

6-1. RCM 706 MENTAL CAPACITY AND MENTAL RESPONSIBILITY INQUIRY

The accused's actions and demeanor as observed by the court or based on the assertion from a reliable source that the accused may lack mental capacity or mental responsibility may be sufficient to cause the court to order a sanity board pursuant to RCM 706. The military judge may order an RCM 706 sanity board sua sponte or upon request of a member of the court, the prosecution, or the defense. A good faith, non-frivolous request for a sanity board should be granted. United States v. Nix, 36 CMR 76 (CMA 1965); United States v. Kish, 20 MJ 652 (ACMR 1985). The military judge should remember, however, that the accused is presumed to be mentally capable and mentally responsible and that a mere assertion that the accused is not is insufficient to raise an issue of mental responsibility or capacity to stand trial.

The military judge rules finally as to whether an inquiry should be made into the accused's mental capacity or mental responsibility. If the military judge orders a sanity board, the order will be in writing and comply with RCM 706. The military judge may order additional sanity boards at any stage of the proceedings.

No individual, other than the defense counsel, accused, or military judge, is permitted to disclose to the trial counsel any statement made by the accused to the board or any evidence derived from that statement. The provisions of MRE 302 prescribe additional rules and procedures governing this situation.

6-4. MENTAL RESPONSIBILITY AT TIME OF OFFENSE

MJ: The evidence in this case raises the issue of whether the accused lacked criminal responsibility for the offense(s) of (state the alleged offense(s)) as a result of a severe mental disease or defect. (In this regard, the accused has denied criminal responsibility because of a severe mental condition.)

You are not to consider this defense unless you first find that the government has proved beyond a reasonable doubt each element of the offense(s) of (state the alleged offense(s)). In other words, you will vote first on whether the government has proved beyond a reasonable doubt each element of the offense(s).

I will instruct you later on the required number of votes for a finding of Guilty. If your vote results in a finding of Not Guilty, you will return a finding of Not Guilty and you do not consider the issue of mental responsibility. On the other hand, if your vote results in a finding of Guilty (of the offense or a lesser included offense), then you must decide whether the accused was mentally responsible for the offense(s) of (state the alleged offense(s)). This will require a second vote. I will instruct you later on the number of votes required for a finding of Not Guilty Only by Reason of Lack of Mental Responsibility. For this second vote, each member must vote, regardless of your vote on the elements of the offense(s).

MJ: Regarding this second vote, you are advised of the following. The accused is presumed to be mentally responsible. This presumption is overcome only if you determine, by clear and convincing evidence, that the accused was not mentally responsible. Note that, while the government has the burden of proving the elements of the offense(s) beyond a reasonable doubt, the defense has the burden of proving by clear and convincing evidence that the accused was not mentally responsible. As the finders of fact in this case,

you must first decide whether, at the time of the offense(s) of (state the alleged offense(s)), the accused actually suffered from a severe mental disease or defect. The term “severe mental disease or defect” can be no better defined in the law than by the use of the term itself. However, a severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct or by nonpsychotic behavior disorders and personality disorders. If the accused at the time of the offense(s) of (state the alleged offense(s)) was not suffering from a severe mental disease or defect, (he) (she) has no defense of lack of mental responsibility.

If you determine that, at the time of the offense(s) of (state the alleged offense(s)), the accused was suffering from a severe mental disease or defect, then you must decide whether, as a result of that severe mental disease or defect, the accused was unable to appreciate the nature and quality or wrongfulness of (his) (her) conduct.

If the accused was able to appreciate the nature and quality and the wrongfulness of (his) (her) conduct, (he) (she) is criminally responsible regardless of whether the accused was then suffering from a severe mental disease or defect.

On the other hand, if the accused had a delusion of such a nature that (he) (she) was unable to appreciate the nature and quality or the wrongfulness of (his) (her) acts, the accused cannot be held criminally responsible for (his) (her) acts, provided such a delusion resulted from a severe mental disease or defect.

To summarize, you must first determine whether the accused, at the time of (this) (these) offense(s), suffered from a severe mental disease or defect. If you are convinced by clear and convincing evidence that the accused did suffer from a severe mental disease or defect, then you must further consider whether (he) (she) was unable to appreciate the nature and quality or the wrongfulness of (his) (her) conduct. If you are convinced by clear and convincing evidence that the accused suffered from a severe mental disease or defect, and you are also convinced by clear and convincing evidence that (he) (she) was unable to appreciate the nature and quality or the wrongfulness of (his) (her) conduct, then you must find the accused Not Guilty Only by Reason of Lack of Mental Responsibility. Again, the accused has the burden of establishing a lack of mental responsibility by clear and convincing evidence. By “clear and convincing evidence,” I mean that measure or degree of proof which will produce in your mind a firm belief or conviction as to the facts sought to be established. The requirement of clear and convincing evidence does not call for conclusive evidence. Whether the evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence. The facts to which the witnesses have testified must be distinctly remembered and the witnesses themselves found to be credible. In deliberating on this issue, you should consider all the evidence, including that from experts (and laypersons), as well as your common sense, your knowledge of human nature, and the general experience that most people are mentally responsible.

6-5. PARTIAL MENTAL RESPONSIBILITY

MJ: An issue of partial mental responsibility has been raised by the evidence with respect to (state the applicable offense(s)).

In determining this issue you must consider all relevant facts and circumstances and the evidence presented on the issue of lack of mental responsibility (except _____). (You may also consider _____.)

One of the elements of (this) (these) offense(s) is the requirement of (premeditation) (the specific intent to _____) (that the accused knew that _____) (that the accused's acts were willful (as opposed to only negligent)) (_____).

An accused may be sane and yet, because of some underlying (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____), may be mentally incapable of (entertaining (the premeditated design to kill) (the specific intent to _____) (having the knowledge that _____) (acting willfully) (_____).

You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____ of such consequence and degree as to deprive (him/her) of the ability to (act willfully) (entertain (the premeditated design to kill) (the specific intent to _____)) (know that _____) (_____).

The burden of proof is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. If you are not satisfied beyond a reasonable doubt that the accused, at the time of the alleged offense(s), was mentally capable of ((entertaining (the premeditated design to kill) (the specific intent to _____)) (knowing that _____) (acting willfully in _____) (_____), you must find the accused Not Guilty of (that) (those) offense(s).

It is essential that you remember that the defense of lack of mental responsibility and the defense of partial mental responsibility are separate and distinct. For the defense of lack of mental responsibility, the burden is on the defense to prove, by clear and convincing evidence, the accused's lack of mental responsibility. On the other hand, any evidence of partial mental responsibility may be considered by you in deciding whether the government has proven beyond a reasonable doubt that the accused had the required (state of mind) (specific intent) to commit the offense. The same evidence, however, may be considered with respect to both types of defenses.

MJ: Remember that (state the lesser included offense raised) is a lesser included offense of the offense of (state the alleged offense). This lesser included offense does not contain the element that the accused (had the premeditated design to kill) (specific intent to _____) (knew that _____) (willfully _____) (_____). In this regard, the instructions I just gave you with respect to the accused's partial mental responsibility and ability to (premeditate) (know) (form the specific intent) (act willfully) (_____ do not apply to the lesser included offense of (state the lesser included offense raised).

6-6. EVALUATION OF TESTIMONY

MJ: In considering the issue(s) of mental responsibility, (and partial mental responsibility,) you may consider evidence of the accused's mental disease or defect (and mental condition) before and after the alleged offense(s) of (state the alleged offense(s)), as well as the evidence as to the accused's mental disease or defect (and mental condition) on that date. The evidence as to the accused's mental disease or defect (and mental condition) before and after that date was admitted for the purpose of assisting you in determining the accused's mental disease or defect (and mental condition) on the date of the alleged offense(s).

You have heard the evidence of (psychiatrists) (and) (psychologists) (and) (_____) who testified as expert witnesses. Experts in a particular field are permitted to give their opinion. In this connection, you are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect. What psychiatrists (and psychologists) may or may not consider a severe mental disease or defect for clinical purposes, where their concern is treatment, may or may not be the same as a severe mental disease or defect for the purpose of determining criminal responsibility. Whether the accused had a severe mental disease or defect (or mental condition) must be determined by you.

(There was also testimony of lay witnesses, with respect to their observations of the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts. In weighing the testimony of such lay witnesses, you may consider the each witness's circumstances, opportunity to observe the accused and to know the facts to which the witness has testified, and willingness and capacity to expound freely as to his/her observations and knowledge. You may also consider the basis for the witness's opinion and conclusions, and the time of their observations in relation to the time of the offense charged.)

(You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness's observation of the accused and the nature and length of time of the witness's contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a mental disease or defect (or mental condition) and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.)

You are not bound by the opinions of (either) (expert) (or) (lay) witness(es). You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight you believe it is fairly entitled to receive.

6-7. PROCEDURAL INSTRUCTIONS ON FINDINGS (MENTAL RESPONSIBILITY IN ISSUE)

The following procedural rules will apply to your deliberation and must be observed: The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should properly include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret written ballot, and all (primary) members of the court are required to vote. (Alternate members will not, at this time, participate in deliberations or voting.)

(The order in which the (charges and) specifications are to be voted on will be determined by the President subject to objection by a majority of the members.) You vote on the specification(s) under the charge before you vote on the charge. With respect to (each) (The) Specification, you vote first on whether the prosecution has proved the elements of the offense beyond a reasonable doubt, without regard to the defense of lack of mental responsibility. If your vote results in a finding that the prosecution has not proved the elements, then your vote constitutes a finding of Not Guilty, and you need not further consider the specification (that your vote concerned.)

If your vote results in a finding that the prosecution has proved the elements of the offense, you then vote on whether the defense has proven, by clear and convincing evidence, the accused's lack of mental responsibility for that offense.

(If you find the accused Guilty of any specification under (The) (a) Charge, then the finding as to (The) (that) Charge must also be Guilty.)

The junior member collects and counts the votes. The count is checked by the president who immediately announces the result of the ballot to the members.

(IF CHARGES WERE REFERRED PRIOR TO 1 JANUARY 2019, PROVIDE THIS INSTRUCTION ON THE REQUIRED NUMBER OF VOTES TO CONVICT:) The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding that the prosecution has proven the elements of the specification. Since we have ___ members, that means ___ members must concur in any such finding. If fewer than ___ members vote that the prosecution has proven the elements of the specification, then your vote has resulted in a finding of Not Guilty as to that specification (and you should move on to consider the remaining specification(s) (and) charge(s)).

(IF CHARGES WERE REFERRED ON OR AFTER 1 JANUARY 2019, PROVIDE THIS INSTRUCTION ON THE REQUIRED NUMBER OF VOTES TO CONVICT:) The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding that the prosecution has proven the elements of the specification. Since we have ___ members, that means ___ members must concur in any such finding. If fewer than ___ members vote that the prosecution has proven the elements of the specification, then your vote has resulted in a finding of Not Guilty as to that specification (and you should move on to consider the remaining specification(s) (and) charge(s)).

MJ: If, however, ___ or more members vote that the prosecution has proven the elements of the specification, you must next vote on whether the accused has proven, by clear and convincing evidence, that (he) (she) lacked mental responsibility.

The concurrence of a majority of the members present when the vote is taken is required for any finding that the accused lacked mental responsibility. Since we have ___ members, that means ___ members must concur in any such finding.

MJ: If your vote results in a finding of lack of mental responsibility, then your vote constitutes a finding of Not Guilty Only by Reason of Lack of Mental Responsibility. If, however, less than the required number of members votes that the accused lacked mental responsibility, then you have rejected that defense and your first vote constitutes a finding of Guilty.

MJ: As soon as the court has reached its findings, and I have examined the Findings Worksheet, the findings will be announced by the president in the presence of all parties. As an aid in putting your findings in proper form and in making a proper announcement of the findings, you may use Appellate Exhibit ___, the Findings Worksheet (which the Bailiff will now hand to the president).

MJ: (COL) (___) _____, as indicated on Appellate Exhibit(s) ___, the first portion will be used if the accused is completely acquitted or completely convicted of (the) (all) charge(s) and specification(s). (The second portion will be used if the accused is convicted of some, but not all, of the offenses). Once you have finished filling in what is applicable, please line out or cross out everything that is not applicable so that when I check your findings, I can ensure that they are in proper form. (The next page of

Appellate Exhibit ____ would be used if you find the accused guilty of the lesser included offense of _____ by exceptions (and substitutions). This was (one of) (the) lesser included offense(s) I instructed you on.)

MJ: You will note that the Findings Worksheet(s) (has) (have) been modified to reflect the words that would be deleted, (as well as the words that would be substituted therefor) if you found the accused guilty of the lesser included offense(s). (This) (These) modification(s) of the worksheet in no way indicate(s) (an) opinion(s) by me or by either counsel concerning any degree of guilt of this accused. (They are) (It is) merely included to aid you in understanding what findings might be made in the case, and for no other purpose whatsoever. The worksheet(s) (is) (are) provided only as an aid in finalizing your decision.

MJ: Any questions about the Findings Worksheet?

MBRS: (Respond.)

MJ: If, during your deliberations, you have any questions, open the court, and I will assist you in that matter. The Uniform Code of Military Justice prohibits me or anyone else from entering your closed sessions. You may not consult the Manual for Courts-Martial or any other legal publication unless it has been admitted into evidence.

MJ: Do counsel object to the instructions given or request additional instructions?

TC/DC: (Respond.)

MJ: If it is necessary (and I mention this because there is no latrine immediately adjacent to your deliberation room), your deliberations may be interrupted by a recess. However, before you may leave your closed-session deliberations, you must notify us, we must come into the courtroom, formally convene, and then recess the court; and after the recess, we must reconvene the court and formally close again for your deliberations. So, with that in mind, (COL) (____) _____ do you desire to take a brief recess before you begin your deliberations, or would you like to begin immediately?

PRES: (Responds.)

MJ: Bailiff, please hand to the president of the court Prosecution Exhibit(s) _____ (and Defense Exhibit(s) _____) for use during the court's deliberations.

TC/BAILIFF: (Complies.)

MJ: (COL) (____) _____, please do not mark on any of the exhibits, except the Findings Worksheet (and please bring all the exhibits with you when you return to announce your findings.)

MJ: The court is closed.