

52ND MILITARY JUDGE COURSE

INSTRUCTIONS

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INSTRUCTIONS

Outline of Instruction

I. INTRODUCTION

- A. According to Black's Law Dictionary, jury instructions are "direction[s] given by the judge to the jury concerning the law of the case; a statement made by the judge to the jury informing them of the law applicable to the case in general or some aspect of it; an exposition or the rules or principles of law applicable to the case or some branch or phase of it, which the jury *are bound to accept and apply.*" BLACK'S LAW DICTIONARY 856 (6th ed.1991).
- B. There are three essential presumptions underlying the use of instructions at trial.
1. The panel or jury **listens to** the instructions.
 2. The panel or jury **understands** the instructions. *See United States v. Quintanilla*, 56 M.J. 37, 83 (2001).
 3. The panel or jury **follows** the instructions. *See United States v. Quintanilla*, 56 M.J. 37, 83 (2001).

II. SOURCES OF INSTRUCTIONS

- A. Rule for Courts-Martial (R.C.M.) 920 (findings instructions) and R.C.M. 1005 (sentencing instructions).
- B. Military Rules of Evidence (Mil. R. Evid.). Mil. R. Evid. 105.
- C. Case Law. *See, e.g.*, court-approved model interracial identification instruction. *United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990).
- D. Counsel. Military judge is required to give requested instruction if: (1) issue is reasonably raised, (2) not adequately covered elsewhere in anticipated instructions, and (3) proposed instruction accurately states the law concerning facts in the case. *United States v. Briggs*, 42 M.J. 367 (1995). *See, e.g., United States v. Terry*, 64 M.J. 295, 299 (2007) (The military judge will generally instruct on matters that are “in issue.” “A matter is ‘in issue’ when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose.” R.C.M. 920(e)).
- E. DA Pam 27-9, Military Judges’ Benchbook (15 September 2002).

III. PRELIMINARY INSTRUCTIONS

- A. Military judge should give preliminary instructions as it sets the stage for what is about to happen.
- B. Mixed plea cases. The military judge should ordinarily defer informing the members of the offenses to which the accused pled guilty until after the findings on the remaining contested offenses have been entered. R.C.M. 913(a).
 - 1. Exception: when the accused requests otherwise. *See* discussion portion of R.C.M. 913(a).
 - 2. Exception: when the accused’s plea was to lesser-included-offense and the prosecution intends to prove the greater offense. *See* discussion portion of R.C.M. 913(a).

IV. FINDINGS INSTRUCTIONS

A. Required Instructions. R.C.M. 920(e).

1. Elements of the offense(s). Benchbook, ch. 3. If the military judge entirely omits an element, the error is *per se* prejudicial. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988). However, if the judge adequately identifies the element but gives an erroneous instruction on it, that error may be tested for prejudice. *United States v. Cowan*, 42 M.J. 475 (1995); *see also United States v. Glover*, 50 M.J. 476 (1999). In *Glover*, the accused was convicted of wrongful use of an inhalant under Article 134. The military judge instructed the members that one of the elements was that the use of the inhalant had to be wrongful; however, he failed to clarify further or define what the term “wrongful” meant. Although the CAAF found error the court held that no element was left out; the defense did not object at trial and there is nothing in the Benchbook that provides for a more detailed instruction on the term “wrongful” in this context. It was not prejudicial error because there was no evidence that the accused may have accidentally or unintentionally inhaled the can of “dust off.”
2. Mere failure to object to the instructions given by the military judge does not waive appellate review of the instructions given. Affirmative waiver on the record is required. *United States v. Wolford*, 62 M.J. 418 (2006). In *Wolford*, the CAAF concluded that the military judge instructed the members correctly on the legal definition of “child pornography” and also held that the images alone may constitute legally sufficient evidence as to whether an actual child was used to produce child pornography.
3. The military judge must be careful when instructing the members on the permissive inference instruction for wrongful use of a controlled substance. A confusing instruction could create a mandatory presumption vice a permissive inference of wrongfulness rendering such an instruction unconstitutional. *United States v. Brewer*, 61 M.J. 425 (2005).
4. The panel returns a general verdict and does not specify how the law applies to the facts, nor does the panel explain its reasons for its decision to convict or acquit. A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of those means beyond a

reasonable doubt. *United States v. Brown*, 65 M.J. 356 (C.A.A.F. 2007) and *United States v. Hardy*, 46 M.J. 67, 73 (C.A.A.F. 1997).

5. Elements of any lesser-included-offenses. The military judge has a *sua sponte* duty to instruct on all lesser-included-offenses **reasonably raised** by the evidence. *United States v. Davis*, 53 M.J. 202 (2000); *United States v. Griffin*, 50 M.J. 480 (1999); and, *United States v. Wells*, 52 M.J. 126 (1999).
 - a) A lesser-included-offense is reasonably raised when the greater offense requires members to find a disputed factual element not required for conviction of the lesser included offense. *United States v. Miergrimando*, 66 M.J.34 (C.A.A.F. 2008), (premeditation is the disputed element between premeditated murder and attempted voluntary manslaughter.) *United States v. Arviso*, 32 M.J. 616 (A.C.M.R. 1991).
 - b) Any doubt must be resolved in favor of the accused. *United States v. Rodwell*, 20 M.J. 264 (C.M.A. 1985).
 - (1) The defense may affirmatively waive instruction on lesser included offenses. *United States v. Strachan*, 35 M.J. 362 (C.M.A. 1992). *But cf. United States v. Toy*, 60 M.J. 598 (N-M. Ct. Crim. App. 2004) (holding that a military judge can instruct on LIOs over defense objection if the LIO is reasonably supported by the evidence).
 - (2) The military judge may instruct on lesser- included-offenses in order of severity of punishment or severity of the elements of the offenses. *United States v. Emmons*, 31 M.J. 108 (C.M.A. 1990).
 - c) A service court may, after disapproving a conviction for an offense due to an error, approve a conviction for the lesser included offense whose instruction was not considered, and instructed upon at the trial and in fact had been waived by both parties. The court's authority comes from Article 66(c), UCMJ which allows the court to consider the entire record. *United States v. Upham*, 66 M.J. 83 (C.A.A.F. 2008).

6. Time-barred lesser-included offenses. In *United States v. Thompson*, 59 M.J. 432 (2004), the CAAF held that where some LIOs may be time-barred by the statute of limitations, the military judge has an affirmative duty to personally discuss the issue with the accused, and if not waived by the accused, to modify the instructions to include only the period of time for those LIOs that are not time-barred by the statute of limitations.

7. Special defenses. Benchbook, ch. 5.
 - a) Special defenses are those defenses that, while not denying that the accused committed the acts charged, seek to deny criminal responsibility for those acts.

 - b) The military judge has a *sua sponte* duty to instruct on special defenses reasonably raised by the evidence. *United States v. Gillenwater*, 43 M.J. 10 (CAAF 1995) (evidence was sufficient to support mistake of fact defense in wrongful appropriation case where appellant's supervisor testified he may have given appellant permission to take Government items home for personal use); *United States v. Jones*, 7 M.J. 441 (C.M.A. 1979) (instruction that defense of alibi "may or may not" have been raised was improper; military judge must determine if defense has been raised and instruct accordingly).

 - c) Defense counsel may affirmative waive an affirmative defense instruction. *United States v. Gutierrez*, 64 M.J. 374 (CAAF 2007)

 - d) Special defenses include:
 - (1) Self-defense and defense of others. Benchbook, paras. 5-2 and 5-3. See *United States v. Dearing*, 63 M.J. 478 (2006). Mutual combatant can regain the right to self-defense if the other side escalates the level of conflict or if the aggressor is unable to withdraw in good faith. *United States v. Lewis*, 65 M.J. 85 (2007)

 - (2) Accident. Benchbook, para. 5-4. See *United States v. Brown*, 63 M.J. 735 (Army Ct. Crim. App. 2006)

- (3) Duress. Benchbook, para. 5-5. *See United States v. Vasquez*, 48 M.J. 426 (1998)
- (4) Entrapment. Benchbook, para. 5-6.
- (5) Defense of property. Benchbook, para. 5-7.
- (6) Obedience to orders. Benchbook, para. 5-8.
- (7) Physical or financial inability. Benchbook, paras. 5-9 and 5-10.
- (8) Mistake of fact or law, Benchbook, para. 5-11, and mistake of fact as to age in carnal knowledge cases. Benchbook, p. 444. *See United States v. Gutierrez*, 63 M.J. 568 (Army Ct. Crim. App. 2006), rev'd 64 M.J. 374 (2007). Military Judge is required to provide a mistake of fact defense regarding the victim's age for indecent act with a child offense if there is some evidence to raise the defense. *United States v. Acosta-Zapata*, 65 M.J. 811 (Army Ct. Crim. App. 2007)
- (9) Voluntary intoxication. Benchbook, para. 5-12. Voluntary intoxication is a mandatory instruction when some evidence of intoxication raises a reasonable doubt about actual knowledge, specific intent, willfulness, or premeditation when they are elements of a charged offense. *United States v. Hensler*, 44 M.J. 184, 187 (C.A.A.F. 1996). To receive the instruction, some evidence must show that the intoxication was severe enough to have the effect of rendering the accused incapable of forming the necessary intent, not just evidence of mere intoxication. *United States v. Hearn*, 66 M.J. 770 (Army Ct. Crim. App. 2008). In *Hearn*, ACCA developed a three-prong test to determine whether some evidence of voluntary intoxication was raised at trial:
 - (a) The crime included a mental state;

- (b) There is evidence of impairment due to the ingestion of alcohol or drugs;
 - (c) There is evidence that the impairment affected the accused's ability to form the requisite intent or mental state.

- (10) Voluntary abandonment. Benchbook, para. 5-15.

- (11) Parental discipline. Benchbook, para. 5-16.

- (12) Evidence negating mens rea. Benchbook, para. 5-17.

- (13) Self-help under a claim of right. Benchbook, para. 5-18.

- (14) Lack of causation. Benchbook, para 5-19.

- (15) Lack of mental responsibility. Benchbook, chapter 6.

- e) Other defenses. The military judge ordinarily has no *sua sponte* duty to instruct on defenses which deny the accused's commission of the acts charged. *United States v. Stafford*, 22 M.J. 825 (N.M.C.M.R. 1986). These defenses include:
 - (1) Character. Benchbook, para. 5-14.

 - (2) Alibi. Benchbook, para. 5-13.

- f) In determining whether to give a requested instruction on a defense, the judge may not weigh the credibility of the defense evidence. *United States v. Brooks*, 25 M.J. 175 (C.M.A. 1987).

- 8. Only matters properly before the court-martial may be considered.

9. Presumption of innocence, reasonable doubt, the burden of proof, and procedures to be used for voting. Benchbook, pages 8-154.
- B. Evidentiary Instructions. Benchbook, ch. 7. The military judge ordinarily has no *sua sponte* duty to give these instructions. However, when the evidence relates to a central issue at trial, in some cases it may be plain error for the military judge *not* to give a *sua sponte* evidentiary instruction. *See United States v. Kasper*, 58 M.J. 314 (2003) (when the government introduced “human lie detector” testimony through an OSI agent, it was plain error for the judge not to give a *sua sponte* curative instruction, even though defense counsel did not request one, because the testimony involved a central issue at trial -- the appellant’s credibility).
1. Principals. Benchbook, para. 7-1. If the evidence indicates that someone other than the accused committed the substantive criminal acts, the military judge should instruct on the theory of principals.
 2. Joint offenders. Benchbook, para. 7-2. During a joint trial, the military judge should give this instruction to explain the relationship between offenders.
 3. Circumstantial evidence. Benchbook, para 7-3. The military judge should give this instruction if the issue is raised; it is almost always appropriate.
 4. Stipulations. Benchbook, para. 7-4. When a stipulation of fact or expected testimony is received, the military judge should give an instruction. Stipulations of fact may be read to the members and brought into deliberations. Stipulations of expected testimony are only read to the members and can not be taken back into deliberations.
 5. Judicial notice. Benchbook, para. 7-6. The military judge shall give an instruction whenever he or she takes judicial notice of any matter. *See* Mil. R. Evid. 201 and 201A.
 6. Credibility of witnesses. Benchbook, para. 7-7. This instruction should be given upon request or when appropriate and must be given when the credibility of a principal witness or witness for the prosecution has been assailed by the defense.

7. Cross-racial identification. Benchbook, para. 7-7-2.
 - a) This instruction should be given if cross-racial identification is in issue.
 - b) The mere fact that an eyewitness and the accused are of different races does not require instruction; cross-racial identification must be a “primary issue” in the case. *United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990).
8. Character evidence. Benchbook, para 7-8. This instruction should be given when a pertinent character trait is in evidence.
9. Expert testimony. Benchbook, para. 7-9-1. This instruction should be given if any expert testimony has been received.
10. Accomplice testimony. Benchbook, para. 7-10. This instruction should be given whenever the evidence tends to indicate a witness was culpably involved in a crime with which the accused is charged.
11. Prior statement by a witness. Benchbook, para 7-11. This instruction should be given whenever a witness’s prior statements have been introduced to impeach or bolster his or her credibility.
12. Failure to testify. Benchbook, para. 7-12.
 - a) General rule. When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel’s election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice. Mil. R. Evid. 301(g).
 - b) Even if not requested, or waived, if the members raise an issue about the accused’s silence, the military judge should give the instruction. *United States v. Jackson*, 6 M.J. 116 (C.M.A. 1979).

- c) In *United States v. Forbes*, 59 M.J. 934 (N-M. Ct. Crim. App. 2004) (*en banc*), the NMCCA held that the accused's election not to give the instruction is binding unless the MJ determines the instruction is necessary in the interests of justice. The NMCCA adopted a sliding-scale standard of review depending on how thoroughly the MJ identifies and balances the case-specific interests of justice in deciding to give the instruction over defense objection. The CAAF adopted the NMCCA's sliding-scale standard of review for this "defense friendly" rule. Because the MJ gave the instruction over defense objection the case was set aside. 61 M.J. 354 (2005). The military judge must either abide by the defense's election or make case-specific findings for why it is necessary to give instruction over defense objection.

- d) In *United States v. Andreozzi*, 60 M.J. 727 (Army Ct. Crim. App. 2004) the defense sought to introduce evidence through another witness that he [SSG Andreozzi] "wanted to preserve his marriage." Trial counsel objected on hearsay grounds and the military judge instructed the members that they could not consider this evidence because "trial counsel had not had an opportunity to cross-examine" the declarant. This instruction was clearly erroneous because it commented on the accused's right to remain silent; however, error was harmless beyond a reasonable doubt.

13. Uncharged misconduct. Benchbook, para. 7-13.

- a) The military judge is required to instruct on the limited use of uncharged misconduct "upon request." Mil. R. Evid. 105.

- b) Instruction may be required even absent defense request. *United States v. Barrow*, 42 M.J. 655 (A.F. Ct. Crim. App. 1995) (despite defense request not to give limiting instruction regarding uncharged misconduct, one was required because "[n]o evidence can so fester in the minds of court members").

- c) Timing of instruction. *United States v. Levitt*, 35 M.J. 114 (C.M.A. 1992). Instruction should be given immediately following introduction of evidence and repeated before deliberations.

14. Spill-over effect of charged misconduct. Benchbook, para. 7-17. This instruction should be given whenever unrelated but similar offenses are tried at the same time.
- a) A military judge’s refusal to give a “spill-over” instruction was prejudicial error. *United States v. Myers*, 51 M.J. 570 (N-M. Ct. Crim. App. 1999)
 - b) Defense counsel’s failure to request a spill-over instruction or to object to the findings instruction and their failure to show any material prejudice did not establish plain error even given the close scrutiny applied to a capital case. *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008).
15. Past sexual behavior of victim. Benchbook, para. 7-14. This instruction should be given upon request, or when appropriate, if the past sexual behavior of a victim of a sex offense has been introduced under Mil. R. Evid. 412.
16. Variance. Benchbook, paras. 7-15 and 7-16. This instruction should be given if the evidence indicates that the offense occurred, but the time, place, amount, etc. is different than that charged. *United States v. Walters*, 58 M.J. 391 (2003). The appellant was tried for wrongful use of ecstasy on “divers occasions.” The government presented evidence of six uses, and after being instructed on variance, the panel found him guilty of use on “one occasion.” The CAAF reversed, holding that where a specification alleges wrongful acts on “divers occasions,” any findings by exceptions and substitutions that remove the “divers occasions” language must specify the particular instances of conduct upon which the findings are based. *See also United States v. Seider*, 60 M.J. 36 (2004) (citing *Walters* and holding that the AFCCA could not conduct an Art. 66 review when the members excepted the words “divers occasions” from their findings and did not indicate which of the two instances the accused was guilty). In *United States v. Augspurger* 61 M.J. 189 (2005), the Government charged Airman Basic Augspurger with wrongful use of marijuana on divers occasions based on three discrete occasions of use. The members convicted for wrongful use of marijuana excepting the words “on divers occasions.” The military judge should either have properly instructed the members that if they excepted the language “on divers occasions” they needed to make clear which factual allegation

supported a conviction, or she could have sought clarification from the members after announcement of findings.

17. Impeachment questions. Benchbook, para 7-18. This instruction should be given when “have you heard” or “did you know” questions are used to test an opinion or otherwise rebut character evidence and may not be considered for any other purpose.
- C. When Given. Instructions can be given before or after arguments by counsel and before members close to deliberate. R.C.M. 920(b). The timing is within the sole discretion of the military judge. See discussion to R.C.M. 920(b).
 - D. How Given. Instructions must be given orally on the record in the presence of all parties and members. Written copies of the instructions or, unless a party objects, portions of them may also be given to the members for their use during deliberation. R.C.M. 920(d).

V. SENTENCING INSTRUCTIONS

- A. Required Instructions. R.C.M. 1005(e).
 1. Maximum punishment. Benchbook, pages 61, 89-90.
 - a) Maximum punishment. Military judge must instruct on the maximum punishment, but not how the amount was reached (unitary sentencing). *United States v. Purdy*, 42 M.J. 666 (Army Ct. Crim. App. 1996). *See also, United States v. Reyes*, 63 M.J. 265 (2006) regarding prejudice toward the accused for erroneous instruction on the maximum punitive discharge.
 - b) Punishments other than the maximum. The military judge has no *sua sponte* duty to instruct on other punishments. Instruction on the maximum punishment plus a proper sentence worksheet is sufficient. However, if counsel requests instruction on other possible punishments, the military judge will usually err if he

denies such a request. *United States v. Brandolini*, 13 M.J. 163 (C.M.A. 1982).

2. Procedures for deliberations and voting. Benchbook, pages 72-4, 103-05.
 - a) Judge has a *sua sponte* duty to instruct on proper voting procedures. R.C.M. 1005 and 1006.
 - b) Failure to give instruction that members are to begin voting with the lightest proposed sentence is not plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986); but see *United States v. Thomas*, 46 M.J. 311 (1997) (distinguishing *Fisher* and holding that sentence of death had to be set aside when military judge instructed that the members had to vote on the most serious sentence first); *United States v. Simoy*, 50 M.J. 1 (1999) (same).
 - c) Collecting and counting votes.
 - (1) *United States v. Truitt*, 32 M.J. 1010 (A.C.M.R. 1991). Failure to instruct that junior member collects and counts the votes and the president shall check the count was harmless error.
 - (2) *United States v. Harris*, 30 M.J. 1150 (A.C.M.R. 1990). Failure to give instructions that voting was to be by secret written ballot and that the junior member was to collect and count the ballots constituted plain error.
3. Members cannot rely upon mitigating action by the convening authority. R.C.M. 1005 (e)(4).
4. Members must consider all matters in extenuation, mitigation and aggravation. R.C.M. 1005(e)(5).
 - a) *United States v. Simmons*, 48 M.J. 193 (1998). Accused convicted of kidnapping. In sentencing, defense introduced some evidence that accused was abused as a child. Defense wanted the military judge to give an instruction in mitigation that the accused was

abused as a child. Held: no error for not giving the instruction. Court said there was not enough evidence to require the instruction.

- b) *United States v. Perry*, 48 M.J. 197 (1998). Accused convicted of forcible sodomy and other offenses. Defense wanted an instruction in sentencing about the fact that the accused dismissal may cause the accused to pay back his education. The judge refused to give the instruction, claiming that it was collateral and there were too many factors to know for certain whether the money would be taken back, CAAF agreed. *But see United States v. Boyd*, 55 M.J. 217, 221 (2001) (holding that military judges are required to instruct on the impact of a punitive discharge on retirement benefits, “if there is an evidentiary predicate for the instruction and it is requested”).
- c) *United States v. Barrier*, 61 M.J. 482 (2005). Following his conviction, SrA Barrier made an unsworn statement in which he mentioned that another airman in an unrelated case received a certain punishment. Over defense objection, the military judge gave the *Friedmann* instruction (based on *United States v. Friedmann*, 53 M.J. 800 (A. F. Ct. Crim. App. 2000) in which the military judge instructed the members that the dispositions of other courts-martial were irrelevant for sentencing purposes.

- B. When and How Given. R.C.M. 1005(b) and (d). Sentencing instructions should be given after arguments by counsel on sentencing and before the members close to deliberate. Instructions must be given orally, but may, in addition, be in writing.

VI. CONCLUSION