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Military Justice Handbook

Guide for Summary Court-Martial Trial Procedure

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SUMMARY of CHANGE

DA PAM 27-7
Guide for Summary Court-Martial Trial Procedure

Not applicable.

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Military Justice Handbook

Guide for Summary Court-Martial Trial Procedure

By Order of the Secretary of the Army:

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that accused persons are given fair and impartial trials in accordance with the requirements of law.

Applicability. This pamphlet applies to the Active Army, the Army National Guard (ARNG), and the US Army Reserve (USAR).

Proponent and exception authority. The proponent of this regulation is The Judge Advocate General.

Impact on New Manning System.

This pamphlet does not contain information that affects the New Manning System.

Interim changes. Interim changes to this pamphlet are not official unless they are authenticated by The Adjutant General. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested Improvements. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to The Judge Advocate General's School, Army, ATTN: JAGS-ADC, Charlottesville, VA 22903-1781.

Distribution restriction.

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The term "he" (and its derivatives) used in this text is generic and except where otherwise indicated should be applied to both male and female.

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Summary. This pamphlet is intended as a practical guide for officers detailed as summary courts-martial. It contains information relating generally to the duties of the summary court-martial, as well as a procedural guide to the conduct of the trial from the opening session through sentencing. It is designed to provide summary courts-martial with the essential procedural guidelines necessary to insure

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Section I Introduction

1. Purpose and scope

a. This pamphlet is intended as a practical guide for officers detailed as summary courts-martial. It contains information relating generally to the duties of the summary court-martial, as well as a procedural guide to the conduct of the trial from the opening session through sentencing. It is designed to provide summary courts-martial with the essential procedural guidelines necessary to insure that accused persons are given fair and impartial trials in accordance with the requirements of law.

b. It is not the purpose of this pamphlet to answer all questions of procedure or substance which may arise during the trial. Many of the more routine procedural problems are discussed in a general way, however, and this guide should assist in answering some commonly encountered questions.

2. General

a. When this pamphlet and other legal materials available fail to provide sufficient information concerning law or procedure, the summary court-martial should seek advice on these matters from the judge advocate office serving the command. That office will insure that a judge advocate who is totally uninvolved in the case is made available to brief the summary court-martial and answer any questions of law or procedure which arise. For example, the summary court-martial may desire information from a judge advocate concerning what lesser offenses are included in an offense charged (MCM, 1984, part IV, para. 2-113(d); Art. 77, UCMJ) or concerning which defenses, if any, may be applicable to an offense charged. The summary court-martial should not, however, ask or accept advice from a judge advocate or any other person concerning what factual conclusions should be drawn from the evidence in the case or concerning the amount or nature of a sentence which should be imposed upon an accused. These are matters solely and wholly within the responsibility of the summary court-martial, without recourse to the opinions or recommendations of other persons.

b. The proceedings of a summary court-martial are open, and, unless they are to appear as witnesses in the case, individuals desiring to attend as spectators must be permitted to be present at any portion of the proceedings not involving the disclosure of classified information.

c. The accused may be represented during the summary court-martial proceedings by a civilian lawyer provided by him or by a military lawyer if one has been made available for that purpose by competent authority. Civilian or military counsel representing the accused should be allowed to cross-examine witnesses for the government, examine witnesses for the defense, state objections to the reception of evidence and questions asked of witnesses by the summary court-martial, make argument concerning the weight or sufficiency of the evidence or the appropriateness of a sentence, and otherwise perform the normal functions of counsel.

d. An officer detailed as a summary court-martial should be familiar with the entire contents of this pamphlet. If not, the officer runs the risk of committing unintentional error through lack of knowledge or by oversight. Needless error in the conduct of trials by summary courts-martial reflects adversely on the armed forces and the operation of the system of justice provided by the Congress in the Uniform Code of Military Justice. In preparing for and conducting a trial, the officer appointed as a summary court-martial must be totally impartial, both in appearance and actuality, for it is a judicial function that the officer is performing.

3. Key to references

Table 1
Key to References

Reference	In open text	In parenthesis or similar context
Manual for Courts-Martial, United States, 1984	The Manual	MCM, 1984
An Article of the Uniform Code of Military Justice	Article 15	Art. 15
A chapter of the Manual	Chapter XIII of the Manual	MCM, 1984, Chap. XIII
Rules for Courts-Martial	Rule for Court-Martial 101	R.C.M. 101
An appendix of the Manual	Appendix 5 of the Manual	MCM, 1984, App. 5
A rule of evidence from Part III of the Manual	Rule 304	Mil R. Evid. 304
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Table 1
Key to References—Continued

Reference	In open text	In parenthesis or similar context
An paragraph of this guide	Paragraph 6	Para. 6
An appendix of this guide	Appendix B	App. B

4. References

The basic provisions of the law relating to court-martial practice and procedure are in the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1984. These references, in conjunction with DA Pam 27-9 (The Military Judges’ Benchbook) and this pamphlet, provide the information upon which the summary court-martial will depend during the preparation for and conduct of the trial.

5. Functions and duties of the summary court-martial

a. The function of a summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure. The summary court-martial will thoroughly and impartially inquire into both sides of the matter and will insure that the interests of both the Government and the accused are safeguarded.

b. The summary court-martial is the presiding officer at all sessions of the trial and is responsible for ensuring that the proceedings are conducted in a fair, orderly, and dignified manner in accordance with law.

c. The summary court-martial rules finally on all motions and all questions of fact and law. The summary court-martial determines guilt or innocence and, if the accused is found guilty, adjudges an appropriate sentence (R.C.M. 1301; MCM, 1984, app. 12).

6. Evidence

The Military Rules of Evidence are found in Part III of the Manual for Courts-Martial. Answers to evidentiary questions which arise prior to or during the trial can usually be found in that chapter.

7. Motions

a. *Motions to grant appropriate relief.* The summary court-martial rules finally on all motions. Motions for appropriate relief are not directed to final termination of the proceedings, but are directed to an alleged defect in the case that impedes the accused in preparing for trial or in presenting the case. For example, a specification that is indefinite or ambiguous as to time and place might give rise to a motion for appropriate relief. If granted, it would not terminate the proceeding, but would necessitate an amendment of the specification to make it more definite and certain. For a list of some of these motions, together with a discussion of the relief required, see R.C.M. 905, 906, 907, 1304(b)(2)(C).

b. *Motions to suppress.* A motion to suppress, if granted, precludes the summary court from considering certain evidence. If the motion is granted, this does not operate to acquit the accused, but does mean that the excluded evidence may not be considered in arriving at a verdict. Motions to suppress are aimed at three areas: admissions and confessions, searches and seizures, and pretrial identifications. Your obligation is to advise the accused of the right to make a motion to suppress evidence and that if no such motion is made, the evidence will be admitted and considered by you. You may require such motions to specifically identify the alleged deficiency in the evidence. Accordingly, if the accused is represented by counsel at the court-martial this specificity requirement should normally be enforced. If the accused is not represented by counsel a motion in general terms is sufficient. When an accused who is not represented by counsel objects to the evidence in general terms, you may ask him questions in an attempt to focus more specifically on his complaint. For example, if the accused objects to evidence which was obtained as the result of a search, you may ask if he believes the search was not properly authorized or whether he believes he did not properly consent to the search. A sample explanation of a motion to suppress is included in this pamphlet. The motion will be litigated prior to entry of the plea, and you should consult the judge advocate officer serving your command before litigating the motion.

c. *Motions to dismiss.* Motions to dismiss are directed to matters which forbid trial. A motion to dismiss is not properly concerned with the merits of the case, that is, the question of guilt or innocence. These motions include denial of speedy trial, statute of limitations, former jeopardy, and lack of jurisdiction. If granted, these motions normally terminate the proceedings. For a discussion of the general principles applicable to motions to dismiss, see R.C.M. 907, 916.

d. *Motion for a finding of not guilty.* A motion for a finding of not guilty is usually made at the conclusion of the evidence presented by the government. The motion should be granted as to any offense charged if the evidence presented is insufficient to sustain a conviction for that offense or for any lesser included offense. For a discussion of this motion and the test to be applied should it be made, see R.C.M. 917.

8. Use of trial procedure guide

Sections II-VI of this pamphlet are procedural guides designed for use by summary courts-martial in carrying out their function. These guides serve as outlines of procedure and include information and references in a form suitable for easy use. If carefully followed, the guides should aid in avoiding procedural errors and in facilitating trial proceedings. Appendix 9 of the Manual for Courts-Martial also contains a guide that should be consulted.

9. Attendance of witnesses

a. The summary court-martial assures attendance of military witnesses at the trial of the accused by notifying the witnesses' unit commander of the requirement that they be present to testify. Generally, appearance at a court-martial takes precedence over other military duties.

b. If individuals who are not subject to the Uniform Code of Military Justice (civilians) are essential witnesses and they are unable or unwilling to appear in the absence of a subpoena and the advancement of fees and travel allowances, the summary court-martial will have to issue a subpoena (R.C.M. 703; Sec. III, AR 37-106, Chap. 13). Before doing so, the summary court-martial should consult the judge advocate office serving the command and the local disbursing officer. Service of the subpoena on the witness and the advancement of funds must also be arranged. If the witness resides in the local area, the summary court-martial may accomplish these tasks personally or arrange for another to accomplish them. In some instances, local civilian witnesses will be willing to appear without having their fees and costs of transportation advanced to them. Under these circumstances, the subpoena may be delivered to the witness when he appears at the trial. After the witness has acknowledged service of the subpoena in writing and after the witness testifies, the summary court-martial should arrange to have the fees and allowances paid by the disbursing officer. Sometimes civilian witnesses are willing to testify without subpoena, without reimbursement for costs and transportation, and without receipt of witness fees.

c. Although depositions may be taken from witnesses in proper cases (R.C.M. 702; 1301 (f)), the summary court-martial should always obtain the advice and direction of the judge advocate office serving the command before attempting to take a deposition.

10. Maximum sentence

a. The maximum punishment authorized for any offense in violation of the Uniform Code of Military Justice equals or exceeds the punitive jurisdiction of a summary court-martial (Art. 20; MCM, 1984, part IV and app 12).

b. The maximum sentence imposable by a summary court-martial falls into two categories: (1) that imposable upon enlisted persons above the fourth pay grade, and (2) that imposable upon enlisted persons in the fourth pay grade or lower. The maximum sentence, in addition to admonition or reprimand, which may be imposed by a summary court-martial is as follows:

(1) Enlisted persons above the fourth pay grade:

(a) Reduction to the next inferior pay grade; and

(b) Forfeiture of two-thirds pay per month for one month; and

(c) Restriction to specified limits for two months.

(2) Enlisted persons in the fourth pay grade or lower:

(a) Reduction to the lowest pay grade; and

(b) Forfeiture of two-thirds pay per month for one month; and

(c) Confinement for thirty days; or, instead of (c)

(d) Hard labor without confinement for forty-five days; or, instead of (c) or (d)

(e) Restriction to specified limits for two months.

c. There is no requirement that the maximum punishment or any punishment be imposed. Lesser punishments and variations of the types of punishment are authorized (R.C.M. 1002, 1003, 1301(d), and MCM, 1984, app. 12). Consult R.C.M. 1003(b)(3) for permissible variations in fines and forfeitures.

Note. When both reduction and forfeiture are imposed, the forfeiture is computed utilizing the monthly pay of the rank to which the accused has been reduced. A sentence to a forfeiture should include an express statement of the dollar amount. An approved and unsuspended sentence of confinement at hard labor or hard labor without confinement automatically reduces the accused to the lowest enlisted grade (Art. 58a).

A summary court-martial cannot suspend a sentence but can recommend suspension of a sentence, or portions thereof, to the convening authority.

Section II

Preparing for Trial

11. Purpose and scope

The purpose of this section is to provide the summary court-martial with a suitable reference to aid him in preparing for the conduct of a summary court-martial.

12. General

Upon receipt of the charges and accompanying papers, you, as the summary court-martial, should act immediately in the sequence indicated below. The file you receive will normally include several copies of the charge sheet; written statements of witnesses or summaries thereof; any documentary evidence, such as personnel action forms (DA Form 4187) indicating a change in personnel status for cases involving absence without leave; and copies of the record of previous convictions, if any. You must keep in mind that the statements of witnesses contained in the file may be used by you for the purpose of preparing for trial only, that is, to determine the order of witnesses and the questions you are going to ask them, and for certain other limited purposes (as, for example, the impeachment of the testimony of a witness at trial by previous inconsistent statements (Mil. R. Evid. 613(a), (b); 801(d)). You may not use the CID or MPI report as a substitute for live witnesses except to the extent the accused consents after being advised that he need not do so, and that he is entitled to have the witnesses present. You may consider as evidence in the case only testimony and other evidence admissible under the rules of evidence (MCM, 1984, Part III) which you actually receive as evidence at the trial in the presence of the accused. A record of previous convictions will rarely be admissible on the question of guilt or innocence. Therefore in most cases you may consider previous convictions only for the purpose of determining what sentence is appropriate in the event you have found the accused guilty. Remember that as to any offense to which the accused pleads not guilty, you must presume the accused to be innocent until you are convinced of his guilt beyond a reasonable doubt by legal and competent evidence received by you at the trial in the accused's presence.

13. Study of the case

a. Examine the charge sheet carefully.

(1) Determine whether the pay of the accused entered on page 1 of the charge sheet is consistent with the accused's grade and length of service. If the pay of the accused as reflected on the charge sheet appears to be inaccurate, determine the facts and make appropriate corrections on all copies of the charge sheet. You should initial any changes you make.

(2) Correct any obvious administrative, clerical, or typographical errors on the charge sheet and initial each. Corrections of the charges and specifications which involve the inclusion of any person, offense, or matter not fairly included in the charges as referred for trial will not be made (R.C.M. 603, 1304(a)). If the charges or specifications are faulty in some material respect, return the file to the convening authority, explaining the reasons for returning it.

(3) Ascertain whether the endorsement by which the case has been referred for trial is administratively correct, including the designation of the court-martial order by which you were detailed as summary court-martial. If you determine that the referral for trial is incorrect, return the file to the convening authority with an explanation for doing so.

(4) Ascertain whether the charges are sworn. If they are not, confer with the accuser to determine whether he desires to swear to the truth of the charges. An accused may not be tried on unsworn charges over his objection.

b. Determine the law applicable to the case.

(1) Familiarize yourself with the elements (essential facts) of the offense(s) charged. Read the discussion of the offense or offenses in Part IV of the Manual, particularly the paragraphs entitled, "Proof." If an offense is charged as a violation of Article 134 and no discussion of the specific elements appears in the Manual, the elements of the offense can be identified by breaking the specification down into its essential, component allegations. Each of these allegations is an element of the offense. For example, if the offense charged is careless discharge of a weapon, the offense will be charged in substantially the following language.

"In that Private (E2) Hef L. Finger, U.S. Army, Company B ..., did, at Fort ..., on or about 3 September 19 ..., through negligence, discharge a rifle in the barracks of Company B, ..." (MCM, 1984, Part IV, Para. 80f).

The elements of the offense are—

(2) Assure yourself that each specification actually alleges an offense (see R.C.M. 307(c) and MCM, 1984, part IV) and that each offense is charged as a violation of the proper article of the Code. If you conclude that the wording of a specification departs so materially from an applicable form specification that either no offense is alleged or the specification is ambiguous, return the file to the convening authority stating your reasons for returning it.

(3) If the accused is charged with a failure to obey a regulation or written order and a copy of the directive is not included in the file, obtain copies of the directive and unfamiliarize yourself with its provisions.

(4) Determine the admissibility and authentication of any documentary evidence, such as personnel action forms (DA Form 4187) and copies of records of previous convictions (see Mil. R. Evid. 803, 901, 902, 1001-1005). Assign exhibit numbers to all documentary evidence and any real evidence (physical objects) in the order in which you intend to use them at trial. When you actually receive (admit) an exhibit in evidence at the trial, mark it, "Received in Evidence," followed by your initials.

c. Plan an orderly procedure.

(1) Determine the order in which you plan to call the witnesses. Witnesses for the Government should be called

first, normally in an order which will permit the facts of the case to be presented, as near as possible, in a chronological manner.

(2) You may not take the testimony of any witness by telephone at the trial without the accused's consent. However, if in preparing the case or during the trial you feel a need to make further inquiry, you may communicate by telephone or otherwise with prospective witnesses or others, *except the accused*, for the purpose of determining the extent of their knowledge concerning the case, whether you will call them as witnesses, whether they are in possession of admissible documentary or real evidence, or whether they know of witnesses or evidence that should be presented at trial. You *must not* consider such an out of court statement as evidence in the case unless it becomes the subject of a stipulation of fact or testimony (see R.C.M. 811) to which the accused specifically and knowledgeably consented. Also, in preparing for the trial, you may locate and obtain for use at the trial any relevant documentary or real evidence, even if it was not contained or mentioned in the file as received by you.

d. Determine whether there are any reasons which would prevent you from conducting a fair and impartial trial. If there are, as when you have personal knowledge of the incident involved in the charge because of having been an eyewitness to the event or otherwise, notify the convening authority of that fact.

e. Any questions which arise during your examination of the charge sheet and determination of the law applicable to the case should be directed to the judge advocate office serving the command.

14. Preparation for initial session and procurement of witnesses

a. Arrange for a location at which the initial session may be held. This location must accommodate the hearing of witness testimony. Set a time, date, and uniform for the initial session.

Note. Appendix A is an example of a desired room arrangement for the conduct not only of the initial session but also of the trial proceedings as a whole.

b. Notify the accused, through his commanding officer, to be at the prescribed location in appropriate uniform at the time set for the initial session. Inform the accused of the right to consult with qualified defense counsel before the trial date for advice concerning rights and options and the consequences of waivers of these rights by voluntarily consenting to trial by summary court-martial. DA Form 5111-R (Summary Court-Martial Rights Notification/Waiver Statement) must be completed and attached to each copy of the charge sheet. Appendix B is a sample of a completed DA Form 5111-R. If you deny the accused an opportunity to consult with counsel prior to trial, you must fully document the circumstances in a certificate attached to the record of trial. See AR 27-10, paragraph 5-21.

c. Notify all witnesses whom you intend to call to be ready to appear at the place of trial upon further notification by you. For planning purposes, you should notify the witnesses of a tentative time and date at which they may be required to appear. If the accused pleads guilty to the charges, however, you may not need to call the witnesses. Furthermore, if the accused requests additional witnesses to testify in his behalf or if he is granted a continuance to obtain additional evidence, the date on which the witnesses will be called to testify may have to be postponed. By alerting the witnesses to be ready to appear, if needed, but by not requiring their appearance until you notify them, you permit them to continue to perform their regular duties without interruption and without requiring them to appear needlessly.

d. Determine whether military legal counsel will be available to represent the accused at trial free of cost. Your determination of the availability of counsel without cost to the accused is in furtherance of an orderly procedure and alerts the appropriate authority of the need for counsel in the event of a request by the accused.

e. Obtain copies of DD Form 2329 (Record of Trial by Summary Court-Martial) and complete paragraph 1-3. Sample copies of the form are at appendix C of this pamphlet and MCM, 1984, appendix 15.

Section III

Guide for Opening Initial Session of the Trial Proceeding

15. Purpose and Scope

The procedure for conduct of a trial by summary court-martial encompasses those applicable procedures prescribed for a trial by general court-martial (see MCM, 1984, chap VIII; chap XIII; app. 8). The following suggested procedure offers those normally encountered formalities common to trials by summary courts-martial.

- a. Identification of summary court-martial and convening orders;
- b. Referral of charges;
- c. Assembly of the court;
- d. Cautionary instructions;
- e. Explanation of duties of summary court-martial;
- f. Explanation of right to object to trial by summary court-martial;
- g. Explanation of right to inspect allied papers and personnel records;
- h. Identification of Government witness(es);
- i. Explanation of right to cross-examine;

- j. Explanation of right to present evidence;
- k. Explanation of testimonial rights concerning offense(s);
- l. Explanation of evidence considered;
- m. Explanation of testimonial rights concerning offense(s);
- n. Explanation of right to remain silent;
- o. Explanation of testimonial rights in extenuation and mitigation;
- p. Announcement of maximum punishment;
- q. Explanation of plea options;
- r. Reading of charge(s);
- s. Explanation of lesser included offense(s);
- t. Motions;
- u. Explanation of pleas.

16. General

The initial session of the trial proceedings will be held pursuant to the arrangements you have made in accordance with paragraph 14. This session should be conducted with dignity and decorum, inasmuch as the initial session is a part of the formal trial proceedings, even though no witnesses are normally called to testify.

17. Guide

Note. This guide is a modification of the trial procedure set forth in appendix 9 of the manual. It is intended for use by the summary court-martial at the initial session at which the accused is read the charge(s) and enter his plea(s).

a. Identification of Summary Court-Martial and Convening Orders.

SUM CM: I am (Major) _____. I was detailed a summary court-martial by Summary Court-Martial Convening Order Number _____, Headquarters, _____ dated _____.

b. Referral of Charges.

SUM CM: Certain charges against you have been referred to me for trial by summary court-martial by (command of) (order of _____ on _____ (date of referral). I now hand you a copy of the charges against you, and I suggest that you keep this copy and refer to it throughout these trial proceedings.

c. Assembly of the Court.

SUM CM: The court is now assembled for the trial of your case. The charges are signed by _____, a person subject to the Code, as accuser, and are properly sworn to before an officer of the armed forces authorized to administer oaths. The charges allege, in general, (the offense(s) of _____) (that you did _____).

Note. If the charges are not sworn, advise the accused as follows:

SUM CM: The charges in this case are unsworn. You may not be tried on unsworn charges over your objection. Therefore, if you object to being tried on unsworn charges, I will return the charges to the convening authority without trial. Do you object to being tried on unsworn charges?

If the accused objects to trial on unsworn charges, return the file to the convening authority explaining the reasons for it.

d. Cautionary Instruction

SUM CM: I am now going to advise you of the rights you have in this trial. You should carefully consider each explanation because you have the right to object to trial by summary court-martial. Until I have completed my explanation, I do not want you to say anything except to answer specific questions that I will ask you. Do you understand?

ACCUSED: (Yes) (No), sir. *Note.* Because of the important nature of the matters that follow, it is essential that the accused understand that he must only respond to the specific questions asked by you. To facilitate this understanding, the accused should be advised further that he will have a later opportunity to ask any questions or seek clarifications that may come to mind and that each will be either answered or explained at that time.

e. Duties of SCM.

SUM CM: As summary court-martial it is my duty to obtain and examine all the evidence concerning any offense(s) to which you plead not guilty, and to thoroughly and impartially inquire into both sides of the matter. I will call witnesses

for the prosecution and question them, and I will help you in cross-examining those witnesses. I will help you obtain evidence and present the defense. This means that one of my duties is to help you present your side of the case. You may also represent yourself, and if you do, it is my duty to help you. You are presumed to be innocent until your guilt has been proved by legal and competent evidence beyond a reasonable doubt. If you are found guilty of an offense, it is also my duty to consider matters which might affect the sentence, and then to adjudge an appropriate sentence. Do you understand that?

ACC: (Yes) (No), sir.

f. Right to Object to SCM.

SUM CM: You have the absolute right to object to trial by summary court-martial. If you object the appropriate authority will decide how to dispose of the case. The charges may be referred to a special or general court-martial, or they may be dismissed, or the offenses charged may be disposed of by (nonjudicial punishment [if not previously offered and refused] or) administrative measures. [See R.C.M. 306.] Do you understand that?

ACC: (Yes) (No), sir.

g. Right to Inspect Allied Papers and Personnel Records.

SUM CM: You may inspect the allied papers and personnel records. [Hand those documents which are available to the accused for examination in your presence.] (You may also inspect identify personnel records or other documents which are not present) which are located at _____. You may have time to examine these if you wish.)

h. Identification of Government Witness(es).

SUM CM: The following witnesses will probably appear and testify against you. (Captain) _____, (Sergeant) _____, (Private First Class) _____, and (Private) _____.

i. Right to Cross-Examine.

SUM CM: After these witnesses have testified in response to my questions, you will have the right to cross-examine and to ask them to answer any questions that relate to this case. You may exercise your right to cross-examine in any one of three ways: first, you may act on your own behalf and ask questions; second, if you are represented by counsel, your counsel will conduct the cross-examination; or third, if you prefer, I will ask questions for you after you inform me of the matters about which you desire the witness to be questioned.

j. Right to Present Evidence.

SUM CM: You have the right to call witnesses and to produce other evidence in your behalf. I will arrange for the attendance of any witnesses needed by you or the production of any evidence relating to your case or help you in any other way possible. [I notice that (Sergeant) _____, (Private) _____, and (Mr.) _____ are listed as witnesses for you on the charge sheet, and I have arranged to have them present to testify at the trial.]

k. Evidence to be Considered. SUM CM: In deciding this case, I will consider only evidence introduced during the trial. I will not consider any other information, including any statements you have made to me, which is not introduced in accordance with the Military Rules of Evidence during the court-martial. Do you understand that?

ACC: (Yes) (No), sir.

l. Testimonial Rights Concerning Offense(s). SUM CM: As the accused in this case, you also have these rights: First, you may be sworn and testify as a witness concerning the offense(s) charged against you.

Note. Continue with one of the following instructions as appropriate. If there is only one specification:

SUM CM: If you do so you can be questioned by me about the whole subject of the offense and about your worthiness of belief.

If there is more than one specification:

SUM CM: If your testimony should concern less than all of the offenses charged against you and you do not desire to or do not testify concerning others, then you may only be questioned by me about those offenses concerning which you do testify and concerning your worthiness of belief. I will not question you regarding any offense about which you do not testify unless the questioning is relevant to an offense concerning which you do testify.

m. Right to Remain Silent.

SUM CM: Second, you may remain silent, that is, say nothing at all. You have a right to do this if you wish; if you do remain silent, it will not count against you in any way, and I will not consider it as an admission that you are guilty. If you remain silent, I am not permitted to question you about the offense(s).

n. Testimonial Rights In Extenuation and Mitigation.

SUM CM: Third, if you are found guilty, you will have the right to present matters in extenuation or mitigation, and any other matter you want me to consider before imposing sentence. Matters in extenuation or mitigation are matters which tend to explain the offense or show your good military record. In this regard, you may testify under oath. On the other hand, you may remain silent, in which case I will not draw any inferences from your silence. In addition you may, if you wish, make an unsworn statement. This statement may be oral or in writing, or both. If you make an unsworn statement, I am not permitted to question you about it, but I may receive evidence to contradict anything contained in the statement. If you testify under oath, I may question you on your testimony.

o. Maximum Punishment.

SUM CM: If I find you guilty (of the offense) (of any of the offenses charged), the maximum sentence which I am authorized to impose is:

Note. For an accused of a pay grade of E-4 or below, proceed as follows.

(1) *E-4 and below.*

- (a) reduction to lowest enlisted pay grade; and
- (b) forfeiture of two-thirds of 1 month's pay; and
- (c) confinement for 1 month.

Note. For an accused of a pay grade above E-4, proceed as follows.

(2) *E-5 and above.*

- (a) reduction to the next inferior pay grade; and
- (b) forfeiture of two-thirds of 1 month's pay; and
- (c) restriction to specified limits for 2 months.

SUM CM: Do you understand the maximum punishment which this court-martial is authorized to adjudge?

ACC: (Yes) (No), sir.

p. Plea Options.

SUM CM: You may plead not guilty or guilty to each offense with which you are charged. You have an absolute right to plead not guilty and to require that your guilt be proved beyond a reasonable doubt before you can be found guilty. You have the right to plead not guilty even if you believe you are guilty. Do you understand that?

ACC: (Yes) (No), sir.

SUM CM: If you believe you are guilty of an offense, you may, but are not required to, plead guilty to that offense. If you plead guilty to an offense, you are admitting that you committed that offense, and this court-martial could find you guilty of that offense without hearing any evidence, and could sentence you to the maximum penalty I explained to you before. Do you understand that?

ACC: (Yes) (No), sir.

q. Lesser Included Offenses.

SUM CM: [Examine the list of lesser included offenses under each punitive article alleged to have been violated. See MCM, 1984, Part IV. If a lesser included offense may be in issue, give the following advice.] You may plead not guilty to Charge _____, Specification _____, as it now reads, but plead guilty to the offense of _____, which is included in the offense charged. Of course, you are not required to do this. If you do, then I can find you guilty of this lesser offense without hearing evidence on it. Furthermore, I could still hear evidence on the greater offense for purposes of deciding whether you are guilty of it. Do you understand that?

ACC: (Yes) (No), sir.

SUM CM: Do you understand your rights as I have explained them to you?

ACCUSED: (Yes) (No), sir.

Note. If the accused does not understand any of the rights explained, they should be explained again.

SUM CM: Do you want some time to consider whether to object to trial by summary court-martial or to prepare for trial?

ACCUSED: (Yes) (No), sir.

Note. If the accused answers in the affirmative, recess or adjourn the proceeding for a reasonable period, advising the accused of the date, time, and location of resumption of the proceeding (see note on recesses and adjournments in para 21).

Note. If the accused does not desire time to consider his decision or upon resumption of the proceeding, begin again at this point and proceed as indicated.

SUM CM: Do you consent or object to trial by summary court-martial?

ACCUSED: I (consent) (object), sir.

Note. placing your signature in the space provided. If the accused consents to trial by summary court-martial, proceed as follows. The accused may be asked to initial the notation on the record of trial that the accused did or did not object to trial by summary court-martial (app C). This is not required, however.

Note. If the accused is represented by an attorney, note the representation in writing for the record. A suggested format is at appendix D. Attach the original representation certificate to the record of trial and a copy to each copy of the record of trial.

r. Reading of the Charges.

SUM CM: The charge(s) and specification(s) against you which have been referred to me for trial are as follows:

Charge (I): Violation of the Uniform Code of Military Justice,

Article _____.

Specification (1): In that _____.

Specification (2): In that _____.

(_____.)

(Charge (II): (Additional Charge): Violation of the Uniform Code of Military Justice, Article _____).

(Specification (1): In that _____.

(_____)).

Having read the charge(s) and specification(s) to you and having previously furnished you with a copy of them, I now ask if you understand them?

ACCUSED: (Yes) (No), sir.

Note. Make certain that the accused understands the charges and specifications. Unless the accused is represented by counsel, it may be necessary to explain each specification in simple language, breaking it down into its essential components, or elements, and to ask the accused if he understands. Any additional explanation needed by the accused should be given.

s. Motions.

SUM CM: Before I ask you whether you are going to plead not guilty or guilty to the charge(s) and specification(s) and explain these pleas to you, I now advise you that any motion to dismiss (the) (any of the) charge(s) and specification(s) or to grant other relief should be made at this time.

Note. At this point, you should advise the accused concerning any motions (R.C.M. 905, 906, 907) which from your examination of the file you feel he may desire to make. A sample explanation of a motion to suppress a confession or admission is provided in the note below.

If the accused makes a motion to dismiss or to grant other relief, the trial may not proceed until you have disposed of the motion. A sample series of questions on a motion to suppress a confession or admission is provided in the note below.

When the accused has no motions to make or if all motions have been disposed of and termination of the trial has not resulted, proceed with the trial as indicated:

t. Sample Motion to Suppress.

Note. Involuntary confessions or admissions may be the subject of a motion to suppress. A confession or admission is not voluntary if it was obtained through the use of coercion, unlawful influence, or unlawful inducement, including obtaining the statement by

questioning an accused without complying with the warning requirement of article 31 (b) and, if appropriate, without advising the accused of his rights to counsel during the interrogation. You must also keep in mind that an accused cannot be convicted on the basis of his out-of-court self-incriminating statement alone, even if it was voluntary, for such a statement must be corroborated if it is to be used as a basis for conviction (Mil. R. Evid. 304).

Examples of points which may be raised by a motion to suppress are the failure to warn a suspect:

- (1) of the nature of the offense of which he was accused or suspected;
- (2) that he had the right to remain silent;
- (3) that any statement he made could be used as evidence against him.

Other allegations of deficient warnings may be the target of a motion to suppress. These depend on two general circumstances, the status of the interrogator and the status of the suspect. First, if the interrogation is conducted by a person subject to the UCMJ who is required to give warnings under Article 31, then additional warnings are required if the suspect being interrogated is in custody, reasonably believes he is in custody, or is otherwise deprived of his freedom of action in a significant way. Second, if the interrogation is conducted by a person subject to the UCMJ acting in a law enforcement capacity or agent of such person, then additional warnings are required if the interrogation is conducted subsequent to pretrial restraint under R.C.M. 304 and the interrogation concerns the offenses or matters that were the subject of the pretrial restraint. Under these circumstances the accused may make a motion to suppress based on a failure to additionally warn him:

- (1) that he had the right to consult counsel and have counsel with him during the interrogation; and
- (2) that "counsel" could either be a civilian counsel provided by him, or a free military counsel appointed for him or both.

Even assuming a proper warning, the accused may make a motion to suppress based on a deficient waiver of those rights. After the applicable explanation, the accused or suspect must have *affirmatively* acknowledged that he understood the rights involved, *affirmatively* consented to make a statement, and if appropriate, *affirmatively* declined the right to counsel. If the accused was entitled to and requested counsel, the record must show that the interrogation ceased until counsel was obtained. If he affirmatively declined counsel, he should have been asked if he desired to make a statement. If he answered in the negative, the record must show that the interrogation ceased. He should also affirmatively consent to making a statement. In all cases where you are considering a motion to suppress, you will generally call the person who obtained the statement to testify as a witness.

u. Sample Advice on Motion to Suppress to Accused Not Represented by Counsel at Hearing.

SUM CM (to accused, after permitting him to examine the statement when it is in writing): This is a statement allegedly made by you that I propose to admit in evidence. However, before admitting the statement, I want to determine whether you have any objection. If you have no objection, I will consider the statement. In this regard, the Uniform Code of Military Justice provides that no person subject to the Code may compel you to incriminate yourself or answer any question which may tend to incriminate you. In this regard, no person subject to the Code may interrogate or request any statement from you if you are accused or suspected of an offense without first informing you of the nature of the offense of which you are suspected and advising you that you need not make any statement regarding the offense of which you are accused or suspected; that any statement you do make may be used as evidence against you in a trial by court-martial; [only if applicable] that you have the right to consult with counsel and have counsel with you during the interrogation; [only if applicable] and that counsel can be civilian counsel provided by you, or free military counsel appointed for you or both. Finally, any statement obtained from you through the use of coercion, unlawful influence, or unlawful inducement, may not be used in evidence against you in a trial by court-martial. In addition, any statement made by you that was actually the result of any promise, or that was made by you after you had invoked any of your rights at any time during the interrogation and your request to exercise those rights was denied, is inadmissible and cannot be used against you. Before I consider receiving this statement in evidence, you have the right at this time to introduce any evidence you desire concerning the circumstances under which the statement was obtained or concerning whether the statement was in fact made by you. 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 me just as is the testimony of other witnesses. I will have the right to question you upon your testimony, but if you limit your testimony to the circumstances surrounding the taking of the statement or as to whether the statement was in fact made by you, I may not question you on the question of your guilt or innocence of the offense itself, nor may I ask you whether the statement is true or false. In other words, you can only be questioned upon the issues concerning which you testify and upon your worthiness of belief, but not upon anything else.

On the other hand, you need not take the witness stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand will not be considered as an admission by you either that the statement was made by you under circumstances which would make it admissible or that it was in fact made by you.

You also have the right to cross-examine this witness concerning his testimony, just as you have the right with other witnesses, or, if you prefer, I will cross-examine him for you along any line of inquiry you indicate. Do you understand your rights?

ACCUSED: (Yes) (No), sir.

SUM CM: Do you have any objection to my receiving the statement in evidence?

ACCUSED: (Yes, sir (stating reasons)) (No, sir). [NOTE: If the accused has no objection you can admit the statement without further inquiry.]

SUM CM: Do you wish to introduce any evidence concerning the taking of the statement or concerning whether you in fact made the statement or to cross-examine any witness about the taking of the statement.

ACCUSED: (Yes) (No), sir.

[Note: Potential questions are below.]

SUM CM: Do you wish to testify yourself concerning these matters?

ACCUSED: (Yes) (No), sir.

SUM CM: [Note: After hearing the applicable testimony, state your ruling.] (Your objection is sustained) (Your objection is overruled and) (The statement will be received in evidence (as Exhibit No. _____)). [Note: If the motion or objection is overruled and factual issues are involved in the ruling, you must state essential findings of fact. (Mil. R. Evid. 304(d)(4))].

v. Potential Questions.

SUM CM: Did you make any explanation of rights to the accused concerning the making of a statement?

WITNESS: Yes, sir, I did.

SUM CM: What explanation did you make?

WITNESS: I told him that he was suspected of wrongfully appropriating a one-quarter ton truck, U.S. No. _____, belonging to his company, which he used as a mail carrier, on _____, 19____, by driving it to Hattiesburg without authority. I then told him he did not have to make any statement at all; that if he did make any statement it could be used as evidence against him in a trial by court-martial; that he had the right to consult counsel and have counsel with him during the interrogation; and that counsel could be civilian counsel provided by him or free military counsel appointed for him or both.

SUM CM: Did you inquire as to his understanding of these rights?

WITNESS: I did, and he stated that he understood them.

SUM CM: Did you ask the accused if he desired to have or consult with counsel?

WITNESS: Yes, sir, I did.

SUM CM: Did the accused indicate that he did desire counsel?

WITNESS: No, sir, he stated he did not desire counsel.

SUM CM: Did you ask if he wanted to make a statement at that time?

WITNESS: Yes, sir, I asked him if he wished to make a statement.

SUM CM: Did he respond to the question?

WITNESS: Yes, sir, he said he wanted to talk to me about the incident.

SUM CM: Did you make any promises to him, threaten him, or employ any force or violence in connection with

obtaining a statement?

WITNESS: No, sir, I did not.

SUM CM: Did the accused make a statement to you?

WITNESS: Yes, sir, he did.

SUM CM: Describe fully the manner in which the statement was obtained.

WITNESS: _____.

SUM CM: At any time during the interrogation of the accused, did he indicate that he wished to invoke any of his rights either with regard to the making of a statement or with regard to counsel?

WITNESS: No, sir, he did not.

Note. If the witness testifies that he obtained a written statement from the accused, he should be asked if and how he can identify it as a written statement of the accused.

w. Explanation of Plea(s). SUM CM: Before you enter your plea(s) to the (remaining) charge(s) and specification(s), I will explain your rights concerning the plea(s) you are about to make. First, you may plead not guilty to the charge(s) and specification(s) (or to any of them).

Note. The italicized phrase must be used when more than one offense is charged.

SUM CM: You have a moral and legal right to plead not guilty even though you may believe that you are guilty. A plea of not guilty merely means that you are requiring that your guilt be proved beyond a reasonable doubt in this trial before you may be found guilty. If you plead not guilty to (the charge and specification) (one or more of the charges and specifications), I will proceed to hear and consider the evidence as to (the charge and specification) (each charge and specification to which you plead not guilty). Second, you may plead guilty to the charge(s) and specification(s) (or to any of them).

Note. The italicized phrase must be used when more than one offense is charged.

SUM CM: If you plead guilty to a charge and specification, you thereby admit every essential fact, or element, of the offense stated in that specification. I am authorized to find you guilty of any charge and specification to which you plead-guilty because of your plea alone without calling any witnesses or considering any evidence. However, you will still have the opportunity to have witnesses testify, or to introduce other evidence for the purpose of lessening the severity of the sentence. Any plea of guilty you desire to make must be entirely voluntary, and you should not plead guilty unless you are convinced that you are in fact guilty. If you are not convinced that you really are guilty, you should not allow any other consideration to influence you to plead guilty. By your plea of guilty, you also waive the right on appeal to object to my earlier rulings on the motions denied.

Note. Explanation of Plea of Guilty to Lesser Included Offense. If a less serious offense is included in an offense charged (see discussion of each offense in MCM, 1984, Part IV), advise the accused substantially as follows:

SUM CM: Third, you may plead guilty to a lesser included offense, that is, to an offense included in (an) (the) offense charged which is less serious than the offense charged. (Included in the offense alleged (in Specification ... of Charge ...) is the lesser offense of ...) If you plead guilty to a lesser included offense, you thereby admit every essential fact, or element, of that offense. With respect to any lesser included offense to which you plead guilty, I may find you guilty of that offense without any proof. However, I will call witnesses and produce any other evidence available for the purpose of determining whether you are guilty of the greater, rather than the lesser offense. Any elements of the greater offense which you admit in your plea of guilty to the lesser offense will be accepted as true and need not be proved further.

SUM CM: If you plead guilty to (the) (any) offense, I may sentence you to the maximum sentence I am authorized to impose, which is _____(see para 10).

I will not accept any plea of guilty unless you understand its meaning and effect and unless I am satisfied that you are voluntarily pleading guilty, that you are convinced that you are guilty, and that you are in fact guilty. If you desire some time to consider what your plea(s) will be, I will postpone the proceedings for a period long enough for you to decide. Do you understand the various pleas and the rights you have in connection with them, and do you want some additional time to make up your mind?

ACCUSED: (Yes) (No), sir.

Note. Do not proceed further until you are convinced that the accused understands his rights as to the plea(s) he may enter. When the accused is not represented by counsel and he desires some time to decide how he wants to plead, recess or adjourn the proceedings for a reasonable period, advising the accused how long the period will be. When the period elapses, call the accused before you and continue as follows:

SUM CM: How do you plead?

ACCUSED: I plead: (To all Charges and Specifications) (To Specification _____ of Charge _____) (_____): (Guilty) (Not Guilty)

Note. If the accused refuses or fails to plead guilty or not guilty to an offense charged, you should enter a plea of not guilty to that offense for him. If the accused refuses to enter any plea, evidence must be presented to establish that the accused is the person named in the specification(s) and is subject to court-martial jurisdiction. See R.C.M. 202, 1301(c). If the accused pleads guilty to one or more offenses, then proceed with Section III(A). If the accused pleads not guilty to all offenses, then note such pleas on the record of trial and skip to section III(B).

Section III(A)

Guide for Receiving Pleas of Guilty; Findings

18. Purpose and scope

The following procedure is suggested for use by the summary court-martial in the event the accused desires to plead guilty to one or more of the offense(s) with which he is charged. The guide will aid in insuring that the pleas of guilty are accepted only if the accused fully understands the proceedings and his rights therein pursuant to a plea of guilty.

- a. Explanation of plea of guilty;
- b. Waiver of Fifth and Sixth Amendment rights;
- c. Explanation of elements of offense(s);
- d. Elicitation of accused's description of offense(s);
- e. Maximum punishment based on plea;
- f. Plea of guilty to lesser included offense;
- g. Voluntariness of guilty plea;
- h. Acceptance of provident plea;
- i. Announcement of findings.

19. General.

You, as the summary court-martial, must conduct an in depth inquiry into any plea(s) of guilty to insure that the accused fully understands the ramifications of such plea(s). Before conducting the inquiry set out in the guide below, you should become thoroughly familiar with and be able to explain to the accused the elements of the offenses to which he has pleaded guilty as well as the appropriate discussions concerning those elements located in the elements of offenses section of DA Pam 27-9 (The Military Judges' Benchbook).

20. Guide.

- a. *Explanation of Plea of Guilty.*

SUM CM: It is my purpose to explain fully the meaning and effect of your plea, and to conduct an inquiry so that I may determine whether you fully understand its meaning and effect. Hold your copy of the specification(s) and charge(s) in your hand so that you may refer to them readily during this hearing. Your plea of guilty will not be accepted unless you understand its meaning and effect. You are legally entitled to plead not guilty even though you believe you are guilty, and thus place upon the Government the burden of proving your guilt beyond reasonable doubt.

A plea of guilty is equivalent to a conviction and is the strongest form of proof known to the law. On your plea alone, without receiving any evidence, this court can find you guilty of the offense(s) to which you plead guilty. Your plea will not be accepted unless you realize that by your plea you admit every act or omission and every element with respect to the offense(s) to which you plead guilty, and that you are pleading guilty because you really are guilty. If you are not convinced that you are in fact guilty, you should not allow any other consideration to influence you to plead guilty.

Do you understand what I have just told you?

ACCUSED: (Yes) (No), sir.

SUM CM: Do you have any questions at this time?

ACCUSED: (Yes) (No), sir.

b. Waiver of Fifth and Sixth Amendment Rights.

SUM CM: By your plea of guilty, you waive—and by “waive” I mean “give up”—certain important rights. These rights are:

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

Second, the right to a trial of the facts by this court—that is, the right to have this court decide whether or not you are guilty based upon evidence which the Government will present, and on any evidence you may introduce.

Third, the right to be confronted by and to cross-examine any witnesses against you. Do you understand what these rights are?

ACCUSED: (Yes) (No), sir.

SUM CM: Do you further understand that by pleading guilty you no longer have these rights?

ACCUSED: (Yes) (No), sir.

c. Explanation of Elements of Offense(s).

Note. In order to confirm the existence of a factual basis for the plea, the elements of each offense charged must be explained to the accused (see DA Pam 27-9, The Military Judge’s Benchbook), and additional specific inquiry must be made of the accused. Also, documentary and other physical evidence may be examined.

SUM CM: I am going to list the elements of the offense(s) to which you have pleaded guilty. These are the facts which the government must prove beyond reasonable doubt before the court can find you guilty if you plead not guilty. As I state each of these elements, ask yourself whether it is absolutely true and whether you wish to admit that it is true, and then be prepared to discuss each of these essential facts with me when I have finished. The elements of the offense(s) which your plea of guilty admits are: (Read the elements of the offense(s) from the appropriate proof paragraph of DA Pam 27-9, The Military Judge’s Guide. These should be specific as to alleged names, dates, places, amounts, and acts.)

Do you understand each of the elements of the offense(s)?

ACCUSED: (Yes) (No), sir.

SUM CM: Do you have any question about any of them?

ACCUSED: (Yes) (No), sir.

SUM CM: Do you understand that your plea of guilty admits that each of these elements accurately describes what you did?

ACCUSED: (Yes) (No), sir.

SUM CM: Do you believe, and admit, that taken together these elements correctly describe what you did?

ACCUSED: (Yes) (No), sir.

d. Elicitation of Accused’s Description of Offense(s).

Note. You should now question the accused about the circumstances of the offense(s) to which the accused has pleaded guilty. The accused will be placed under oath for this purpose. See oath below. The purpose of these questions is to develop the circumstances in the accused’s own words, so that you may determine whether each element of the offense(s) is established.

SUM CM: Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: (Yes) (No), sir.

e. Maximum Punishment Based on Plea.

SUM CM: (State the accused’s name), on your plea of guilty alone, you could lawfully be sentenced to the maximum punishment authorized. In this case, the maximum punishment authorized for the offense(s) to which you have pleaded

guilty is _____ (see para. 10).

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

ACCUSED: (Yes) (No), sir.

f. Plea of Guilty to a Lesser Included Offense.

Note. In the event the accused has pleaded guilty to a lesser included offense, add the following questions:

SUM CM: Do you understand that your plea of guilty to the lesser included offense of (absence without leave) (_____) constitutes a confession of all the elements of the offense charged with the exception of (the intent to remain away permanently) (_____), and no further proof is necessary to establish those elements admitted by your plea?

ACCUSED: (Yes) (No), sir.

SUM CM: If you plead guilty to this lesser offense of _____, in order to prove your guilt of the greater offense of _____, only the (one) _____ remaining element(s) of the greater offense need be proven beyond reasonable doubt. Do you understand this?

ACCUSED: (Yes) (No), sir.

g. Voluntariness of Guilty Plea. SUM CM: Has any one made any threat or tried in any other way to force you to plead guilty?

ACCUSED: (Yes) (No), sir.

SUM CM: Are you pleading guilty because of any promises or understandings between you and the convening authority or anyone else?

ACC: (Yes) (No), sir.

[*Note.* If the accused answers yes, you must inquire into the terms of such promises or understandings in accordance with R.C.M. 910. See MCM, 1984, app. 8, note 35 through acceptance of plea.)

SUM CM: Do you understand that even though you feel that you are guilty, you have a legal and a moral right to plead not guilty and place the burden on the Government to prove your guilt by legal and competent evidence beyond reasonable doubt?

ACCUSED: (Yes) (No), sir.

h. Acceptance of Provident Plea.

Note. A plea of guilty is not provident and will not be accepted unless you, the summary court-martial, make findings that the plea of guilty is made voluntarily and with full knowledge of its meaning and effect, and specifically that the accused has knowingly, intelligently, and consciously waived his rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against him. If the plea of guilty is improvident, you should advise the accused to plead not guilty because the guilty plea will not be accepted. You should further advise the accused that if he persists in entering a guilty plea: it will be rejected, a plea of not guilty will be entered in the record by the court, and the trial will proceed as though he had pleaded not guilty. If the plea is provident, you should announce the findings as follows:

SUM CM: Do you have any further questions as to the meaning and effect of your plea of guilty?

ACCUSED: (Yes) (No), sir.

SUM CM: Do you understand the meaning and effect of your plea of guilty?

ACCUSED: (Yes) (No), sir.

SUM CM: I find that the plea of guilty is made voluntarily and with full knowledge of its meaning and effect. I further specifically find that the accused has knowingly, intelligently, and consciously waived his rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against him. Accordingly, the plea is provident and is accepted.

However, you are advised that you may request to withdraw your plea(s) at any time before sentence is announced, and if you have a sound reason for your request, I will grant it.

Note. All pleas should be noted at this time in the space provided on the record of trial form.

Note. If the accused has pleaded not guilty to any offense charged, continue with section III(B). If the accused entered, and you accepted, pleas of guilty to all offenses, continue here:

i. Announcing Findings (Plea of Guilty to All Charges and Specifications).

Note. If the accused has entered a plea of guilty to all charges and specifications, and you have accepted these pleas, you may proceed at once to announce your findings of guilty of these charges and specifications. In announcing the findings, request the accused stand before you and announce your findings substantially as follows:

SUM CM: I find you: Of (the Charge and Specification) (all Charges and Specifications): Guilty.

Note. The findings of guilty should immediately be noted in the space provided for findings on the record of trial form. Next advise the accused as follows:

SUM CM: (I do not intend to call any witnesses.) (I am going to call (some of) the witnesses to testify in order to obtain a better knowledge of what occurred to help me in determining the sentence.) (However,) you may desire to call witnesses or to introduce other matters in extenuation or mitigation, that is, for the purpose of lessening the severity of the sentence. (The names of _____, _____, and _____ are listed on the charge sheet as being witnesses for you, and they have been notified to appear to testify for you.)

Note. Continue at Section III(C).

Section III(B)

Guide for ascertaining defense witnesses

21. Guide

Note. If the accused has entered a plea of not guilty to an offense charged, advise him as follows:

SUM CM: (The names of _____, _____, and _____ are listed on the charge sheet as being witnesses for you, and they have been notified to appear to testify for you.) If you know of any (other) witnesses you desire to have called to testify in your defense, give me their names and organizations or addresses, and I will try to arrange to have them called as witnesses. You may also wish to arrange for the attendance of another group of witnesses. For example, if I should find you guilty (of one or more of the offenses), you have the right to call witnesses or to introduce other matters in mitigation or extenuation, that is, for the purpose of lessening the severity of the sentence.

Note. Continue to Section III(C).

(Title and paragraph not used.)

No entries in this section.

Section III(C)

Guide for Closing Initial Session

22. Guide

SUM CM: I will now advise you more particularly as to the meaning of extenuation and mitigation. You may introduce matters tending to show that you have a good character generally or tending to establish your good character, reputation, or record for efficiency, fidelity, subordination, temperance, courage, or any other traits that go to make up a good soldier (see R.C.M. 1001 (c)). You may also offer evidence which serves to explain the circumstances surrounding the commission of the offense, including the reasons that caused you to act as you did but not amounting to a defense. Matters in mitigation or extenuation of an offense may be introduced through the testimony of witnesses, official records, letters, affidavits, or any other written documents. If you introduce matters in mitigation or extenuation of an offense, I have the right to call witnesses to testify, or to receive and consider other evidence, for the purpose of contradicting the matter you have introduced.

Do you want me to call witnesses for the purpose of testifying in mitigation or extenuation on your behalf (in the event you are found guilty of (the) (an) offense)? If so, furnish me with a list of their names and organizations or addresses. If you want me to get some military records that you would otherwise be unable to obtain, provide me with a list of these documents also.

If you desire to introduce letters, affidavits, or other documents in mitigation or extenuation and these documents are not now in your possession, please advise me so that I can postpone the date I have tentatively set for proceeding with the trial.

Do you understand?

ACCUSED: (Yes) (No), sir.

Note. If the accused has been found guilty of all charges and specifications on pleas of guilty and it appears that no evidence regarding the sentence is to be produced other than that already in your possession, proceed immediately in accordance with section V of this guide.

If the accused desires to have witnesses called or to have certain documents or records obtained, arrange, if possible, to have the witnesses present and the documents or records produced at the time and place set for the next session of the trial. However, if the accused indicates a desire to obtain letters, affidavits, or other documents not now in his possession, ordinarily he will be unable to do so by the date you had originally planned to proceed with the case. In this event or in the event you are unable to arrange for the attendance of certain witnesses or the production of certain documents requested by the accused by the date originally planned, set a new date sufficiently far in the future to permit the attendance of the witnesses and the production of the documents. In either event, inform the accused when and where you intend to continue the proceedings and arrange for his attendance. Also, notify the witnesses of the date and place you have set for the further proceedings and arrange for their attendance.

Note. Recesses and adjournments.

These continuances are called either recesses or adjournments. A recess is a temporary cessation of the proceedings which are resumed later on the same day. An adjournment is a cessation of the proceedings for a period extending beyond the same day. If you recess the court and plan to leave the courtroom for an appreciable length of time, you should inform the accused of the fact and the hour when you will return. If you adjourn the court, you should so inform the accused and advise him of the hour, date, and, if a change in the place of trial is necessary, the place at which you will resume the proceedings. If during the period of a continuance you learn that a witness will be unable to attend at the date appointed for resuming the proceedings, a new trial date should be set by you, and you should inform the accused, through his commanding officer, and any witnesses that may be needed on the new date. Any time during the proceedings at which you find it necessary or desirable to recess or adjourn the court, as when you have granted a continuance (see R.C.M. 906(b)(1)), an announcement in substantially the following form should be made:

SUM CM: (I have been called on an alert.) (The additional witness(es) will not be able to appear to testify until _____.) (_____). The court is (recessed) (adjourned) until _____ hours (on _____), at which time the court will again be in session (at _____). You must be (here) (there) at that time.

Note. A guide for receiving evidence on the issue of guilt or innocence appears at section IV.

(Title and paragraph not used.)

No entries in this section.

Section IV

Guide for Receiving Evidence on Pleas of Not Guilty; Findings

23. Purpose and scope

The following procedure is suggested in a trial by summary court-martial for receiving evidence relative to the question of the accused's guilt or innocence. Witnesses should be excluded from the courtroom except when they testify. Portions of this guide are also appropriate for use in receiving evidence relative to sentencing.

- a. Reassembly of proceedings;
- b. General nature of the charge(s);
- c. Presentation of Government evidence;
- d. Calling witnesses;
- e. Swearing witnesses (oath);
- f. Formal questions;
- g. Direct examination;
- h. Cross-examination;
- i. Identification and presentation of real (physical) evidence;
- j. Presentation of confessions and admissions;
- k. Excusing a witness;
- l. Presentation of documentary evidence;
- m. Closing the Government's evidence;
- n. Opening the accused's case;
- o. Calling additional witnesses;
- p. Recall of a witness;
- q. Explanation of accused's rights as a witness;

- r. Closing the trial on the issue of guilt or innocence;
- s. Deliberating on findings;
- t. Announcement of findings.

24. Guide.

a. Reassembly of Proceedings

SUM CM: The court is again in session. Are you ready to proceed?

Note. If the accused is not ready to proceed and has reasonable grounds for requesting a delay in the commencement of the proceedings, you should grant a continuance for a sufficient period of time to meet his needs.

b. General Nature of the Charges

SUM CM: The general nature of the charge(s) in this case is (are) (absence without leave), (_____) (_____) . At an earlier session of this trial conducted on _____ you pleaded (guilty to the offense(s) of _____) (not guilty to the offense(s) of _____). I am prepared at this time to hear evidence on the charge(s) to which you have pleaded not guilty.

c. Presentation of Government Evidence

SUM CM: I will now call witnesses and receive evidence on behalf of the government. Following my questions to the government witnesses, you (or your counsel) will have an opportunity to question them also. After all the evidence for the Government has been heard or received, you (or your counsel) will have the opportunity to call witnesses and present evidence on your behalf.

d. Calling Witnesses

SUM CM: I call (CPT _____) (SGT _____) as a witness for the Government.

e. Swearing a Witness

SUM CM: 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)?

Note. The word "affirm" should be substituted for the word "swear" and the phrase "So help you God" should be deleted when administering the affirmation to persons who have conscientious scruples against taking an oath or to persons who do not believe in a Supreme Being (R.C.M. 807). When testimony is given through an interpreter, the interpreter must first be sworn (R.C.M. 807(b)(1)(A), (b)(2)(E)). The interpreter must translate questions and answers in verbatim form. When administering the oath, direct the witness or interpreter to stand before you and to raise his right hand. You should also raise your right hand while you administer the oath.

WITNESS: I do.

Note. After the oath has been administered, request the witness to be seated in the chair provided. Witnesses other than the accused should ordinarily be excluded from the courtroom until called to testify (R.C.M. 806(b)).

f. Formal Questions

SUM CM: Are you (state the full name, rank, organization, and social security number of the witness)?

Note. Civilian witnesses should reveal full name, residence, occupation and social security number.

WITNESS: Yes, I am.

SUM CM: Do you know the accused?

WITNESS: (Yes) (No), sir.

Note. If identification of the accused is not an essential part of the expected testimony of the witness, this question may be omitted. If the witness identifies the accused, you should normally ask him to state the accused's name and organization, if he knows it. If the witness does not appear to be well acquainted with the accused and identification of the accused is relevant to and part of his testimony, you should inquire concerning the basis for his identification of the accused.

g. Direct Examination

SUM CM: Did you see the accused on the morning of 3 June 1984?

WITNESS: I did.

SUM CM: Where were you at the time you saw him?

WITNESS: I was in the dayroom of Company B, _____, Fort _____.

SUM CM: About what time was this?

WITNESS: It was approximately 0930 hours.

SUM CM: Who else was present?

WITNESS: Sergeant John Smith was there.

SUM CM: What was the accused doing at that time?

WITNESS: He was arguing with Sergeant Smith and (witness continues with details of incident).

h. Cross-Examination

SUM CM: You (or your counsel) may now cross-examine this witness concerning any of his testimony, any knowledge he may have of the offense(s), or concerning his worthiness of belief. If you wish, I will do this for you if you will inform me in a general way of the matters about which you want me to question the witness.

Note. The accused, if he requests, should be permitted to see any statement of the witness which may be in the file to aid him in determining what questions to ask, or to have you ask, the witness. Such statements should also be made available to counsel when the accused is so represented.

ACCUSED: Sir, please ask him if he heard everything that Sergeant Smith said to me in the dayroom.

SUM CM: Did you hear the whole conversation between the accused and Sergeant Smith in the dayroom?

WITNESS: No, sir. They were arguing at the time I came into the dayroom, and I don't know what was said before I got there.

SUM CM: Do you have any more questions you want this witness to answer?

ACCUSED: No, sir.

i. Identification and Presentation of Real (Physical) Evidence

SUM CM: I have here a knife which I have designated as Exhibit No._____.

Note. At this point in the proceedings, you should permit the accused to examine the exhibit.

SUM CM: Do you recognize this knife?

WITNESS: I do.

SUM CM: How do you recognize it?

WITNESS: I recognize it by the broken small blade on it and by the scratches I saw Captain Roe place on it when I handed it to him.

SUM CM: How did it come into your possession?

WITNESS: I found it under the accused's bunk.

SUM CM (to accused, after questioning the witness further as to the circumstances under which the knife was found and after cross-examination, if any, of the witness): Do you have any objection to my receiving this exhibit in evidence?

ACCUSED: (Yes, sir (stating reasons)) (No, sir).

SUM CM: (Your objection is sustained) (Your objection is overruled and) (The exhibit will be received in evidence).

Note. When evidence is admitted as an exhibit, mark it "Received in Evidence," followed by your initials.

j. Excusing a Witness

SUM CM: I have no more questions to ask this witness. Are there any additional questions you desire to ask or to have me ask the witness?

ACCUSED: (Yes) (No), sir.

SUM CM (to witness): You are excused, but remain in the vicinity of the courtroom because you may be needed again. You are instructed not to discuss your testimony in the case with anyone except the accused (or his counsel). 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 the accused (or his counsel) attempts to talk to you about your testimony in this case, you should make the circumstances known to me.

Note. If the witness is a civilian or an officer with important duties, who desires to return to his work, and you are convinced that no further testimony from him will be needed, you may excuse him permanently from the trial.

k. Presentation of Documentary Evidence

SUM CM: I have here copies of personnel strength reports of Company B, _____, for 29 May 1984 and for 3 June 1984 which I have designated Exhibit No. _____. They appear to be certified as true copies by _____.

SUM CM (to accused, after permitting him to examine the document): Do you have any objection to my receiving these exhibits in evidence?

ACCUSED: (Yes, sir (stating reasons)) (No, sir).

SUM CM: (Your objection is sustained) (Your objection is overruled and) (The exhibits will be received in evidence).

l. Closing the Government's Evidence

SUM CM: This completes the evidence to be presented on behalf of the Government. (I will now call the witnesses who are to testify for you.) (Do you have any witnesses to testify for you on the question of your innocence or guilt of the charge(s)?)

Note. The summary court-martial may be asked to rule upon a motion for a finding of not guilty at the close of the government's evidence. The basis for such a motion may be an alleged failure to introduce sufficient evidence to support one of the essential elements of the offense charged. (See R.C.M. 917). Thereafter, the accused or his counsel (if any) may ask to open the defense with a brief introductory statement and proceed with the direct examination of defense witnesses. You should proceed as outlined below.

m. Opening the Accused's Case

SUM CM: You may question each of the witnesses who are to testify for you or, if you prefer, I will question them if you will tell me generally what you want me to question them about.

ACCUSED: I would prefer to have you question them, sir. I would like you to call Sergeant Jones as my first witness. He was with me at the time, and he can tell you how the fight started.

SUM CM: Very well.

Note. The procedure for administering the oath and for the introductory questioning of the witness set forth in this guide should be followed for defense as well as Government witness. After the accused has completed his examination of the defense witness or you have done so for him, you may cross-examine the witness if cross-examination seems to be warranted. Continue to examine each witness until all relevant testimony has been obtained and the accused has expressed satisfaction that all pertinent testimony has been given. The rules prohibiting leading questions on direct examination (Mil. R. Evid. 611 (c)) should be relaxed when the accused desires to conduct his own examination of defense witnesses.

n. Calling Additional Witness(es)

Note. When all witnesses who were initially called have testified, determine whether other witnesses should be called in the interests of justice and fairness to both the Government and the accused and whether any of the witnesses who have testified should be recalled. In addition, inquire of the accused substantially as follows:

SUM CM: (I do not intend to call any additional witnesses.) (I intend to call _____ and _____ as additional witnesses.) (I am going to recall _____ to the stand for further questioning.) Are there any witnesses you desire to recall to the stand, or are there any additional witnesses who have not been called whom you wish to testify?

ACCUSED: (Yes) (No), sir.

Note. If you desire to call additional witnesses, either on your own motion or at the accused's request or on motion of counsel for the accused, you should attempt to arrange for their immediate presence if that is possible. If arrangements cannot be made to have the witnesses testify on the date of the trial, you should continue the case to a date on which the witnesses will be able to attend. If the accused desires to call additional witnesses and the nature of their testimony is not apparent, inquire of the accused substantially as follows:

SUM CM: What do you expect Private First Class Brown (the witness the accused desires to have called) will testify to concerning this case?

ACCUSED: _____.

SUM CM: I will arrange for Private First Class Brown to testify. (The expected testimony of Private First Class Brown does not appear to be relevant to any issue in this case. For this reason, I will not call him as a witness.)

o. Recall of a Witness SUM CM (to witness): You are reminded that you are still under oath.

p. Explanation of Accused's Rights as a Witness

Note. After all the witnesses for the Government and for the accused have testified on the question of guilt or innocence in a case in which the accused has pleaded not guilty to one or more specifications, advise the accused as follows:

SUM CM: Earlier in this trial, I advised you concerning your right to testify under oath concerning the offense(s) charged against you or to remain silent. I will repeat this advice if you want me to. Do you want me to repeat this advice?

ACCUSED: (Yes) (No), sir.

Note. If the accused answers in the affirmative, repeat the advice. When the accused indicates he understands his rights, with or without repetition, you should inquire substantially as follows.

SUM CM: Do you wish to testify (concerning the specification) (concerning one or more of the specifications and, if so, concerning which specification or specifications do you wish to testify)?

ACCUSED: (Yes, sir. I want to testify (concerning _____).) (No sir. I do not wish to testify.)

Note. If the accused elects to testify, administer the oath to him, and permit him to testify concerning any offense about which he desires to testify. You may, and ordinarily should, question him concerning every relevant fact and element of any offense about which he does testify.

q. Closing the Trial on the Question of Guilt or Innocence

SUM CM: I have now heard all of the evidence. You may make an argument on this evidence before I decide whether you are guilty or not guilty.

Note. If requested to do so, the summary court-martial should grant a request for the accused, or his counsel if he is so represented, to make a brief statement of closing remarks summarizing the defense of the accused.

When all the evidence concerning guilt or innocence for the Government and the accused has been received, announce the close of this portion of the trial in substantially the following form:

SUM CM: The taking of evidence in this case on the question of guilt or innocence is closed.

r. Deliberating on the Findings

SUM CM: The court-martial is closed so that I may review the evidence. Wait outside the courtroom until I recall you.

Note. After that portion of the trial relating to the question of guilt or innocence has been completed, review the evidence in your mind.

In deliberating on the findings, you should keep in mind that before you can find the accused guilty of any offense *you must be convinced beyond a reasonable doubt by the evidence you have received in court in the presence of the accused that he is guilty of that offense.* See R.C.M. 918. You may not consider any alleged facts or data which you did not receive in evidence, such as a confession of the accused which you did not receive because it was taken in violation of Article 31 of the Code. Furthermore, you may find the accused guilty only of the offense or offenses charged, a lesser offense included in an offense charged, or, by exception or exceptions and substitutions, an offense which does not change the identity of an offense charged or a lesser included offense thereof (R.C.M. 922; MCM, 1984, App. 10). You may either recess or adjourn the court while you are deliberating on the findings.

If it is immediately apparent that none of the evidence is in conflict and establishes the guilt of the accused beyond a reasonable doubt or if, on the other hand, it is immediately apparent that the evidence is not sufficient to establish the accused's guilt beyond a reasonable doubt, you may announce your findings immediately.

s. Announcing the Findings

Note. When you have reached your findings, recall the accused, direct him to stand before you, and announce your findings substantially in accordance with one of the following forms, as appropriate. For further instructions as to form of findings, see R.C.M. 922 and MCM, 1984, App. 10.

(1) Not guilty of all offenses.

SUM CM: I find you: Of (the) (all) Specification(s) and Charge(s): Not Guilty.

(2) Guilty of all offenses charged.

SUM CM: I find you: Of (the) (all) Specification(s) and Charge(s): Guilty.

(3) Guilty of some but not all offenses charged.

SUM CM: I find you: Of Specification (_____) of (the) Charge (____): (Guilty) (Not Guilty); Of Specification (_____) of (the) Charge (____): (Guilty) (Not Guilty); Of (the) Charge (____): (Guilty) (Not Guilty)

(4) Guilty of lesser included offense or with exceptions and substitutions.

SUM CM: I find you: 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 _____).

Note. All findings should immediately be noted on the record of trial.

In a case in which the accused has pleaded guilty to some but not all of the charges and specifications, any findings of guilty resulting from the guilty pleas should also be announced at this time. If the accused has been found not guilty of all charges and specifications, take action in accordance with Section VI of this pamphlet. If the accused has been found guilty of any offense, continue with Section V.

Section V

Procedure Pertaining to Sentence

25. Purpose and scope

The purpose of this section is to set forth an orderly presentencing and sentencing procedure. The guide which follows may be used, in conjunction with procedures for receiving evidence already illustrated, as an aid by the summary court-martial.

- a. Verification of personal data;
- b. Evidence of previous convictions;
- c. Witnesses in extenuation and mitigation;
- d. Documentary matters in extenuation and mitigation;
- e. Testimonial rights of accused in extenuation and mitigation;
- f. Witnesses in rebuttal;
- g. Argument on sentence;
- h. Deliberating on sentence;
- i. Announcing sentence;
- j. Adjourning the court-martial.

26. Guide

a. Verification of Personal Data

Note. When a finding of guilty has been made as to any one or more charge, proceed as follows:

SUM CM: I will now receive information in order to decide on an appropriate sentence. Examine the information concerning you located on the front page of your copy of the charge sheet. Is your personal data, as shown, correct?

ACCUSED: (Yes) (No), sir.

Note. If the accused alleges any of the personal data to be incorrect, you must determine the issue after obtaining any official verifications available to you.

b. Evidence of Previous Convictions

Note. If there is evidence of a previous admissible (see R.C.M. 1001), conviction, present it in evidence in the manner illustrated in section IV for receiving documentary evidence. If the accused claims that it is not correct, you must determine the issue from sources available to you. Military and civilian convictions of the accused may be introduced.

Previous convictions may be proven by any evidence admissible under the Military Rules of Evidence. Normally, previous convictions may be proven by use of the personnel records of the accused, by the record of the conviction, or by the order promulgating the result of trial.

c. Evidence of Nonjudicial Punishment Evidence of the imposition of nonjudicial punishment under the provisions of Article 15 of the Uniform Code of Military Justice may be considered so long as the record of punishment is properly completed and properly maintained in the accused's personnel file, see AR 27-10, chapter 3, and is properly authenticated. See Mil. R. Evid. 902.

d. Witness(es) in Extenuation and Mitigation

Note. The requirements for the personal appearance testimony in the presentencing proceeding differs substantially from that when the testimony of a witness is offered on the merits. During the presentencing proceedings, there is much greater latitude to receive information by means other than testimony presented through the personal appearance of the witnesses. See R.C.M. 1001(c) for determination of availability of witnesses prior to trial. The determination at trial as to whether a witness shall be produced to testify during presentencing proceedings is a matter within your sound discretion, subject to the limitations set out in R.C.M. 1001(e)(2). Under those provisions, a witness may be produced to testify during presentence proceedings through a subpoena or travel orders at government expense only if—

“(a) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;”

“(b) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;”

“(c) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;”

“(d) Other forms of evidence, such as oral depositions, written interrogatories, or former testimony would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and”

“(e) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding

that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.&/q;”

SUM CM: You have previously indicated to me (a) (number of) (there were no) witness(es) that you desired to testify on your behalf in extenuation and mitigation. (I have arranged for the witness(es) to be present.) Are there any witnesses you desire to call for the purpose of testifying on your behalf in extenuation and mitigation (other than those you have already indicated)?

ACCUSED: _____.

SUM CM: I will now receive testimony from the witnesses in extenuation and mitigation.

Note. Witness testimony is received in accordance with procedures already illustrated in section IV.

e. Documentary Evidence in Extenuation and Mitigation

SUM CM: I will now receive any documentary evidence you desire me to consider in extenuation or mitigation.

Note. Evidence from the accused’s personnel records, including evidence favorable to the accused, should now be received in accordance with R.C.M. 1001(b)(2) and the procedures illustrated in section IV. These records should be shown to the accused.

SUM CM: Do you know any reason why I should not consider these?

ACC: (Yes) (No), sir.

Note. You should resolve objections under R.C.M. 1002(b)(2) and the Military Rules of Evidence and then proceed as follows. See also R.C.M. 1001(b)(3), (4), and (5) concerning other evidence which may be introduced.

f. Testimonial Rights of Accused in Extenuation and Mitigation

SUM CM: You have the right to testify under oath concerning matters in extenuation and mitigation, or you may remain silent, in which case I will not draw any inferences from your silence. Or, if you wish, you may make an unsworn statement. If you testify under oath, I may question you on your testimony. If you make an unsworn statement, I am not permitted to question you about it, but I may receive evidence to contradict anything contained in it. An unsworn statement may be submitted orally in writing. Do you understand?

ACCUSED: (Yes) (No), sir.

Note. If the accused elects to testify under oath, administer the oath or remind him that he is still under oath, as appropriate. You may cross-examine the accused on this testimony. If the accused elects to make an unsworn statement, permit him to do so. Also receive any unsworn written statement that the accused may furnish to you. You may not cross-examine the accused on his written or verbal unsworn statement.

g. Witness(es) in Rebuttal

Note. If you conclude that you should call (a) witness(es) in rebuttal of matters presented in extenuation and mitigation, do so, continuing the case if necessary to arrange for their attendance. Witnesses in rebuttal are sworn and examined by you in the manner previously illustrated in Section IV. Also, the accused is again extended the right to cross-examine or request you to cross-examine the witnesses.

h. Argument on Sentence

SUM CM: You may make an argument on an appropriate sentence.

ACC: _____.

i. Deliberating on Sentence

SUM CM: This court–martial is closed for determination of the sentence. Wait outside the courtroom until I recall you.

Note. If, upon the conclusion of the taking of evidence, if any, you have determined what sentence is appropriate, you may announce the sentence immediately. If you desire to give further consideration to the matter of the sentence, recess or adjourn the court. In determining whether or not to adjudge a reduction of any kind as a part of the sentence, you should keep in mind the sentence limitations and maximums. (See para 10.)

j. Announcing Sentence

Note. When you have determined an appropriate sentence, require the accused to stand before you while you announce the sentence. For forms of sentences, see MCM, 1984, appendix 11.

SUM CM: I sentence you: To _____.

Note. If the sentence includes confinement, advise the accused as follows.

SUM CM: You have the right to request in writing that [name of convening authority] defer your sentence to confinement. Deferment is not a form of clemency and is not the same as suspension of a sentence. It merely postpones the running of a sentence to confinement.

Note. Whether or not the sentence includes confinement, advise the accused as follows.]

SCM CM: You have the right to submit in writing a petition or statement to the convening authority. This statement may include any matters you feel the convening authority should consider, a request for clemency, or both. This statement must be submitted within 7 days, unless you request and the convening authority approves an extension of up to 10 days. After the convening authority takes action, your case will be reviewed by a judge advocate for legal error. You may suggest, in writing, legal errors for the judge advocate to consider. If, after final action has been taken in your

case, you believe that there has been a legal error, you may request review of your case by The Judge Advocate General of the Army. Do you understand these rights?

ACC: (Yes) (No), sir.

k. Adjourning the Court-Martial

SCM CM: This court-martial is adjourned.

Note. Record the sentence in the record of trial, inform the convening authority of the findings, recommendations for suspensions, if any, and any deferment request. If the sentence includes confinement, arrange for the delivery of the accused to the accused's commander, or someone designated by the commander, for appropriate action. Ensure that the commander is informed of the sentence. Complete the record of trial and forward to the convening authority. See section VI below.

Section VI

Post-Trial Duties

27. Purpose and scope

The purpose of this section is to advise the summary court-martial of the appropriate post-trial actions that he must accomplish.

28. Completion of the record of trial

You must prepare an original and at least two copies of the record of trial (App C). You must also authenticate the record by signing each copy in the space provided. As soon as the record is authenticated, you must cause a copy of the record of trial to be served on the accused and attach the accused's receipt for the copy to the record. If the accused was represented by counsel, the copy of the record may be served on counsel. The original and one copy of the record must be forwarded to the convening authority.

29. Report of result of trial

Prepare, sign, and dispatch a sufficient number of copies of a report of result of trial by summary court-martial (see app E) to make distribution of one copy to the immediate commander of the accused, one copy to the convening authority if he is other than the accused's immediate commander, one copy to the commanding officer of the confinement facility if the accused was in pretrial confinement or if the sentence adjudged includes confinement, and such other copies as may be required by local directives. A sample of a completed DA Form 4430-R is at appendix E.

30. Return of file to convening authority

When all of the procedures indicated above have been completed, return the file to the convening authority, including, in addition to all papers originally accompanying the file, any documentary or other exhibits received or offered in evidence at the trial (or copies or descriptions thereof certified by you, see M.R.E. 902(4); R.C.M. 1001-1008) which were not included in the original file.

31. Recommendation for clemency

You may, if you consider it appropriate, recommend to the convening authority that clemency, in the form of a suspension of part or all of the sentence or in any other form, be extended to the accused. Any recommendation for clemency should be in writing.

Appendix A
Suggested Arrangement of Courtroom for Trial

The following figure is a suggested arrangement of the courtroom for trial.

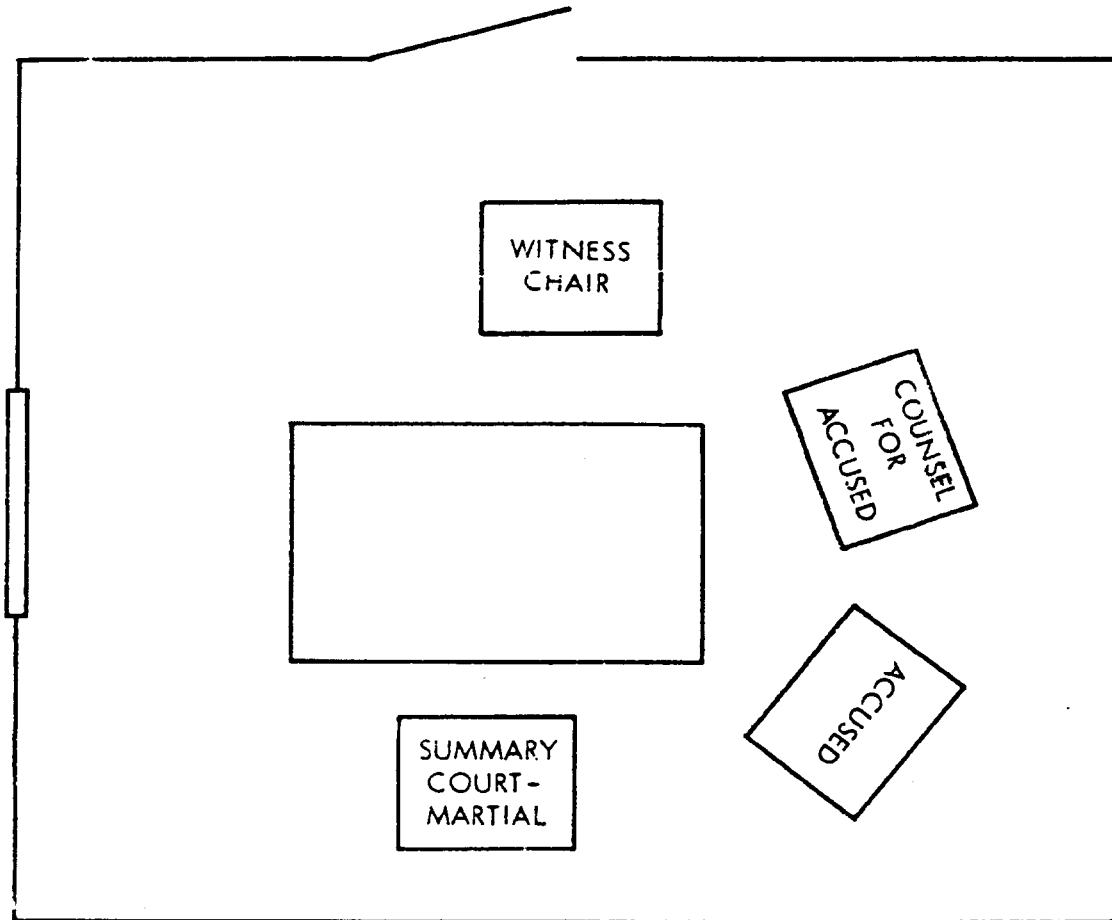


Figure A-1. Suggested Arrangement of Courtroom for Trial

Appendix B

Summary Court-Martial Rights Notification/Waiver Statment (DA Form 5111-R)

The following is an example Summary Court-Martial Rights Notification/Waiver Statment (DA Form 5111-R).

SUMMARY COURT-MARTIAL RIGHTS NOTIFICATION/WAIVER STATEMENT	
For use of this form, see AR 27-10; the proponent agency is TJAG.	
1. STATEMENT CONCERNING REFUSAL TO ACCEPT QUALIFIED COUNSELING, ARTICLE 20, UCMJ AND UNDERSTANDING OF RIGHTS	
<p>a. On _____, I was afforded an opportunity to consult with legal counsel before making my decision to consent to Summary Court-Martial proceedings under Article 20, UCMJ. <small>(Date)</small></p> <p>b. I have decided not to see counsel in connection with this action.</p> <p>c. I understand my rights under Article 20, UCMJ, including my right to object to trial by Summary Court-Martial, punishment limitations, potential use of the record of Summary Court-Martial in any subsequent courts-martial, and other consequences of my decision.</p> <p>d. I voluntarily decide to consent to trial by Summary Court-Martial.</p>	
<small>TYPED OR PRINTED NAME AND RANK OF SERVICE MEMBER</small>	<small>SIGNATURE OF SERVICE MEMBER</small>
<small>TYPED OR PRINTED NAME & RANK OF SUMMARY COURT-MARTIAL OFFICER</small>	<small>SIGNATURE OF SUMMARY COURT-MARTIAL OFFICER</small>
2. STATEMENT ACKNOWLEDGING QUALIFIED LEGAL COUNSEL FOR ARTICLE 20, UCMJ, AND STATEMENT OF UNDERSTANDING OF RIGHTS	
<p>a. On <u>18 September 1984</u>, I consulted with <u>CPT James Watt</u> who <small>(Date) (Name and Rank of Defense Counsel)</small></p> <p>explained my rights to me under the provisions of Article 20, UCMJ, to include my right to object to trial by Summary Court-Martial, punishment limitations, potential use of the record of Summary Court-Martial proceedings in any subsequent courts-martial, and other consequences of my decision.</p> <p>b. I understand my rights and voluntarily decide to consent to trial by Summary Court-Martial.</p>	
<small>TYPED OR PRINTED NAME AND RANK OF SERVICE MEMBER</small>	<small>SIGNATURE OF SERVICE MEMBER</small>
PFC Arthur N. Sherry	Arthur Sherry
<p>c. I have advised <u>PFC Arthur N. Sherry</u> of his or her statutory and regulatory rights with <small>(Name and Rank of Service Member)</small> regard to this Summary Court-Martial and the possible consequences of his or her consent or objection to trial by Summary Court-Martial.</p>	
<small>TYPED OR PRINTED NAME, RANK, & BRANCH OF DEFENSE COUNSEL</small>	<small>SIGNATURE OF DEFENSE COUNSEL</small>
CPT James Watt	James Watt
3. REFUSAL TO ACKNOWLEDGE RECEIPT OF ADVICE - ARTICLE 20, UCMJ	
<p>After I advised _____ of his <small>(Name (First, MI, Last)) (Rank) (SSN)</small></p> <p>or her rights to consult with legal counsel before making a decision to consent or object to Summary Court-Martial proceedings under Article 20, UCMJ, he or she refused to complete and sign an acknowledgement of receipt of the advice.</p>	
<small>TYPED OR PRINTED NAME & RANK OF SUMMARY COURT-MARTIAL OFFICER</small>	<small>SIGNATURE OF SUMMARY COURT-MARTIAL OFFICER</small>
<small>REMARKS</small>	

DA FORM 5111-R, Aug 84

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Figure B-1. Summary Court-Martial Rights Notification/Waiver Statment (DA Form 5111-R)

Appendix C
Record of Trial by Summary Court-Martial (DD Form 2329)

The following is an example of a Record of Trial by Summary Court-Martial (DD Form 2329).

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL			
1a. NAME OF ACCUSED (Last, First, MI) Arthur N. Sherry	b. GRADE OR RANK PFC	c. UNIT OR ORGANIZATION OF ACCUSED Co A, 1st Battalion, 61st Inf	d. SSN 111-11-1111
2a. NAME OF CONVENING AUTHORITY (Last, First, MI) Gail L. Busybody	b. RANK COL	c. POSITION Commander	d. ORGANIZATION OF CONVENING AUTHORITY 61st Infantry Brigade
3a. NAME OF SUMMARY COURT-MARTIAL (If SCM was convened, so state.) Ron F. Andrews	b. RANK Major	c. UNIT OR ORGANIZATION OF SUMMARY COURT-MARTIAL 2d Battalion, 61st Inf	
(Check appropriate answer)			YES NO
4. At a preliminary proceeding held on <u>20 September</u> 19 <u>84</u> , the summary court-martial gave the accused a copy of the charge sheet.			X
5. At that preliminary proceeding the summary court-martial informed the accused of the following:			
a. The fact that the charge(s) had been referred to a summary court-martial for trial and the date of referral.			X
b. The identity of the convening authority.			X
c. The name(s) of the accuser(s).			X
d. The general nature of the charge(s).			X
e. The accused's right to object to trial by summary court-martial.			X
f. The accused's right to inspect the allied papers and immediately available personnel records.			X
g. The names of the witnesses who could be called to testify and any documents or physical evidence which the summary court-martial expected to introduce into evidence.			X
h. The accused's right to cross-examine witnesses and have the summary court-martial cross-examine on behalf of the accused.			X
i. The accused's right to call witnesses and produce evidence with the assistance of the summary court-martial if necessary.			X
j. That during the trial the summary court-martial would not consider any matters, including statements previously made by the accused to the summary court-martial, unless admitted in accordance with the Military Rules of Evidence.			X
k. The accused's right to testify on the merits or to remain silent, with the assurance that no adverse inference would be drawn by the summary court-martial from such silence.			X
l. If any findings of guilty were announced, the accused's right to remain silent, to make an unsworn statement, oral or written or both, and to testify and to introduce evidence in extenuation or mitigation.			X
m. The maximum sentence which could be adjudged if the accused was found guilty of the offense(s) alleged.			X
n. The accused's right to plead guilty or not guilty.			X
6. At the trial proceeding held on <u>21 September</u> 19 <u>84</u> , the accused, after being given a reasonable time to decide, <input type="checkbox"/> did <input checked="" type="checkbox"/> did not object to trial by summary court-martial. (Note: The SCM may ask the accused to initial this entry at the time the election is made.)			
<u>AMS</u> (Initial)			
7a. The accused <input type="checkbox"/> was <input checked="" type="checkbox"/> was not represented by counsel. (If the accused was represented by counsel, complete b, c, and d below.)			
b. NAME OF COUNSEL (Last, First, MI)			c. RANK (If any)
d. COUNSEL QUALIFICATIONS			

DD FORM 2329
84 AUG

Figure C-1. Record of Trial by Summary Court-Martial (DD Form 2329)

8. The accused was arraigned on the attached charge(s) and specification(s). The accused's pleas and the findings reached are shown below		
CHARGE(S) AND SPECIFICATIONS	PLEA(S)	FINDINGS (Including any exceptions and substitutions)
Ch. I Spec. 1 Spec. 2	NG NG NG	G NG G except "\$74.00", substituting "\$25.00"
Ch. II Spec. Add'l Ch. Spec.	G G NG NG	G G NG NG
9. The following sentence was adjudged: Confinement for 15 days, forfeiture of \$200 pay per month for 1 month and reduction to the grade of E-1		
10. The accused was advised of the right to request that confinement be deferred. (Note: When confinement is adjudged.) <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		11. The accused was advised of the right to submit written matters to the convening authority, including a request for clemency, and of the right to request review by the Judge Advocate General. <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO
12. AUTHENTICATION		
<u>Ron E. Anderson</u> Signature of Summary Court-Martial		<u>21 September 1984</u> Date
13. ACTION BY CONVENING AUTHORITY		
The sentence is approved and will be executed.		
<u>Gail L. Busybody</u> Typed Name of Convening Authority	<u>Commander</u> Position of Convening Authority	
<u>Colonel</u> Rank		
<u>Gail L. Busybody</u> Signature of Convening Authority	<u>29 September 1984</u> Date	

Figure C-1. Record of Trial by Summary Court-Martial (DD Form 2329)—Continued

**Appendix D
Representation Certificate**

The following is an example of a Representation Certificate.

(date)

The accused was represented by _____,
an attorney.

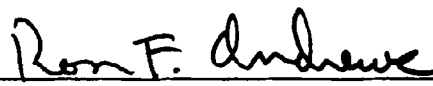
(signature of accused)

**(signature of summary court-martial
officer)**

Figure D-1. Representation Certificate

Appendix E
Result of Trial (DA Form 4430-R)

The following is an example of a Report of Result of Trial (DA Form 4430-R).

DEPARTMENT OF THE ARMY																																			
For use of this form, see AR 27-10; the proponent agency is The Judge Advocate General.																																			
<p>SUBJECT: REPORT OF RESULT OF TRIAL TO: Commander, 61st Infantry Brigade</p>																																			
<p>1. Notification under R.C.M. 1101 and AR 27-10, paragraph 5-26 is hereby given in the case of the United States v. <u>PFC Arthur N. Sherry</u></p>																																			
<p>2. Trial by <u>Summary</u> Court-Martial on <u>21 September</u> 19<u>84</u> at <u>FT Nowhere,</u> <u>North Dakota.</u></p>																																			
<p>3. Court-martial appointed by: CMCO Number <u>2</u> HQ <u>61st Infantry Brigade</u> dated 15 September 1984.</p>																																			
<p>4. Summary of offenses, pleas, and findings:</p> <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <thead> <tr> <th style="text-align: center;">CH.</th> <th style="text-align: center;">ART. UCMJ.</th> <th style="text-align: center;">SPEC</th> <th style="text-align: left;">BRIEF DESCRIPTION OF OFFENSE(S)</th> <th style="text-align: center;">PLEA</th> <th style="text-align: center;">FINDING</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">I</td> <td style="text-align: center;">86</td> <td style="text-align: center;">1</td> <td>Failure to repair, 20 Aug</td> <td style="text-align: center;">NG</td> <td style="text-align: center;">G</td> </tr> <tr> <td></td> <td></td> <td style="text-align: center;">2</td> <td>Failure to repair, 22 Aug</td> <td style="text-align: center;">NG</td> <td style="text-align: center;">G</td> </tr> <tr> <td style="text-align: center;">II</td> <td style="text-align: center;">121</td> <td style="text-align: center;">The</td> <td>Wrongful appropriation</td> <td style="text-align: center;">NG</td> <td style="text-align: center;">G,</td> </tr> <tr> <td colspan="5"></td> <td style="text-align: right; vertical-align: bottom;">except \$74, substituting \$25.</td> </tr> </tbody> </table>						CH.	ART. UCMJ.	SPEC	BRIEF DESCRIPTION OF OFFENSE(S)	PLEA	FINDING	I	86	1	Failure to repair, 20 Aug	NG	G			2	Failure to repair, 22 Aug	NG	G	II	121	The	Wrongful appropriation	NG	G,						except \$74, substituting \$25.
CH.	ART. UCMJ.	SPEC	BRIEF DESCRIPTION OF OFFENSE(S)	PLEA	FINDING																														
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		2	Failure to repair, 22 Aug	NG	G																														
II	121	The	Wrongful appropriation	NG	G,																														
					except \$74, substituting \$25.																														
<p>5. SENTENCE: Confinement for 15 days, forfeiture of \$200 pay per month for 1 month, Red E-1.</p>																																			
<p>6. Date sentence adjudged: 21 September 1984</p>																																			
<p>7. Contents of pretrial agreement concerning sentence, if any: None</p>																																			
<p>8. Number of days of presentence confinement, if any: None</p>																																			
<p>9. Name(s) and SSN(s) of companion accused or co-accused, if any: None</p>																																			
<p> _____ (SIGNATURE) RON F. ANDREWS _____ (TYPED NAME) MAJ IN _____ (RANK) (BRANCH OF SERVICE)</p>																																			

DA FORM 4430-R, Aug 84

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Figure E-1. Result of Trial (DA Form 4430-R)

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