).

—not guilty plea

Note. The instructions given by the MJ will necessarily vary in each case because of the different facts and circumstances involved. The MJ shall give the mandatory instructions required by MCM 78 and Article 51(c) and any additional instructions required by the law in light of the circumstances of the case. When an issue is raised as to the admissibility of a confession or admission, he should instruct the court as to the effect of his ruling admitting the statement and the duty of the court in this regard. See MCM 140a. In addition the MJ may instruct, on his own initiative or request of counsel, upon any additional matters which he considers appropriate. For example, see the matters covered in MCM 78c, 74a and 74d.

(concluding charge)

Note. The MJ may appropriately conclude his instructions with the following additional charge:

MJ: The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you members of the court. You must disregard any comment or statement made by me during the course of the trial which may seem to indicate an opinion as to the guilt or innocence of the accused, for you alone have the independent responsibility of deciding this issue. Each of you must impartially resolve the ultimate issue as to the guilt or innocence of the accused in accordance with the law, the evidence admitted in court, and your own conscience.

Note. The MJ may provide the court with a findings worksheet (app. A) to assist the court in making its findings. If used, the findings worksheet should be attached to the record as an appellate exhibit.

MJ: Are there any objections by counsel to instructions?

TC: _____.

DC: _____.

MJ: The court will be closed.

Note. Only the members of the court will be present during deliberation and voting (MCM 74d(1)). No legal authorities may be taken into closed session; this trial guide may not be taken into closed session. If a separate room is provided for deliberation by the members, all members retire to this room. Otherwise, all persons including the MJ leave the courtroom except the members of the court. Neither the MJ nor counsel may consult with the members in closed session. Advice of the MJ may be sought when necessary, but the court will be opened and the advice will be obtained in open session in the presence of both counsel and the accused. These proceedings shall be made a part of the record. See MCM 74c and Articles 26(e) and 39.

Voting on findings

Note: When the court has been closed the members deliberate and vote on the findings. See MCM 74 for the method of voting; the number of votes required, and rules applicable to reconsideration of the findings.

Additional advice on findings

Note. After a special court-martial has finally voted on the findings in closed session, the court may open and ask the military judge for assistance so that it may put the findings in proper form (MCM 74f(1)). Advice may also be requested in open session at any time before a final vote is taken on findings in any case of doubt which may arise (MCM 74e).

Findings announced

MJ: The court will come to order

TC: All parties to the trial who were present when the court closed are now present (except _____).

Note. The president before announcing the findings will present them to the MJ to permit him to examine them for defects in form. If it appears to the MJ that the court has made an ambiguous or inconsistent finding, he may give the court additional instructions. Before doing so, he should advise both sides of the circumstances requiring the additional instructions and permit argument thereon. See MCM 74d(3) concerning reconsideration of findings and MCM 74g regarding correction of incorrectly announced findings.

Note. The accused and his counsel normally report to and stand before the president when the findings are announced.

—acquittal

Note. If the accused is found not guilty of all specifications, the president announces:

PRES: _____, it is my duty as president of this court to advise you that the court in closed session, and upon secret written ballot has found you not guilty of (the) (all) Specification(s) and Charge(s).

MJ: The court will adjourn to meet on future call.

—conviction

Note. Only the required fraction of votes should be announced, not the actual number of members who concurred in the findings of guilty (MCM 74g).

(itemized)

(with exceptions and substitutions)

PRES: _____, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you: [Of (all) the Specification(s) and Charge(s): Guilty] [Of Specification _____, Charge _____: (Guilty) (Not guilty). Of Charge _____: (Guilty) (Not guilty). Of Specification _____, Charge _____: Guilty, except the words " _____" and " _____", (substituting therefor, respectively, the words " _____" and " _____", of the excepted words, not guilty, of the substituted words, guilty). Of Charge _____: (Guilty) (Not guilty, but guilty of a violation of Article _____)].

Note. If the accused has been tried by the MJ alone and only general findings are involved, the MJ will announce them as listed below. For special findings see appendix C, and MCM 74i and appendix 8.

—acquittal by MJ alone

MJ: _____, it is my duty as military judge to advise you that this court finds you not guilty of (the) (all) Specification(s) and Charge(s). The court will adjourn to meet on future call.

—conviction by MJ alone

MJ: _____, it is my duty as military judge to inform you that this court finds you: Of (all) the Specification(s) and Charge(s): that this court finds you: [Of (all) the Specification(s) and Charge(s): Guilty] [Of Specification _____, Charge _____ (Guilty) (Not guilty). Of Charge _____: (Guilty) (Not guilty). Of Specification _____, Charge _____: Guilty, except the words " _____" and " _____" (, substituting therefor, respectively, the words

" _____" and " _____", of the excepted words, not guilty, of the substituted words, guilty). Of Charge _____ : (Guilty) (Not guilty), but guilty of a violation of Article _____].

Note. For further instructions as to the forms of findings, see MCM 74b and c; for example of proper findings, see the pertinent portions of MCM 158 and appendix 10a and 15a.

Presentence procedure

MJ: The court will now hear the personal data concerning the accused shown on the charge sheet, and any other information from his personnel records relevant to sentencing and will receive evidence of previous convictions, if any.

Personal data from charge sheet

TC: The first page of the charge sheet shows the following data concerning the accused: _____.

—verified by accused

TC: Does the accused have any objection to the data as read?

DC: (He does not.) (The accused objects to _____.)

Note. If any of the data are in error, corrections should be made. Errors claimed by the accused which the TC is not readily able to verify will, if of minor importance, be noted in the record and not further action taken upon them; if of material importance the MJ may direct verification of the claimed error before the court proceeds to vote upon the sentence.

Evidence of previous convictions

Note. If the TC has no evidence of admissible previous convictions, he should state:

TC: I have no evidence of previous convictions.

Note. If the TC has evidence of admissible previous convictions, it is marked, offered in evidence, and admitted in the same manner as prescribed above for other documentary evidence. See MCM 75b(2).

Summary of information from personnel records for sentencing purposes.

Note. At this time the trial counsel may present to the military judge any personnel records of the accused or copies or summaries thereof as provided in MCM 75d, appendix 8g, and paragraph 2-20, AR 27-10. The military judge will determine what information from these records is relevant to the imposition of an appropriate sentence. If before court members the TC will read the relevant information to them or have the documents marked as exhibits, made a part of the record, and presented to the court members.

Matter in aggravation, mitigation, or extenuation

Note. This is the proper time for counsel to introduce matter in aggravation if admissible (MCM 75b(8)), and matter in extenuation or mitigation and for the accused to make a statement if he desires (MCM 75c).

Rights of accused

Note. The MJ may assume that the accused has been correctly advised of his rights to testify. However, when he considers it necessary or when the accused is not represented by legally qualified counsel he should, out of the hearing of the court members, ask the DC if the accused has been advised of his rights, or give the explanation below, or both (MCM 58b):

MJ: _____, you are advised that you may now present evidence in extenuation or mitigation of the offense(s) of which you stand convicted. You may, if you wish, testify under oath as to these matters, or you may remain silent, in which case the court will not draw any inferences from your silence. In addition, you may, if you wish, make an unsworn statement in mitigation or extenuation of the offense(s) of which you stand convicted. This unsworn statement is not evidence, and you cannot be cross-examined upon it, but the prosecution may offer evidence to rebut anything contained in the statement. The statement may be oral or in writing, or both. You may make it yourself, or it may be made by your counsel, or by both of you. Talk with your counsel and tell the court what you want to do.

DC: The accused _____.

Arguments

Note. If a verbatim record is being maintained, any oral statement made by the accused or his counsel will be recorded verbatim. Any statement in writing will be attached as a defense exhibit.

Sentence instructions

Note. After presentation of matters in extenuation and mitigation by the defense and any rebuttal by the prosecution counsel for both sides may present argument for an appropriate sentence. See MCM 75e.

Court closed for sentence

Note. Before closing the court for deliberation and voting on the sentence, the MJ shall instruct the court as required by MCM 76b(1), shall insure that he tailors his instructions as required by that paragraph and shall instruct the court on any other matters required by law. In addition the MJ may instruct, on his own initiative or on request of counsel, upon any additional matters which he considers appropriate. For example, see the various other matters contained in MCM 76. He may provide the court with a sentence work sheet (app B) to assist the court in formulating the sentence, but if used it should be appended to the record as an appellate exhibit. See MCM 81 for rules relating to rehearings and new and other trials.

MJ: The court will be closed.

Voting on sentence

Note. Only the members of the court will be present during deliberation and voting (MCM 76b(2)). For this purpose, the members may retire to another room or all persons other than the members may be cleared from the courtroom. No legal authorities or this trial guide may be taken into closed session. The MJ should not enter this closed session for any reason; however, the court may be given additional instructions in open session when it so requests or when the MJ considers it appropriate (MCM 76b(4)).

Note. See MCM 76b(2) concerning the method of voting, MCM 76b(3) for the number of votes required, and MCM 76d regarding sentence reconsideration.

Limitation on sentence

Note. The sentence must be within the maximum limits prescribed in chapter XXV of the Manual. As to rehearings and new and other trials, see MCM 81d and Article 68. The court will adjudge a single sentence for all the offenses of which the accused was found guilty. A separate sentence must be adjudged for each accused.

Court opens

MJ: The court will come to order.

TC: All the parties to the trial who were present when the court closed are now present (except _____).

Note. The president, before announcing the sentence, will present it, in writing to the MJ for his examination. If the MJ notes any ambiguity or apparent illegality, he should bring the irregularity to the attention of the court. See MCM 76d concerning reconsideration of sentence.

Note. The accused and his counsel normally report to and stand before the president when the sentence is announced.

Sentence

PRES: _____, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences you: _____.

Note. As in the case of findings, only the required fraction of votes should be announced, not the actual number of members who concurred in the sentence.

Improper sentence

Note. See MCM 76c concerning the action of the MJ on any ambiguous or illegal sentence, sentence reconsideration, and correction of any incorrectly announced sentence.

Note. If the accused has been tried by the MJ alone, the MJ announces:

MJ: _____, it is my duty as military judge to inform you that this court sentences you to _____.

MJ: Has the prosecution any other cases to try at this time?

TC: I have nothing further.

MJ: The court will adjourn to meet on future call.

APPENDIX A

FINDINGS WORKSHEET

FOR SPECIAL COURTS-MARTIAL¹

Acquittal

, it is my duty as president of this court to advise you that the court in closed session and upon secret written ballot has found you not guilty of (the) (all) Specification(s) and Charge(s).

Other Findings

, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

1. Of (the) (all) Specification(s) and Charge(s): Guilty.
2. Of Specification_____, Charge_____: Guilty. Of Specification_____, Charge_____: Not Guilty. Of Charge_____: Guilty. Of (the) (all) Specification(s) of Charge_____: Guilty. Of Charge_____: Guilty.
3. Of the Specification: Guilty except the word (s) _____
" _____ Of the excepted words: Not Guilty. Of the Charge: (Guilty) (Not Guilty but Guilty of a violation of Article_____.).
4. Of the Specification: Guilty except the words _____
" _____ and
substituting therefor, respectively, the words _____
" _____,
" _____,
and _____
of the excepted words: Not Guilty; of the substituted words: Guilty. Of the Charge: (Guilty)
(Not Guilty, but Guilty of a violation of Article_____).

Example of Combination

, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of Specification 1, Charge I: Not Guilty.

Of Specification 2, Charge I: Guilty, except the words "of a value of \$52.50," substituting therefor, respectively, the words "of some value less than \$50.00," of the excepted words, not guilty, of the substituted words, guilty.

Of Charge I: Guilty.

Of Specification 1, Charge II: Not Guilty. Of Specification 2, Charge II: Guilty, Of Charge II: Guilty.

¹The court should be furnished a Findings Worksheet which may be completed by the court in closed session by striking out inapplicable language and inserting appropriate words and figures. The Findings Worksheet will be appended to the record of trial as an appellate exhibit.

APPENDIX B

SENTENCE WORKSHEET

FOR SPECIAL COURTS-MARTIAL¹

, it is my duty as president of this court to inform you that the court in closed session and upon ~~secret~~ written ballot, two-thirds of the members present at the time the vote was taken concurring, sentences you:

To have \$ _____ (per month for _____ months) detained.

To forfeit \$ _____.

To forfeit \$ _____ per month for _____ months.

To perform hard labor for _____ (days) (months).

To be confined at hard labor for _____ (days) (months).

To be reduced to the grade of _____, E-_____.

To be reprimanded.

To be restricted to the limits of _____ for _____ (days) (months).

Combinations

To be reduced to the grade of _____, E-_____, to forfeit _____, and to be restricted to the limits of _____ for _____ (days) (months).

To be reduced to the grade of _____, E-_____, and to forfeit _____ per month for _____ months.

To perform hard labor for _____ (days) (months) and to forfeit _____.

To perform hard labor for _____ (days) (months) and to forfeit _____ per month for _____ months.

To be confined at hard labor for _____ (days) (months) and to forfeit _____.

To be confined at hard labor for _____ (days) (months) and to forfeit _____ per month for _____ months.

To be reduced to the grade of _____, E-_____, to forfeit _____ and to be reprimanded.

To be reduced to the grade of _____, E-_____, to forfeit _____ per month for _____ months and to be reprimanded.

To forfeit _____ per month for _____ months, to be confined at hard labor for _____ (days) (months), and to be reduced to the grade of _____, E-_____.

¹A sentence adjudged by court-martial should follow substantially one of the following forms or any necessary modification or combination or equivalent of such forms. A Sentence Worksheet of this sort will be completed by the court in closed session by striking out inapplicable language and inserting appropriate words and figures. The completed form will be marked as an appellate exhibit and attached to the record of trial.

APPENDIX C

FORMAT FOR SPECIAL AND GENERAL FINDINGS

United States of America

Fort Blank, Missouri

v

PVT (E-2) Roger Holliday 000-00-000,
U.S. Army Company B, 20th Signal Battalion,
20th Infantry Division

SPECIAL AND GENERAL FINDINGS

Dated: 23 August 1969

Pursuant to Article 51 (d), UCMJ, the following findings are made:

On 15 August 1969 charges were preferred against the accused, alleging wrongful possession of marihuana on 2 August 1969, and assault on 3 August 1969.

On 18 August 1969, the accused was served with a copy of the charges, which were referred to trial by special court-martial by the Commanding Officer, 20th Signal Battalion, on 18 August 1969. Thereafter, the accused, after consultation with counsel and knowing the identity of the military judge, requested in writing pursuant to Article 16(1) (B), UCMJ, that he be tried by a court composed only of a military judge.

On 22 August 1969 the accused having appeared with counsel, entered a plea of not guilty to all charges and specifications.

The issues raised by said pleading were duly heard before this court on 22 August 1969 and evidence received from the government and the accused.

This court finds as follows:

SPECIAL FINDINGS: CHARGE I

1. On 2 August 1969, PVT Holliday had in his possession .02 ounces more or less of marihuana.
2. PVT Holliday's possession of such marihuana was knowing.
3. Under the circumstances PVT Holliday's possession of marihuana was of such a nature as to be prejudicial to good order and discipline in the army.
4. The search of PVT Holliday and the subsequent seizure of the marihuana ultimately introduced into evidence was lawful. CPT Andrews who conducted the search had probable cause to do so. The information CPT Andrews relied upon as a basis for the search was from SGT Carter, who stated that he had seen what he believed to be marihuana in the accused's possession. SGT Carter had, in the past, supplied information concerning use of or possession of marihuana. In all instances, the information furnished by SGT Carter had been accurate.
5. The chain of custody established by the prosecution was sufficient to show beyond a reasonable doubt that the substance seized from PVT Holliday was the substance later identified as marihuana by CWO Komura of the CID Laboratory.
6. The testimony of PVT Holliday that he was unaware that the substance found on him was marihuana was not credible. The marihuana was found in a package in PVT Holliday's foot-locker. He also admitted that he did tell PVT's Dale and Elk that he had some "grass," although he testified that he was just joking.
7. Upon the evidence in this case the accused is guilty beyond reasonable doubt of wrongful possession of marihuana as alleged in the specification of Charge I.

SPECIAL FINDINGS: CHARGE II

1. On 8 August 1969, the accused struck PFC Sparrow on the head with a beer bottle in the Fort Blank Service Club.
2. The accused's contention that he acted in self-defense was overcome by prosecution evidence that without provocation the accused spoke to PFC Sparrow in a loud, profane, and abusive manner and struck him as PFC Sparrow attempted to leave the premises in order to avoid an altercation. The fact that PFC Sparrow touched the accused with his hand as he attempted to leave the premises was not sufficient to justify the striking of him by the accused.
3. Upon the evidence in this case the accused is guilty beyond reasonable doubt of assault as charged in the specification of Charge II.

GENERAL FINDINGS

PVT Holliday, it is my duty as military judge to inform you that this Court finds you of all specifications and charges: GUILTY.

Dated: 28 August 1969

WILLIAM K. SUTTON
Major, JAGC
Military Judge

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