

Chapter 6

MENTAL CAPACITY AND RESPONSIBILITY

6-1. SANITY INQUIRY

The actions and demeanor of the accused as observed by the court or the assertion from a reliable source that the accused may lack mental capacity or mental responsibility may be sufficient to cause an inquiry by the court. The military judge should remember, however, that the accused is presumed to be sane and that a mere assertion that the accused is insane is not necessarily sufficient to raise an issue of insanity. A request or other action to cause the court to make an inquiry may be initiated by the military judge or any member of the court, prosecution, or defense. A good faith, non-frivolous request for a sanity board should be granted. United States v. Nix, 36 C.M.R. 76 (C.M.A. 1965); United States v. Kish, 20 M.J. 652 (A.C.M.R. 1985).

If the defense proffers expert testimony as to the accused's mental responsibility or capacity, the accused can be required to submit to psychiatric evaluation by Government psychiatrists as a condition to the admission of defense psychiatric evidence. The military judge rules finally as to whether an inquiry should be made into the accused's mental capacity or mental responsibility. When the military judge believes that there is a reasonable basis for an inquiry, the matter will be referred to a board. The referral order must comport with the requirements of RCM 706.

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.

Additional mental examinations may be directed at any stage of the proceedings. If a motion for inquiry into the accused's sanity is denied, the military judge will direct counsel to proceed with the trial. When the motion is granted, the military judge ordinarily should direct further action substantially as follows:

Because the motion for an inquiry into the accused's sanity has been granted, the proceedings in this trial are suspended. Based upon my judicial determination that an inquiry is essential, it is ordered that the accused be examined by a sanity board as provided in Rule for Courts-Martial 706. Priority must be given to this inquiry which should consider all reasonably available sources of relevant information. The officers conducting the examination should be notified that they may be called as witnesses at this trial if and when the court reconvenes.

The court is adjourned.

If the defense proffers expert testimony as to the accused's mental responsibility or capacity, the accused can be required to submit to psychiatric evaluation by Government psychiatrists as a condition to the admission of defense expert testimony. The provisions of MRE 302 prescribe additional rules and procedures governing this situation.

6-2. MENTAL CAPACITY AT TIME OF TRIAL

The military judge rules finally on the issue of mental capacity, which is an interlocutory matter. Any question of mental capacity should be determined as early in the trial as possible. In rare cases a situation may arise where the issue of mental capacity is raised more than once as a result of developing evidence. In this case, the issue should again be determined shortly after it arises. In every case, the issue of mental capacity must be finally determined by the military judge separately from the issue of guilt or innocence or the determination of an appropriate sentence. The standard of proof on this issue is whether the accused is presently suffering from a mental disease or defect rendering him/her mentally incompetent to the extent that he/she is unable to understand the nature of the proceedings or to cooperate intelligently in the defense of the case. When the military judge determines by a preponderance of the evidence that the accused is not competent to stand trial, further action should be directed substantially as follows:

I have determined that the accused lacks the mental capacity to stand trial. The defense's motion for a stay of proceedings is granted. The record of these proceedings with a statement of my determination will be transmitted to the convening authority.

The court is adjourned.

REFERENCES: RCM 909.

6-3. PRELIMINARY INSTRUCTIONS ON SANITY

NOTE 1: Using this instruction. When some evidence has been adduced which tends to show insanity of an accused, the military judge may, at the time the evidence is introduced, advise the members of the relevant legal concepts and applicable procedures. These instructions will facilitate the ability of the members to evaluate subsequent evidence on this issue. The preliminary instructions should be given only after consultation with counsel for both sides. The following preliminary instruction may be appropriate:

There are indications from the (evidence presented so far) (state any other basis) that you may be required to decide the issue of the accused's sanity at the time of the offense. I will now instruct you on certain legal principles and procedures which will assist you in deciding this issue.

NOTE: Other instructions. See Instruction 6-4, Mental Responsibility at Time of Offense.

REFERENCES: RCM 916(k).

6-4. MENTAL RESPONSIBILITY AT TIME OF OFFENSE

NOTE 1: Using these instructions. Lack of mental responsibility (insanity) at the time of the offense is an affirmative defense which must be instructed upon, sua sponte, when the military judge presents final instructions. These instructions may be modified for use as preliminary instructions. See Instruction 6-3, Preliminary Instructions on Sanity. The following instruction is suggested:

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 (himself) (herself) has denied criminal responsibility because of a severe mental condition.)

You are not to consider this defense unless you have first found that the Government has proved beyond a reasonable doubt each essential element of the offense(s) of (state the alleged offense(s)). In other words, you should vote first on whether the Government has proved beyond a reasonable doubt each essential element of the offense(s). Unless at least two-thirds of the members, that is _____ members, find that each element has been proved, you should return a finding of NOT GUILTY (as to that specification) and you need not consider the issue of mental responsibility.

If, however, two-thirds of the members are convinced beyond reasonable doubt that the accused did the act(s) charged (in (the) Specification (____) of (the) (additional) Charge) (or committed a lesser included offense), then you must decide whether the accused was mentally responsible for the offense(s) (state the alleged offense(s)).

This will require a second vote, and each member must vote, regardless of your vote on the elements.

NOTE 2: When a sanity determination might be required in spite of a NOT GUILTY finding. It is possible to acquit of a greater offense and then find the accused NOT GUILTY only by reason of Lack of Mental Responsibility. Tailor instructions accordingly.

The accused is presumed to be mentally responsible. This presumption continues throughout the proceedings until you determine, by clear and convincing evidence, that (he) (she) 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 or the wrongfulness of (his) (her) conduct, (he) (she) is criminally responsible; and this is so regardless of whether the accused was then suffering from a severe mental disease or defect, (and regardless of whether (his) (her) own personal moral code was not violated by the commission of the offense(s)).

(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 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 wrongfulness of (his) (her) conduct, then you must find the accused not guilty only by reason of lack of mental responsibility. On the other hand, you may not acquit the accused on the ground of lack of mental responsibility, absent the accused suffering from a severe mental disease or defect, or if you believe that (he) (she) was able to appreciate the nature and quality and wrongfulness of (his) (her) conduct. Applying these principles to the accused's burden of establishing a lack of mental responsibility by clear and convincing evidence, you are finally advised that the accused, in order to be acquitted on the basis of lack of mental responsibility, is required to prove, by clear and convincing evidence, that the accused was not mentally responsible at the time of the offense(s). 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 unanswerable or 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 of mankind that most people are mentally responsible.

NOTE 3: Other instructions. See Instruction 6-5 for additional instructions which are frequently applicable when insanity is in issue.

6-5. PARTIAL MENTAL RESPONSIBILITY

NOTE 1: Using these instructions. RCM 916(k)(1) and (2) declare that except as relevant to the defense of lack of mental responsibility, a mental disease or defect is not a defense and evidence of same is inadmissible. This is not an accurate statement of the law. Notwithstanding RCM 916(k)(1) and (2), evidence of a mental disease, defect, or condition is admissible if it is relevant to the elements of premeditation, specific intent, knowledge, or willfulness. Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988); United States v. Berri, 33 M.J. 337 (C.M.A. 1991). Use this instruction only when the evidence has raised an Article 50a defense of lack of mental responsibility AND there is evidence that tends to negate any mens rea element. If there is evidence that the accused may have lacked the necessary mens rea but the Article 50a defense of lack of mental responsibility has not been raised, use Instruction 5-17, Evidence Negating Mens Rea.

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. Unless in light of all the evidence you are 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 _____)) (know that _____) (act 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—that is, insanity—and evidence the accused may have lacked the required state of mind are separate defenses although the same evidence may be considered with respect to both.

NOTE 2: Expert witnesses. When there has been expert testimony on the issue, Instruction 7-9-1, Expert Testimony should be given.

NOTE 3: Lesser included offenses. When there are lesser included offenses raised by the evidence that do not contain a mens rea element, the military judge may explain that the partial mental responsibility instruction is inapplicable. The following may be helpful:

Remember that (state the lesser included offense raised) is a lesser included offense(s) 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).

The defense of a lack of mental responsibility, however, applies to both the offense(s) of (state the alleged offense(s)) and the lesser included offense(s) of (state the relevant lesser included offense(s)).

NOTE 4: Voluntary intoxication. When there is evidence of the accused's voluntary intoxication, Instruction 5-12, Voluntary Intoxication, is ordinarily applicable with respect to elements of premeditation, specific intent, willfulness, or knowledge.

6-6. EVALUATION OF TESTIMONY

NOTE: Using these instructions. The following instructions should normally be given to assist the members in evaluating evidence if the military judge instructs on the defense of lack of mental responsibility (Article 50a). The optional portions of the instruction contained in brackets should also be given if the military judge instructs on Partial Mental Responsibility, Instruction 6-5.

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 to determine 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. An expert in a particular field is permitted to give (his) (her) 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 circumstances of each witness, their opportunity to observe the accused and to know the facts to which the witness has testified, their willingness and capacity to expound freely as to (his) (her) observations and knowledge, the basis for the witness' 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' observation of the accused and the nature and length of time of the witness' 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 AT ISSUE)

NOTE 1: Using this instruction. When the defense of lack of mental responsibility has been raised in a trial with members, the following procedural instruction on voting must be given instead of the voting instructions at 2-5-14 and 8-3-13.

MJ: 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 members of the court are required to vote.

You vote on the Specification(s) under the Charge(s) 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 the 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 accused has proven, by clear and convincing evidence, lack of mental responsibility. (The order in which the several charges and specifications are to be voted on should be determined by the president subject to objection by a majority of the members.)

(If you find the accused guilty of any Specification under (the) (a) Charge, the finding as to (the) (that) Charge is 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.

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))).

**Table 6–1
Votes Needed for a Finding of Guilty (Mental Responsibility)**

No. of members	Two-thirds
3	2
4	3
5	4
6	4
7	5
8	6
9	6
10	7
11	8
12	8

NOTE 2: Article 106 offenses. Modify the above instruction in the event of a Charge under Article 106, UCMJ.

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

The concurrence of more than one-half 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.

**Table 6–2
Votes Needed for Mental Responsibility**

No. of members	More than one-half
3	2
4	3
5	3
6	4
7	4
8	5
9	5
10	6
11	6
12	7

NOTE 3: Article 106 offenses. Modify the above instruction in the event of a Charge under Article 106, UCMJ.

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 a majority votes that the accused lacked mental responsibility, then you have rejected that defense and your first vote constitutes a finding of guilty.

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court, and the president should announce only that reconsideration of a finding has been proposed. Do not state: (1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or (2) which specification (and charge) is involved. I will then give you specific further instructions on the procedure for reconsideration.

NOTE 4: Reconsideration instructions. See Instruction 6-8 for detailed reconsideration instructions. Do not use the reconsideration instruction found in Chapter 2.

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 (Trial Counsel) (Bailiff) may now hand to the president).

NOTE 5: Explanation of findings worksheet. A suggested approach to explaining the findings worksheet follows:

MJ: (COL) (___) _____, as indicated on Appellate Exhibit(s) ___, the first portion will be used if the accused is completely acquitted of (the) (all) charge(s) and specification(s). The second part will be used if the accused is convicted, as charged, of (the) (all) charge(s) and specification(s); (and the third 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: (Respond.)

MJ: (Trial Counsel) (Bailiff), please had 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.

6–8. RECONSIDERATION INSTRUCTIONS (FINDINGS—MENTAL RESPONSIBILITY AT ISSUE)

NOTE 1: Using this instruction. An instruction substantially as follows must be given when any court member proposes reconsideration in a case in which the mental responsibility of the accused is at issue:

MJ: Once any finding has been reached and a rebalot has been proposed by any member, the question is whether or not to rebalot on the findings. This shall be determined by secret written ballot.

If you have reached only a finding that the prosecution has proven the elements, but have not yet voted on the issue of mental responsibility, you must reconsider your finding if more than one-third of the members vote in favor of doing so.

NOTE 2: Concurrence-Reconsideration of Findings.

**Table 6–3
Votes Needed for Reconsideration of Findings**

No. of Members	Majority	More than one-third
3	2	2
4	3	2
5	3	2
6	4	3
7	4	3
8	5	3
9	5	4
10	6	4
11	6	4
12	7	5

As we have ___ members, ___ must vote in favor of reconsidering a prior finding that the prosecution has proven the elements.

If you have reached a finding that the prosecution has failed to prove the elements of the offense(s) beyond a reasonable doubt, that constitutes a finding of not guilty. A reballot must be taken on such a prior NOT GUILTY finding when a MAJORITY of the members vote in favor of reconsidering. So you would have to reballot such a NOT GUILTY finding if ___ members voted to reconsider.

If you have reached a finding that the prosecution has proven the elements of the offense, and have further found that the accused was mentally responsible at the time of the offense, that constitutes a finding of guilty.

In that circumstance a member may propose reconsideration as to either the finding on the elements or as to the finding on mental responsibility. The member proposing reconsideration must announce whether he or she desires reconsideration of the determination that the elements were proven or the determination that the accused does not lack mental responsibility, or both. In either case, a reballot must be taken on the proposed issue if more than one-third vote in favor of reconsideration. Since we have ___ members, you would have to reballot such findings if ___ vote to reconsider.

If you end up reballoting on the elements of the offense, and if fewer than two-thirds of the members vote that the elements of the offense(s) have been proven, then your reballot has resulted in a finding of NOT GUILTY. If, on the other hand, you reballot on the issue of lack of mental responsibility, and if a majority of the members find that the accused lacked mental responsibility, then your reballot has resulted in a finding of NOT GUILTY only by reason of Lack of Mental Responsibility.

If you have reached a finding that the prosecution has proven the elements of the offense(s), and have further found that the accused was not mentally responsible at the time of the offense, that constitutes a finding of not guilty only by reason of lack of mental responsibility.

In that circumstance a member may propose reconsideration as to either the finding on the elements or as to the finding on mental responsibility. A reballot must be taken on the finding that the accused lacked mental responsibility if more than one-half of the members vote in favor of reconsideration. Again this would mean you would have to reballot if ___ voted in favor of reconsidering the finding of lack of mental responsibility.

On the other hand, if after a finding that the prosecution has proven the elements of the offense(s), but that the accused lacks mental responsibility, a member proposes reconsideration of the finding that the prosecution has proven the elements of the offense, you must reconsider your finding if more than one-third of the members vote in favor of doing so. Again, you would have to reballot if ___ members voted to reconsider.

If your vote indicates that reconsideration is not necessary, then, if you have not already done so, and if required because of a finding that the elements have been proven, then you should proceed to vote on the issue of mental responsibility. If you have already voted on mental responsibility, then you should (move on to vote on other specifications, if any remain, then) return to open court for the announcement of your findings. If reconsideration is required, you must adhere to all of my original instructions for determining whether the accused is guilty or not, to include the procedural rules pertaining to your voting on the findings, the two-thirds vote required for determining whether the prosecution has proven the elements beyond a reasonable doubt, and the vote by more than one-half to determine whether the accused has proven lack of mental responsibility by clear and convincing evidence.

**MJ: Counsel, any objections to the instructions given or requests for additional instructions?
TC/DC: (Respond.)**

MJ: Court will again be closed.

6–9. SENTENCING FACTORS

NOTE: Using this instruction. Presentence instructions on the mitigating effect of a mental condition or other impairment or deficiency, and on the mitigating or other effect of a condition classified as a personality (character or behavior) disorder should be given whenever any such evidence has been presented, whether before or after findings. Such instructions may be substantially as follows:

Although you have found the accused guilty of the offense(s) charged and, therefore, mentally responsible (you should consider as a mitigating circumstance evidence tending to show that the accused was suffering from a mental condition) (you should consider a condition classified as a (personality) (character or behavior) disorder as a (mitigating) factor tending to explain the accused's conduct.) (I refer specifically to matters including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides).)