LET'S MAKE A DEAL! THE DEVELOPMENT OF PRETRIAL AGREEMENTS IN MILITARY CRIMINAL JUSTICE PRACTICE

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I. Introduction

Pretrial agreements are a part of every trial advocate's practice; in fact, most new trial and defense counsel begin their trial experience with guilty plea cases involving pretrial agreements before moving on to contested cases. Now specifically authorized by Rule for Courts-Martial (RCM) 705,[2] pretrial agreements have not always been a codified or accepted practice and, despite the provisions of RCM 705, remain a constant source of appellate litigation. What we think of now as the law concerning pretrial agreements evolved slowly since the enactment of the Uniform Code of Military Justice (UCMJ);[3] not until 1984 was it made part of the *Manual for Courts-Martial* as RCM 705. Most of what counsel know today as the military judge's "script" for taking a guilty plea as part of a pretrial agreement also evolved over many years of litigation; not until 1982 was it formalized in the *Military Judges' Benchbook.*[4]

While pretrial agreements usually involve a guilty plea, they may also simply involve waiver of certain trial rights, such as the right to trial by members or the right to challenge the admissibility of certain evidence.

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2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705 (2000) [hereinafter MCM].

3. 10 U.S.C. §§ 801-946.

4. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 Apr. 2001) [hereinafter BENCHBOOK].

The rights that an accused might offer to waive are not limited to rights that are exercised at trial;[5] further, a pretrial agreement does not have to be initiated prior to trial but may be negotiated while the trial is in progress.[6]

Rule for Courts-Martial 705,[7] which both authorizes and governs the terms of pretrial agreements, provides that—as part of an agreement with the convening authority—an accused may offer to plead guilty, to enter a confessional stipulation, and to fulfill other terms and conditions not otherwise prohibited by that rule.[8] Convening authorities, in return, may promise to refer the charges to a certain level of court-martial, to refer a capital offense as non-capital, to withdraw charges or specifications, to direct the trial counsel to present no evidence on one or more specifications, and to take specified action on the adjudged sentence.[9] The agreement must be reduced to writing[10] and must contain all of the agreements between the parties.[11] Rule for Courts-Martial 705 also contains a non-exclusive list of prohibited terms or conditions, which will be addressed later in this article.

The purpose of this article is to examine the evolution of the pretrial agreement, with particular focus on the cases from which emerged the present law regarding pretrial agreements. It examines the authority for pretrial agreements, the military judge's role in ensuring compliance with the laws governing pretrial agreements, permissible and prohibited terms of agreements, issues surrounding specific performance of agreements, and post-trial renegotiation of agreements.

II. Background

Pretrial agreements have been used in courts-martial since 1953 and initially developed informally as a matter of trial practice, with no independent legislative or judicial authority. In a letter to staff judge advocates, Major General (MG) Shaw, Acting The Judge Advocate General of the Army, encouraged staff judge advocates to use pretrial agreements for

5. In *United States v. Williams*, 13 M.J. 853 (A.C.M.R. 1982), for example, the accused agreed to testify against a co-accused in return for clemency action.

6. United States v. Walker, 34 M.J. 264 (C.M.A. 1992).

7. MCM, *supra* note 2, R.C.M. 705.

8. *Id.* R.C.M. 705(b)(1).

9. *Id.* R.C.M. 705(b)(2).

10. *Id.* R.C.M. 705(d)(2).

11. BENCHBOOK, *supra* note 4, at 20, 24.

speedier disposition of cases. At the same time, he urged caution in the use of such agreements,

> exhort[ing] all persons concerned with the administration of military justice to guard carefully every right to which an accused might be entitled, saying: "It would be better to free an offender completely, however guilty he may be, than to tolerate anything smacking of bad faith on the part of the government."[12]

Senior Judge Thomas of the Army Court of Military Review (ACMR) offered the following historical perspective on MG Shaw's letter and its "sanction" of pretrial agreements:

> An historical view of the Army's guilty plea program aids in understanding the nature and purpose of the negotiated pretrial agreement. Prior to 1953, less than 10% of accused in Army courts-martial entered pleas of guilty to all charges and specifications. In federal district courts, at that time, over 90% of the defendants plead guilty. Confronted with this disparity, the Acting Judge Advocate General dispatched a letter on 23 April 1953 to Judge Advocates, encouraging them to initiate a guilty plea program within their commands. . . . In May of 1957, The Judge Advocate General set forth additional guidelines. One of these provisions was: "3. The agreement, if made, must be made in writing, unambiguous, and contain no provision circumscribing the rights of an accused."[13]

In one of the first military appellate cases involving pretrial agreements, *United States v. Callahan*,[14] the Army Board of Review (ABR) reassessed the sentence of an accused whose pretrial agreement was conditioned, at least in part, on waiver of his right to present matters in extenuation and mitigation. The ABR noted that it was not their "purpose to assume," nor was it their holding, "that such procedure is other than legal, proper, and under appropriate circumstances, highly desirable."[15] While not expressly approving or disapproving the use of pretrial agreements, this language reflected an initial uneasiness over pretrial agreements that continued through the next few decades. This case also highlighted the

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12. United States v. Callahan, 22 C.M.R. 443, 447 (A.B.R. 1956) (citing JAGJ 1953/1278, 23 Apr. 1953).

13. United States v. Elkinton, 49 C.M.R. 251, 252 (A.C.M.R. 1974).

14. 22 C.M.R. 443 (A.B.R. 1956).

15. *Id*. at 447.

intention of reviewing authorities to carefully scrutinize the explicit or implicit waiver of an accused's rights pursuant to a pretrial agreement.

In the following year, the Court of Military Appeals (COMA) expressly approved the use of pretrial agreements in *United States v. Allen*,[16] but cautioned against allowing such a practice to "transform the trial into an empty ritual."[17] In *United States v. Watkins*,[18] the court acknowledged the benefits that would accrue to an accused who entered into a pretrial agreement:

> In the military service, a practice has been developed which permits an accused to initiate proceedings for leniency in the event that he enters a plea of guilty. This consists of an overture to the convening authority to set the maximum sentence he will affirm if a plea of guilty is entered. A reading of many records in which pleas of guilty have been entered has established that this is a salutary procedure for an accused . . . . The procedure offers the accused a chance to make certain that his sentence will not exceed fixed limits and yet leaves him unbridled in the presentation of extenuation and mitigation evidence at the trial . . . . The arrangement with the convening authority cannot help but benefit the accused for it reduces his punishment if a guilty plea is entered from the permissible maximum set by law.[19]

In Watkins, the appellant challenged the acceptance of his plea of guilty to bribery, alleging that his answers to the law officer during the taking of the plea raised the defense of entrapment. Chief Judge Quinn, one of the two judges in the majority that found that the plea was provident, reached his decision reluctantly, noting that "[t]he negotiated plea program is not quite as salutory as the principal opinion makes it out to be."[20] Judge Ferguson dissented, noting that he would have rejected the plea, and expressing the following concern about the "negotiated guilty plea program:"

> Too many records come before us with multiplicious charges, inconsistencies between the plea and the accused's statements, and minimal presentation of matters in extenuation and mitiga-

16. 25 C.M.R. 8 (C.M.A. 1957).
17. *Id*. at 11.
18. 29 C.M.R. 427 (C.M.A. 1960).
19. *Id.* at 431-32.
20. *Id*. at 432 (Quinn, C.J., concurring).

> tion to merit the conclusion that the program is entirely advantageous. Indeed, this case reflects one of the evils arising from that very arrangement."[21]

Judge Ferguson's concerns were realized in later cases that ultimately became the cornerstone of the law surrounding pretrial agreements as we know it today.

III. Oversight of the Agreement

Two cases from the late 1950's typify the uneasiness with which military appellate courts have historically regarded pretrial agreements. In 1957, Private First Class (PFC) Withey pleaded guilty at a general court-martial to wrongfully possessing three marijuana cigarettes. Before his court-martial closed to deliberate on the sentence, the president of the court asked the law officer if the accused understood the effect of his guilty plea and if he was aware of the maximum sentence that the court could adjudge as a result of his plea. After informing the president that the accused did understand the effect of his plea and the maximum punishment authorized, the law officer added that the accused had pleaded guilty pursuant to a prior agreement with the convening authority. The law officer did not disclose the terms of the agreement, but reminded the members of their duty to adjudge a sentence they believed was fair and just. When the law officer asked the president if that information alleviated the court's concerns, the president of the court replied: "No, it aggravates it. I see absolutely no purpose in having a court-martial if you have predetermined a sentence for the accused."[22] After the court was advised of the maximum confinement sentence of five years, the defense counsel failed to present any matters or argument in extenuation or mitigation, and the court sentenced PFC Withey to three years' confinement.[23]

That same year, Private Welker pleaded guilty to multiple offenses. As in *Withey*, the defense presented no evidence in extenuation and mitigation and made no argument on the sentence. After being informed by the law officer that the maximum punishment included confinement at hard labor for ten years and seven months, the court deliberated for five minutes and sentenced the accused to a dishonorable discharge, total for-

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21. *Id*. at 433 (Ferguson, J., dissenting).
22. United States v. Withey, 25 C.M.R. 593, 595 (A.B.R. 1958).
23. On appeal, the ABR ordered a sentence rehearing. *Id.* at 596.

feitures, and the maximum authorized confinement.[24] On appeal, the COMA noted two facts of particular concern: first, the accused's plea of guilty to one of the charges was "patently inconsistent with the stipulation as to the 'facts;'"[25] and second, "the [trial] court surmised from the accused's plea of guilty that he had an agreement with the convening authority as to the maximum sentence and abdicated their function of adjudging an appropriate sentence in the case."[26]

Withey and *Welker* together demonstrate three of the greatest dangers posed by pretrial agreements: first, that an accused may plead guilty without establishing that he is, in fact, guilty; second, that the convening authority may inadvertently usurp the discretion of the court to adjudge a sentence; and third, that the pretrial agreement may, in effect, effectively weaken the trial process. In the following years, military appellate courts carefully scrutinized each of these concerns.

A. The Military Judge as the Safeguard of the Guilty Plea

Appellate courts have remained sensitive to the danger that, in a rush to secure a favorable agreement, an accused might yield to the temptation to enter an improvident plea. As Judge Ferguson wrote in 1968:

> The benefit to the accused is the ceiling [that] is set absolutely on his punishment in return for the plea. The danger inherent in that arrangement is the entry of an improvident plea in order to insure that ceiling, as evidenced by the many cases in which we have been required, on that basis, to reverse and remand.[27]

The interplay between pretrial agreements and the providence inquiry was first discussed in *United States v. Chancelor*,[28] where in his post-trial clemency interview, the accused revealed facts inconsistent with his plea of guilty. At that time, the providence inquiry was limited to pro forma

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24. United States v. Welker, 25 C.M.R. 151, 152 (C.M.A. 1958).

25. *Id*. at 152-53.

26. *Id.* at 153 (quoting United States v. Buckland, No. CM 394524 (A.B.R. 19 Feb. 1957) (unpublished)).

27. United States v. Cummings, 38 C.M.R. 174, 175 (C.M.A. 1968). *See infra* text accompanying note 137 (discussing *Cummings*, which was reversed for other reasons).

28. 36 C.M.R. 453 (C.M.A. 1966).

advice provided in the *Military Justice Handbook*[29] in which the accused was informed of the maximum punishment that might be imposed and was asked whether he understood the meaning and effect of his plea of guilty. That procedure was followed at trial in *Chancelor*, but after trial the accused asserted his innocence and specifically denied the specific intent required to establish guilt. Defense counsel confirmed that the accused had maintained his innocence throughout the judicial process and stated that "he, for good and sufficient reasons, recommended a guilty plea in spite of accused's protestations of innocence."[30]

The COMA reversed. In its majority opinion, the court examined Article 45, UCMJ,[31] which imposes upon the court the duty to accept a guilty plea only after the accused admits committing the acts charged. Citing testimony before the House Armed Forces Service Committee, Judge Ferguson wrote that there should be "a colloquy between the court and the accused at the taking of the plea and the record transcribed verbatim and not just have a form which is printed and says that the accused was informed of his rights."[32] The court noted that, as a result of the standard practice, "the accused is not advised of the elements of the offense and his guilt in fact is not always established on the record."[33]

Judge Ferguson's recommendation was apparently met with less than full cooperation by the services. Three years later, in 1969, the COMA again faced the issue of an improvident plea, this time holding as law what they had three years earlier urged the services to do in *Chancelor.* In the landmark case of *United States v. Care*,[34] the accused pleaded guilty to desertion as part of a pretrial agreement, but on appeal contended that a plethora of bad advice from his defense counsel had prompted him to enter a plea of guilty, notwithstanding a self-avowed absence of any intention on

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29. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES, MILITARY JUSTICE HANDBOOK: THE LAW OFFICER (30 Apr. 1958) [hereinafter MILITARY JUSTICE HANDBOOK].

30. *Chancelor*, 36 C.M.R. at 454.

31. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) [hereinafter 1951 MCM].

32. *Chancelor*, 36 C.M.R. at 456 (quoting Hearings on H.R. 2498 Before the House Armed Services Comm., 81st Cong. 1054 (1950) (statement of Mr. Felix Larkin, Assistant General Counsel, Department of Defense)).

33. *Id.*

34. 40 C.M.R. 247 (C.M.A. 1969). For an excellent discussion of *Care* and its progeny, see Major Terry L. Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL. L. REV. 195 (1991).

his part to remain away permanently.[35] The court found error in the law officer's failure to inform Private Care of the elements constituting the offense and failure to establish the factual components of the guilty plea, but held that the evidence as a whole—including the wording of the specification—established that Private Care knew what he was pleading guilty to and established his guilt for those charges.[36] The court held, however, "that further action is required toward the objective of having court-martial records reflect fully an awareness by an accused pleading guilty of what he is admitting that he did and intended and of the law that applies to his acts and intentions."[37]

Chastising the services for ignoring their recommendation in *Chancelor*, the court mandated the following:

> [T]he record of trial for those courts-martial convened more than thirty days after the date of this opinion must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge or the president has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.[38]

Much of the confusion that existed before *Care* resulted from a lack of definitive guidance available to law officers conducting courts-martial. Law officers were generally company-grade judge advocates appointed to preside over the courts-martial in their respective jurisdictions. Neither the 1951 nor the 1969 *Manual for Courts-Martial* made reference to pretrial agreements, and the scripts provided in the 1958 *Military Justice*

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35. *Care*, 40 C.M.R. at 249. Care alleged by affidavit: that his counsel failed to explain the elements of desertion to him; that his counsel advised him that contesting the charge would delay trial for four months; that his counsel told him that inevitably he would be convicted and receive the maximum sentence, but by a negotiated pretrial agreement he could limit the confinement portion of his sentence to two years; that this advice from his counsel resulted in his pleading guilty; and that, if he were tried again, he would plead not guilty. The defense counsel responded with an affidavit denying Care's allegations. *Id.*

36. *Id.* Judge Ferguson, who wrote the majority opinion in *Chancelor*, maintained in his *Care* dissent that a reversal was warranted because the law officer failed to conduct a proper inquiry. *Id.* at 254 (Ferguson, J., dissenting).

37. *Id.* at 253.

38. *Id*.

Handbook[39] and the 1969 *Military Judges Guide*[40] were cursory at best. The 1951 *Manual* provided that an accused could enter a plea of guilty, but that "the court may refuse to accept a plea of guilty and should not accept the plea without first determining that it is made voluntarily with understanding of the nature of the charge."[41] The 1951 *Manual* also provided that if the accused "has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . the court shall proceed as though he had pleaded not guilty."[42] It provided no further guidance.

The corresponding *Military Justice Handbook,*[43] which was the law officer's only framework for conducting a court-martial, similarly provided little direction regarding how to determine the providence of a plea; it provided only a script that required that the law officer ask the accused whether the accused understood that the plea of guilty admitted every act or omission of the charged offense, that no further proof was required for conviction, that the accused was legally entitled to plead not guilty, and that a certain maximum punishment was authorized. The script did not provide for any inquiry by the law officer regarding the conduct underlying the offenses or the voluntariness of the plea.

In response to *Chancellor* and *Care*, the 1969 *Manual* added significant language regarding a court's duty to ensure the factual basis for a guilty plea, providing that the court "must question the accused about what he did or did not do and what he intended (where this is pertinent) to determine whether the acts or omissions of the accused constitute the offense or offenses to which he is pleading guilty."[44] The 1969 *Manual* also directed the court to not only advise the accused that if accepted his plea of guilty waived his rights against self-incrimination, his right to a trial of the facts, and his right to confront the witnesses against him, but also to determine whether the accused consciously and knowingly waived those rights.[45]

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39. MILITARY JUSTICE HANDBOOK, *supra* note 29.

40. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES GUIDE (19 May 1969) [hereinafter MILITARY JUDGES GUIDE]. The *Military Judges Guide* replaced the *Military Justice Handbook.*

41. 1951 MCM, *supra* note 31, ¶ 70.

42. *Id*.

43. MILITARY JUSTICE HANDBOOK, *supra* note 29, at 23.

44. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 70(b) (rev. ed. 1969).

45. *Id.*

The Military Judges Guide[46] was published in May, 1969, three months before the COMA issued its opinion in *Care*. Subsequent changes to the *Military Judges Guide* included additional guidance for the providence inquiry and a requirement that the military judge "elicit the facts leading to the guilty plea by conducting a direct and personal examination of the accused as to the circumstances of the alleged offense(s) and other matters leading to his plea."[47] It further provided, "Such questions should be aimed at developing the accused's version of what happened in his own words, and determining if his acts or omissions encompass each and every element of the offense(s) to which the guilty plea relates."[48]

B. The Military Judge as the Safeguard of the Pretrial Agreement

While the decision in *Care* provided specific guidance to courts-martial regarding the taking of a guilty plea, the trial court's role in scrutinizing the specific terms of a pretrial agreement remained unclear. Article 45, UCMJ, established the requirement for provident pleas, but it did not address taking pretrial agreements in connection with guilty pleas.

In 1976, in the case of *United States v. Elmore*,[49] Judge Fletcher of the COMA wrote in a concurring opinion that:

> The ambiguity and apparent hidden meanings which lurk within various pretrial agreement provisions . . . lead me to conclude that henceforth, as part of the *Care* inquiry, the trial judge must shoulder the primary responsibility for assuring on the record that an accused understands the meaning and effect of *each* condition as well as the sentence limitations imposed by any existing pretrial agreement.[50]

Elmore involved an agreement term that was not discussed during the providence inquiry. While the court found that the condition did not violate the law or public policy, Judge Fletcher recognized the problems inherent in the trial court's failure to inquire into the specific terms of the pretrial agreement and feared that, at some point, the court would be left to decide what the parties did—or did not mean—by those terms. In his con-

46. MILITARY JUDGES GUIDE, *supra* note 40.
47. *Id.* at 3-3 (C2, 14 May 1970).
48. *Id.*
49. 1 M.J. 262 (C.M.A. 1976).
50. *Id.* at 264 (Fletcher, J., concurring).

curring opinion, Judge Fletcher wrote that the providence inquiry must include scrutiny of each term of the agreement, and the military judge must strike from the agreement any conditions he feels violate "appellate case law, public policy, or the trial judge's own notions of fundamental fairness."[51] His proposed inquiry also included assurances from both sides that the written agreement encompassed all of the understandings of the parties and that the judge's interpretation of the agreement comported with that of the parties.

Eight months later, the COMA decided *United States v. Green*,[52] where Judge Fletcher, now writing for the majority, held that:

> [A]s part of all *Care* inquiries . . . the trial judge shall ascertain whether a plea bargain exists, and if so, shall conduct an inquiry into the pretrial agreement in accordance with the *Elmore* guidelines previously enunciated . . . . We will view a failure to conduct a plea bargain inquiry as a matter affecting the providence of the accused's plea.[53]

While providing the first substantial guidance for the providence inquiry in cases involving pretrial agreements, the *Green* decision also led to two years of trial-level uncertainty and appellate controversy over *Green's* actual application.[54] This controversy surfaced one year after *Green*, when the ACMR issued its decision in *United States v. Crowley.*[55] In *Crowley*, the accused alleged on appeal that the trial judge had violated the requirements of *Green* by failing to explain the significance of not entering into a stipulation of fact, by failing to ensure that the accused understood the sentence limitations imposed by the pretrial agreement, by failing to ask counsel whether their understanding of the terms and conditions of the pretrial agreement comported with his own, and by failing to obtain the assurances of counsel that the written agreement encompassed all of their understandings. The Army court found that these errors could be cured through affidavits so long as there was substantial compliance with *Green*, holding: "The *Green* decision does not require a perfect plea bargain inquiry . . . . If the military judge has conducted an inquiry which is in sub-

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51. *Id*.

52. 1 M.J. 453 (C.M.A. 1976).

53. *Id*. at 456.

54. *See* Captain Glen D. Lause, *Crowley: The Green Inquiry Lost in Appellate Limbo*, ARMY LAW., May 1979, at 10.

55. 3 M.J. 988 (A.C.M.R. 1977).

stantial compliance with the *Green* guidelines, we hold that the plea can be considered provident."[56]

The Army court's "substantial compliance" standard was rejected three months later, however, when the COMA decided *United States v. King*.[57] Rejecting counsel's argument that "substantial compliance" would suffice, the court held that only strict compliance with *Green* was acceptable and that the court would not "attempt to 'fill in' a record left silent because of the trial judge's omission or to develop a sliding scale analysis whereby 'substantial compliance' becomes our standard of review."[58] The court performed an about-face, however, in 1979, when in *United States v. Hendon*,[59] it held that the accused's guilty plea was provident despite numerous *Green* omissions by the trial judge.[60]

Even before the "appellate limbo" created by *Elmore*, *Green*, *King*, and *Hendon*,[61] the Army Trial Judiciary struggled to provide consistent guidance to the bench. A 1957 Department of the Army (DA) message[62] required law officers to conduct an "out-of court hearing" to determine whether the accused understood the pretrial agreement; however, that message was rescinded in 1965 by another DA message[63] that required only that the agreement be discussed in the Staff Judge Advocate's (SJA) Review and attached thereto. A 1966 memo from the Chief Judicial Officer cited both DA messages and provided that law officers should inquire into the terms of a pretrial agreement when "it appears to them that the interest of justice requires such an inquiry."[64] The Chief Judicial Officer issued yet another memo in February 1968, rescinding the 1966

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56. *Id*. at 995.

57. 3 M.J. 458 (C.M.A. 1977).

58. *Id*. at 459.

59. 6 M.J. 171 (C.M.A. 1979).

60. *See* Lause, *supra* note 54, at 12.

61. Lause refers to *Hendon* as the "un-*King*" decision. *Id*.

62. Message No. 552595, 8 May 1957, Headquarters, Department of Army, The Judge Advocate General, subject: Guidance for Procedures Applicable in Cases Where an Offer of a Plea of Guilty for a Consideration is Accepted.

63. Message No. 736536, 15 Oct. 1965, Headquarters, Department of Army, The Judge Advocate General, subject: Pretrial Agreements (directing that pretrial agreements in effect at the time of the convening authority's action must be mentioned in the SJA Review and attached to the review as an enclosure, but need not be made an appellate exhibit in the case).

64. U.S. DEP'T OF ARMY, UNITED STATES ARMY JUDICIARY: INQUIRY AS TO PRETRIAL AGREEMENTS (15 Feb. 1966).

memo and providing, in light of *Cummings*,[65] "that law officers, in determining the providency of a guilty plea, should inquire as to whether there is a pretrial agreement in connection with the plea and if there is one, should also inquire into its terms, its legality, and the accused's understanding thereof."[66]

This flurry of trial judge memoranda was followed by the 1969 *Manual* and the 1969 *Military Judges Guide*, which did not adequately address pretrial agreements.[67] The military judge's script for the providence inquiry included only an inquiry into the existence of a pretrial agreement and provided that if one existed, "the military judge should inquire into its terms, its legality, and the accused's understanding thereof."[68]

In response to *Green*[69] and *King*,[70] however, the Army Trial Judiciary issued a multitude of amending and rescinding memos that eventually led to a standardized boilerplate script in 1982, when the Trial Judiciary issued a new version of *DA Pamphlet 27-9, Legal Services: Military Judges' Benchbook (Benchbook).*[71] The *Benchbook* script incorporated the *Green* and *King* inquiries into the terms of the agreement and standardized the military judge's inquiry into the terms of the pretrial agreement in conformance with *Green* and *King.*

The 1984 *Manual for Courts-Martial* codified the procedure mandated by case law in RCM 705, which required that the parties inform the military judge of the existence of a pretrial agreement.[72] Similarly, RCM 910(f)[73] requires that the parties inform the military judge of a plea agreement and provides that the military judge may accept the pretrial agreement only if it complies with RCM 705. The military judge must ensure that there has been a "meeting of the minds" and that the terms comport

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65. 38 C.M.R. 174 (C.M.A. 1968).

66. U.S. DEP'T OF ARMY, UNITED STATES ARMY JUDICIARY: INQUIRY AS TO PRETRIAL AGREEMENTS (5 Feb. 1968).

67. MILITARY JUDGES GUIDE, *supra* note 40.

68. *Id*. at 3-5 (C5, 14 May 1970).

69. 1 M.J. 453 (C.M.A. 1976).

70. 3 M.J. 458 (C.M.A. 1977).

71. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (May 1982). The *Military Judges Benchbook* replaced the *Military Judges Guide*.

72. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(d)(f)(2) (1984) [hereinafter 1984 MCM].

73. MCM, *supra* note 2, R.C.M. 705(d)(f)(1).

with the intent of the parties, or allow the accused to withdraw from the pretrial agreement.[74]

C. The Court as the Sole Source of the Adjudged Sentence

1. Trial Before Military Judge Alone

Green's impact on pretrial agreements was not limited to defining the scope of the providence inquiry; it also resolved whether the military judge would view the quantum portion of the pretrial agreement before announcing the sentence.

It was, and still is, standard practice for a military judge in a court-martial with members to view the quantum portion of the pretrial agreement during the taking of the plea. However, the institution of trial by military judge alone, authorized by the 1968 Military Justice Act,[75] raised the issue of whether the trial judge, in his capacity as sentencing authority, should know the quantum portion of the pretrial agreement in advance of announcing his own sentence. Absent dispositive guidance to the contrary,[76] many military judges sitting alone as courts-martial routinely viewed the quantum portion of the pretrial agreement during the taking of the plea.

In *United States v. Villa*,[77] the COMA upheld this practice, holding that, in accordance with *Care*, "[p]art of the judge's inquiry is necessarily directed to the accused's understanding of the punishment to which he will be subject as a result of his plea of guilty."[78] The court continued, "[D]isagreement as to the meaning and scope of the sentence is not uncommon."[79] Noting also that the factors taken into account by the con-

74. Aziz v. Carver, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993).

75. Military Justice Act of 1968, Pub. L. No. 90-632, 1968 U.S.C.C.A.N. (82 Stat.) 1335.

76. The *Military Judges Guide* encouraged military judges sitting alone to not view the quantum before announcing the sentence. MILITARY JUDGES GUIDE, *supra* note 40, 3-5 (C2, 14 May 1970).

77. 42 C.M.R. 166 (C.M.A. 1970).

78. *Id*. at 168.

79. *Id*.

vening authority in entering into the agreement with the accused often differ from the matters considered by the judge in sentencing, the court stated:

> We are also convinced that both the convening authority and the military judge [will] treat the sentence provision as important only to the effectuation of the agreement, and not as an order or wish on the part of the convening authority to influence the judge in his own determination of an appropriate sentence.[80]

Judge Ferguson, in his *Care* dissent, said: "I believe that [this] practice is fraught with danger and should be discontinued. The very fact that my brothers find it necessary to discuss at length the problems involved is, in my opinion, indicative of the potential for prejudice to an accused."[81] Judge Ferguson also noted that the *Military Judges Guide*[82] discouraged the military judge from reviewing the quantum portion of the agreement before announcing the sentence. He wrote, "[I]n my opinion, [it is] asking too much to expect [the military judge] to maintain an impartial disposition relative to sentence after he learns, through perusal of the pretrial agreement, that the initial appellate authority has already determined an appropriate sentence."[83]

Judge Fletcher, writing for the majority in *United States v. Green*,[84] adopted Judge Ferguson's approach and held, "Inquiry into the actual sentence limitations specified in the plea bargain should be delayed until after announcing sentence where the accused elects to be sentenced by the military judge rather than a court with members."[85] Judge Fletcher emphasized not the military judge's ability to determine the providence of the plea or to adjudge an appropriate sentence, but rather "the perceived fairness of the sentencing process."[86] The 1982 *Benchbook* incorporated this change, and in its script, provided for the judge's viewing of the quantum portion of the pretrial agreement only after announcing the sentence. Similarly, the 1984 *Manual for Courts-Martial* included RCM 910(f)(3), which provided that, in a trial by military judge alone, the military judge

80. *Id*. at 169.
81. *Id*. at 170 (Ferguson, J., dissenting).
82. MILITARY JUDGES GUIDE, *supra* note 40.
83. *Villa*, 42 C.M.R. at 171.
84. 1 M.J. 453 (C.M.A. 1976).
85. *Id*. at 456.
86. *Id*. at 455.

shall not examine any sentence limitation contained in the agreement until after announcement of the sentence.[87]

2. Trial Before Court Members

Guilty pleas taken before members created their own set of problems, most dealing with the perils of whether members should be advised of the existence of a pretrial agreement, whether members should be informed of the lesser maximum punishment authorized under the agreement, and whether counsel could "hoodwink" the members into adjudging a sentence that counsel knew would not be approved under the pretrial agreement.[88]

United States v. Withey[89] was returned for a rehearing on the sentence due in part to the members' knowledge of the existence of a pretrial agreement.[90] Other cases in which the court surmised that the members suspected the existence of a pretrial agreement support the notion that the members should not be so informed.[91] *United States v. Welker*[92] was also returned for a rehearing on the sentence, in part due to the court's finding that the members were aware of the existence of a pretrial agreement. The court also noted that connected to this disclosure appeared to be a "tendency on the part of defense counsel to present no evidence, and to make no argument, in mitigation when there is an agreement with the convening authority on the plea and the sentence"[93] and that "[a] continuation of these trends may require reexamination of the practice of negotiating agreement on the plea and the sentence with the convening authority."[94]

Whether the members could be informed of the maximum punishment agreed to by the convening authority was resolved in *United States v. Sanchez*.[95] There, the ABR considered whether the court should be

87. 1984 MCM, s*upra* note 72, R.C.M. 910(f)(3).

88. United States v. Wood, 48 C.M.R. 528, 531 (C.M.A. 1974).

89. 25 C.M.R. 593, 595 (A.B.R. 1958).

90. As previously discussed, the case was also returned for a rehearing on sentencing due to defense counsel's failure to present matters in extenuation and mitigation. *See supra* notes 22-23 and accompanying text.

91. United States v. Allen, 25 C.M.R. 8, 10 (C.M.A. 1957) (members deliberated for eight minutes); United States v. Welker, 25 C.M.R. 151, 152 (C.M.A. 1958) (members deliberated for five minutes).

92. *Welker*, 25 C.M.R. at 151, 152.

93. *Id*. at 153.

94. *Id*.

95. 40 C.M.R. 698 (A.B.R. 1969).

informed that the maximum punishment that the members could adjudge was that agreed to by the convening authority in a pretrial agreement. Holding that "the provisions of a pretrial agreement made by a convening authority are irrelevant in determining the maximum sentence imposable by a court-martial," the ABR found that "a pretrial agreement is merely a voluntary limitation by the convening authority, in advance of trial, upon his statutory discretion regarding the adjudged sentence," and therefore does not affect the range of punishment available to the members.[96]

The issue then arose whether defense counsel could argue for a specific sentence with the knowledge that the pretrial agreement precluded such a sentence. In *United States v. Wood*,[97] defense counsel elicited from the accused at trial that the he would rather spend five years in jail than receive a dishonorable discharge. The judge considered this testimony inconsistent with the plea, as the pretrial agreement provided that the convening authority "would approve no punishment in excess of a suspended bad-conduct discharge, confinement at hard labor for one year, and forfeiture of all pay and allowances."[98] The judge excused the court members and chastised the defense counsel for eliciting testimony that was "not true."[99] He then "denounced defense counsel and the accused for 'attempting to perpetrate' a 'fraud' on the court members."[100] On appeal, the COMA held the following:

> If it is right as a matter of law for the Government to disregard the agreement when instructing the members as to the limits of the sentence, is it not equally right for the accused to disregard the agreement in his argument as to the kind of sentence that should be adjudged? To allow the Government the right to disregard the agreement so that the sentence will be determined on the basis of the maximum punishment allowed by the law increases the likelihood that the adjudged sentence will not be less than that provided by the agreement; to deny the accused the right to disregard the agreement in making his case before the court increases the likelihood even more. One is impelled to ask whether such one-sided application of the agreement is fair.[101]

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96. *Id*. at 699.
97. 48 C.M.R. 528, 531 (C.M.A. 1974).
98. *Id*. at 529.
99. *Id*. at 530.
100. *Id.*
101. *Id.* at 532.

Next in *Wood*, The COMA reviewed many of its recent decisions regarding pretrial agreements, pointing out, as it did in *Watkins*,[102] that "the agreement leaves the accused 'unbridled,' and allows him to 'bring before the court-martial members any fact or circumstance which might influence them to lessen the punishment.'"[103] Concluding that the trial judge erred in characterizing the defense counsel's conduct in *Wood* as a fraud upon the court members, the COMA held, "Whether sentence is imposed by the judge alone or by the court members, the determination is not on the basis of the limits provided by the agreement, but as provided by law."[104] Counsel are free to present a sentencing case as they would in a trial without such an agreement, so long as the evidence elicited during sentencing does not appear to impeach the findings of the court. In fact, the COMA emphasized that defense counsel "must do all he can to obtain the court's independent judgment as to what constitutes a fair sentence for the accused"[105] and "can disregard the agreement by trying to convince the judge or court members that [the accused] is worthy of greater leniency."[106]

This approach was ultimately codified in the 1984 *Manual for Courts-Martial*. Rule for Courts-Martial 705(e), which is based on *Green* and *Woods*, provides that "no member of a court-martial shall be informed of the existence of a pretrial agreement."[107]

IV. Terms of the Agreement

A. Early History

Early caselaw on pretrial agreements expressed a reluctance to permit such agreements to incorporate terms touching on the fundamental rights of the accused. In *United States v. Callahan*, the ABR cautioned against

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102. United States v. Watkins, 29 C.M.R. 427 (C.M.A. 1960).

103. *Wood*, 48 C.M.R. at 532 (quoting *Watkins*, 29 C.M.R. at 431-32).

104. *Id.*.

105. *Id*. at 533.

106. *Id*.

107. MCM, *supra* note 2, app. 21 (Analysis, R.C.M. 705(e)). *See also* United States v. Jobson, 31 M.J. 117 (C.M.A. 1990) (member who had read about the pretrial agreement in the newspaper was not disqualified to serve as a court member); *cf.* United States v. Schnitzer, 44 M.J. 380 (1996) (testimony regarding co-accused's pretrial agreement was elicited by the government during trial; this constituted improper outside influence on sentencing but did not rise to plain error).

allowing the use of pretrial agreements to infringe on the soldier's fundamental rights of due process.[108] Similarly, in *United States v. Cummings*, the COMA noted: "plea arrangements are not designed . . . to 'transform the trial into an empty ritual.' They should concern themselves with nothing more than the bargaining on the charges and sentence, not with ancillary conditions regarding waiver of fundamental rights."[109] Still uncomfortable with the concept of such bargaining within the military, Judge Ferguson wrote in *United States v. Schmeltz*:[110] "This Court has never expressed full satisfaction with the practice of plea bargaining in the armed services. It has, however, repeatedly stated that pretrial agreements should concern themselves only with bargaining on the charges and sentence."[111]

This narrow interpretation of the matters subject to negotiation in a pretrial agreement did not last. Chief Judge Suter of the ACMR, referring to Judge Ferguson's comments in *Schmeltz*, noted ten years later that:

> Recent decisions by the Court of Military Appeals have not observed such a limitation upon the terms of a pretrial agreement. In *United States v. Schaffer,* 12 M.J. 425, 428 (C.M.A. 1982), the Court expressly acknowledged a judicial willingness to accept more complex pretrial agreements, especially when that complexity is proposed by an accused and his counsel. Moreover, the Court has recognized that flexibility and imagination in the plea-bargaining process is allowed as long as the trial and appellate processes are not rendered ineffective and their integrity is maintained. While the decisions concerning pretrial agreements have not been models of clarity, we believe they evince a reluctance to engage in pro forma rejections of pretrial agreements and invite this court to examine the provisions of pretrial agreements in light of the greater flexibility accorded such agreements.[112]

The appellate courts have regularly visited the issue of permissible and impermissible terms of the pretrial agreement. In 1984, the newly created

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108. 22 C.M.R. 443 (A.B.R. 1956).

109. 38 C.M.R. 174, 177 (C.M.A. 1968) (citing United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957)).

110. 1 M.J. 8 (C.M.A. 1975).

111. *Id.* at 11.

112. United States v. Jones, 20 M.J. 853, 855 (A.C.M.R. 1985) (citations omitted).

Rules for Courts-Martial included RCM 705,[113] which specifically listed examples of permissible and impermissible terms. As counsel continue to develop more novel and more complex approaches to obtaining pretrial agreements, however, the issue of whether a specific term is permissible remains a source of appellate litigation.

B. Fundamental Rights That May Not Be Waived Under R.C.M. 705(c)

The United States Supreme Court held in *United States v. Mezzanatto*[114] that a criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution. The Court also noted that, "absent some affirmative indication of Congress's intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties."[115]

Rule for Courts-Martial 705(c) precludes certain rights from waiver as part of a pretrial agreement by providing that:

> A term or condition shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; [or] the complete and effective exercise of post-trial and appellate rights.[116]

Thus, terms or conditions that attempt to restrict an accused's right to present matters in extenuation and mitigation or restrict the right to counsel would be unenforceable. Before the enactment of the Rules for Courts-Martial in the 1984 *Manual*, however, there was no such express prohibition. Consequently, the courts litigated the propriety of these terms on a case-by-case basis.

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113. 1984 MCM, *supra* note 72, R.C.M. 705(c).
114. 513 U.S. 196 (1995).
115. *Id*. at 201.
116. MCM, *supra* note 2, R.C.M. 705(c)(1)(B).

1. Extenuation and Mitigation

In *United States v. Callahan*,[117] the accused agreed to abstain from presenting mitigation evidence during sentencing in order to obtain a favorable pretrial agreement, a common practice at his installation. The ABR found that the accused's "election" not to present mitigation evidence, "encumbered as it was by the compulsion of this improper pretrial agreement—amounted to an unwarranted and illegal deprivation of the accused's right to military due process."[118] The ABR noted that The Judge Advocate General had previously discouraged such a term in a policy statement published in JAG "Chronicle" in 1953.[119] The ABR pointed out that the 1951 *Manual* not only gave the accused the right to present evidence in extenuation and mitigation, but also "expressly facilitates the admission of such evidence by relaxing the rules of evidence."[120] The ABR also noted that "this right is an integral part of military due process, and the denial of such a right is prejudicial to the substantial rights of an accused."[121] Similarly, the court in *United States v. Allen*[122] disapproved of the defense counsel's failure to present extenuation and mitigation evidence and expressed its concern with ensuring an effective trial practice, particularly in the context of a pretrial agreement. Rule for Courts-Martial 705(c)(1)(B)[123] now prohibits any term that deprives the accused of his right to complete sentencing proceedings, including the right to present matters in extenuation and mitigation.[124]

2. Lack of Jurisdiction

The same year that the COMA decided *Allen*, the ABR decided *United States v. Banner*,[125] a case in which the accused agreed to waive a lack of jurisdiction motion as part of a pretrial agreement. On appeal, the ABR found that there was no personal jurisdiction and held that "neither the law nor policy could condone the imposition by a convening authority

117. 22 C.M.R. 443 (A.B.R. 1956).

118. *Id.* at 448.

119. *Id.* at 447 (citing 36 JAG CHRONICLE 183 (4 Sept. 1953)).

120. *Id.* at 448.

121. *Id.*

122. 25 C.M.R. 8 (C.M.A. 1957).

123. MCM, *supra* note 2, R.C.M. 705(c)(1)(B).

124. An accused, however, may waive his right to request out-of-area witnesses as a permissible condition of the agreement.

125. 22 C.M.R. 510 (A.B.R. 1956).

of such a condition,"[126] and that "just as the submission of matters of mitigation should not be precluded by pretrial agreements, the litigation of issues of jurisdiction should not be hampered."[127] Rule for Courts-Martial 705(c)(1)(B)[128] now precludes pretrial agreement terms that waive the right to challenge the court's jurisdiction.

3. Post-Trial and Appellate Rights

Waiver of appellate rights was litigated a year later in *United States v. Darring*,[129] where separate from his pretrial agreement, the accused waived his right to appellate counsel immediately after trial, based on his counsel's advice that "there was little that an appellate defense counsel could do for him"[130] in light of his guilty plea. The court found that the accused's waiver was not made knowingly given the inadequacy of his counsel's advice, which was premature because it was given before post-trial review and action by the convening authority. While the court recognized that in some cases this waiver might be appropriate, it held that "a decision not to request appellate counsel should be predicated only upon the merits of an individual case and the accused's own desires."[131] It discouraged policies requiring an accused to waive appellate representation as flying "in the teeth of our decision in *United States v. Ponds* . . . in which we held that a preliminary waiver of a right to petition this Court for review is a nullity."[132]

In *Ponds*, the court found that while an accused may waive appellate process by not initiating review before the appellate court in a timely matter, any agreement between the accused and the convening authority to waive appellate representation that is "complete to the extent of purporting to provide a consideration to the accused is, for appellate purposes a legal nullity."[133] Similarly, the court in *United States v. Mills* found unenforceable an agreement that "would tend to inhibit the exercise of appellate

126. *Id.* at 519.
127. *Id*. (citation omitted).
128. MCM, *supra* note 2, R.C.M. 705(c)(1)(B).
129. 26 C.M.R. 431 (C.M.A. 1958).
130. *Id*. at 433.
131. *Id*. at 434.
132. *Id*. at 435 (citing United States v. Ponds, 3 C.M.R. 119 (C.M.A. 1952)).
133. *Ponds*, 3 C.M.R. at 121.

rights."[134] Rule for Courts-Martial 705(c)(1)(B)[135] now explicitly prohibits any term in a pretrial agreement that deprives the accused of the complete and effective exercise of post-trial and appellate rights.

4. Speedy Trial

Waiver of speedy trial was first addressed in *United States v. Cummings*,[136] where the court held that the waiver by the accused of his right to raise the issues of lack of speedy trial or denial of due process was void as contrary to public policy. After a lengthy discussion of pretrial agreements and the concerns raised in *Darring*, *Ponds*, *Callahan*, and *Banner*, Judge Ferguson again voiced his concern and his view of the permissible terms of such agreements.

> We reiterate our belief that pretrial agreements are properly limited to the exchange of a plea of guilty for approval of a stated maximum sentence. Attempting to make them into contractual type documents [that] forbid the trial of collateral issues and eliminate matters which can and should be considered below, as well as on appeal, substitutes the agreement for the trial and indeed, renders the latter an empty ritual. We suggest, therefore, that these matters should be left for the court-martial and appellate authorities to resolve and not be made the subject of unwarranted pretrial restrictions.[137]

Rule for Courts-Martial 705(c)(1)(B) now bars waiver of speedy trial as a pretrial agreement term.[138] Notwithstanding this general prohibition, the issue of waiver of speedy trial has arisen recently in *United States v. McLaughlin*[139] and *United States v. Benitez*.[140] In *McLaughlin*, the accused offered to waive a speedy trial issue as part of his pretrial agreement. At trial, the military judge asked defense counsel if he wished to raise a speedy trial motion, and defense counsel stated that he did not. Because the appellant failed to present a colorable claim entitling him to relief, the Court of Appeals for the Armed Forces (CAAF) affirmed the

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134. 12 M.J. 1, 4 (C.M.A. 1981).
135. MCM, *supra* note 2, R.C.M. 705(c)(1)(B).
136. 38 C.M.R. 174 (C.M.A. 1968).
137. *Id*. at 178.
138. MCM, *supra* note 2, R.C.M. 705(c)(1)(B).
139. 50 M.J. 217 (1999).
140. 49 M.J. 539 (N-M. Ct. Crim. App. 1998).

findings and the sentence, but held that the military judge "should have declared the speedy trial provision unenforceable, while upholding the remainder of the pretrial agreement," and should have asked the defense counsel if he wished to raise a speedy trial motion.[141]

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) was less tolerant in *Benitez.* There, the service court set aside the findings and sentence after the accused entered a pretrial agreement offering to waive "all non-constitutional or non-jurisdictional motions,"[142] finding that the accused had a colorable speedy trial issue and that "[t]he law in this area has been well-settled for a long time."[143]

C. Rights That May Be Waived

While RCM 705(c) prohibits waiver of certain rights, the question of which matters are proper subjects of waiver as part of a pretrial agreement continues to spark litigation.

1. Blanket Waivers

The ACMR initially rejected a blanket waiver of all non-jurisdictional motions in *United States v. Elkinton.*[144] There, the pretrial agreement contained a condition then known as the "Hunter provision,"[145] a term that waived all motions except jurisdiction and that was intended to apply to all motions that are automatically waived upon the entry of a guilty plea. Citing *Cummings*,[146] the Army court strongly voiced its discomfort with the provision's blanket waiver of evidentiary motions, stating that "[s]uch attempts on the part of the government to require an accused to bargain

141. *McLaughlin*, 50 M.J. at 219.

142. *Benitez*, 49 M.J. at 541. The Navy-Marine Corps court noted this provision was overbroad, "since it does not expressly include any of the prohibited conditions set forth in Rule for Courts-Martial 705(c)(1)(B)." *Id*.

143. *Id*.

144. 49 C.M.R. 251 (A.C.M.R. 1974).

145. Major Nancy Hunter, *A New Pretrial Agreement*, ARMY LAW., Oct. 1973, at 23, 24.

146. United States v. Cummings, 38 C.M.R. 174 (C.M.A. 1968).

away his right to raise a legal issue have been uniformly condemned."[147] While the court ultimately found no prejudice in *Elkinton* given the specific facts of his case,[148] Senior Judge Thomas again emphasized in his closing comments that "we condemn the use of pretrial agreements of the type in issue."[149] While the court found the blanket waiver of all non-jurisdictional motions to be "contrary to public policy and therefore void,"[150] it did not establish whether waiver of certain evidentiary motions, if specified individually, was permissible.

The "Hunter provision" came before the COMA one year later in *United States v. Holland*.[151] There, the court looked specifically at a provision that required the accused to enter a plea of guilty before presenting evidence on any motions other than jurisdiction. The court held, "Our approval of these arrangements in subsequent opinions . . . was not intended either to condone or to permit the inclusion of indiscriminate conditions in such agreements, even when initiated by the accused."[152] The court struck down the provision, holding that although "well-intentioned, the limitation on the timing of certain motions controlled the proceedings" and constituted "an undisclosed halter on the freedom of action of the military judge."[153] As one scholar commented, the *Holland* decision does not provide that a waiver of motions in a pretrial agreement is invalid, nor does the decision suggest that *Cummings* supports such a position. Rather, the court found this particular provision invalid "because it compromise[d] the effectiveness and integrity of the trial process by attempting to command control of judicial discretion."[154]

The CAAF has taken a less paternalistic view of blanket waivers in recent years. One such waiver survived judicial scrutiny in *United States v. Rivera*,[155] where the appellant agreed "to make no pretrial motions."[156] While the CAAF found that "[o]n its face, this agreement was too broad"[157] and could conceivably violate the rights to due process and the

147. *Elkinton*, 49 C.M.R. at 254.

148. Trial counsel and defense counsel submitted a jointly-signed affidavit which stated, in part, that "the only motion the defense deemed worthy of litigation was one of speedy trial which in fact was raised at the trial level." *Id*. at 255.

149. *Id*.

150. *Id*. at 254.

151. 1 M.J. 58 (C.M.A. 1975).

152. *Id.* at 59.

153. *Id*. at 60.

154. Captain Robert M. Smith, *Waiver of Motions*, ARMY LAW., Nov. 1986, at 10, 15.

155. 46 M.J. 52 (1997).

156. *Id*. at 53.

rights to challenge jurisdiction and speedy trial, the court found the provision enforceable because the "appellant had not identified any issue that he was precluded from raising,"[158] and because the record was devoid "of any evidence of coercion, overreaching, or an attempt to enforce the agreement in a manner contrary to RCM 705(c)(1)(B)."[159]

Similarly, in *United States v. Forester*,[160] the appellant's pretrial agreement provided that he waived "any and all defenses that [he] may present regarding any of the agreed-upon facts during all phases of trial, including the providence inquiry and the case-in-chief."[161] Finding that the "[a]ppellant did not set up any matter inconsistent with his guilty plea that would have required the military judge to inquire into the existence of a defense,"[162] the CAAF held that it "will not overturn a guilty plea based on the 'mere possibility' of a defense."[163] While finding the provision overly broad, the court cited *Rivera* in concluding that "because appellant has not contended that he was precluded by the waiver provision from asserting any defense, he has not shown that he was prejudiced by the inclusion of the provision."[164]

Notwithstanding the courts' initial discomfort with blanket waivers, they have upheld waivers of certain individual motions such as search and seizure motions,[165] hearsay objections,[166] the right to challenge venue,[167] and Article 13, UCMJ, issues.[168] The courts have also upheld waivers of specific rights, including the right to trial by members,[169] the right to challenge an out-of-court identification,[170] the right to investigation of the

157. *Id*. at 54.
158. *Id*.
159. *Id*. at 55.
160. 48 M.J. 1 (1998).
161. *Id*. at 2.
162. *Id.* at 3.
163. *Id.*
164. *Id.* at 4.
165. United States v. Jones, 23 M.J. 305 (C.M.A. 1987).
166. United States v. Gibson, 29 M.J. 379 (C.M.A. 1990).
167. United States v. Kitts, 23 M.J. 105 (C.M.A. 1986).
168. United States v. McFadyen, 51 M.J. 289 (1999). However, the military judge must inquire into the circumstances of the pretrial punishment and the voluntariness of the waiver and ensure that the accused understands the remedy to which he would be entitled if his motion were successful. *Id.*
169. United States v. Burnell, 40 M.J. 175 (C.M.A. 1994); United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987); United States v. Schmelz, 1 M.J. 8 (C.M.A. 1975).
170. United States v. Jones, 23 M.J. 305 (C.M.A. 1987).

charges under Article 32, UCMJ,[171] and the right to confront and cross-examine witnesses.[172]

2. Historical Development of Waivers

The COMA discussed the significance of the origin of such waivers in *United States v. Jones*.[173] There, the accused agreed to waive his right to challenge the legality of any search and seizure and the legality of any out-of-court identification. During the providence inquiry, the defense counsel assured the court that the waiver provision originated with the accused in order to induce the convening authority to accept his offer. The court found such waiver proper, "so long as this provision is shown to have voluntarily originated from [the accused]"[174] and the record establishes that "the agreement was a freely conceived defense product."[175] The court made a similar finding in *United States v. Schaffer*,[176] upholding the accused's waiver of the Article 32 investigation so long as that waiver is "proposed by an accused as part of a plea bargain which is scrutinized carefully in a providence inquiry."[177]

The decision of the COMA in *United States v. Burnell*[178] marked a change in the court's view regarding the significance of which party proposed the terms in a pretrial agreement. In *Burnell*, the court held that "the Government, when considering a proposed pretrial agreement, is not prohibited from insisting that an accused waive his right to trial by members."[179] So long as the accused freely and voluntarily enters the agreement, the government may propose the waiver and the convening authority may refuse to accept the agreement without it; "just as a convening authority has no duty to enter into a pretrial agreement, neither does an accused."[180] Similarly, it is not inappropriate for the government to raise

171. United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982).
172. United States v. Hanna, 4 M.J. 938, 940 (N.M.C.M.R. 1978).
173. 23 M.J. 305 (C.M.A. 1987).
174. *Id.* at 306.
175. *Id.*
176. 12 M.J. 425 (C.M.A. 1982).
177. *Id.* at 429.
178. 40 M.J. 175 (C.M.A. 1994).
179. *Id.* at 176.
180. *Id.*

the sentence limitation of a proposed pretrial agreement if the accused elects to be tried by members.[181]

The cases of *Jones*, *Schaffer*, and *Burnell* were tried before the 1984 *Manual* became effective. Under the 1984 *Manual*, any party to the agreement—the convening authority, staff judge advocate, or the trial counsel—could negotiate the terms of the agreement with the defense, so long as the accused initiated the offer and the negotiations.[182] The 1994 *Manual* expanded this by providing that any of the parties may initiate pretrial agreement negotiations, and that "either the defense or the government may propose any term or condition not prohibited by law or public policy."[183]

Some matters are considered so fundamental to the integrity of the judicial process that the courts have held that in order to effectively waive the right to present such matters as part of a pretrial agreement, the military judge must inquire into the facts underlying the waived matter and ensure that the accused fully understands and consents to the matter being waived. In *United States v. McFadyen*,[184] the CAAF held that while waiver of a pretrial punishment motion under Article 13, UCMJ,[185] does not violate public policy, the military judge faced with such a waiver "should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion."[186]

D. Waiver of Unlawful Command Influence

Waivers of unlawful command influence pose a more difficult problem. The CAAF recently held in *United States v. Weasler*[187] that the accused could lawfully waive an unlawful influence claim regarding the

181. United States v. Andrews, 38 M.J. 650 (A.C.M.R. 1993). *See also* United States v. Zelenski, 24 M.J. 1, 2 (C.M.A. 1987) (service or command policies requiring waiver of members are permissible so long as the waiver is a "freely conceived defense product," but "will be closely scrutinized").

182. 1984 MCM, *supra* note 72, R.C.M. 705(d).

183. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(d)(1) (1994) [hereinafter 1994 MCM].

184. 51 M.J. 289 (1999).

185. MCM, *supra* note 2.

186. *McFadyen*, 51 M.J. at 291.

187. 43 M.J. 15 (1995).

preferral of the charges. In *Weasler*, the company commander was scheduled to take leave before preferral of the charges, so she instructed her executive officer to sign the charge sheet when it arrived. Appellant moved to dismiss the charges on the basis of unlawful command influence. The military judge granted a continuance to secure the testimony of the executive officer. During the continuance, appellant offered to waive the motion to dismiss in return for a favorable sentence limitation. The court found: "This case does not involve the adjudicative process. Here the issue is whether coercion influenced preferral of charges."[188] It continued, "Where there is coercion in the preferral process, 'the charges are treated as unsigned and unsworn,' but the 'failure to object' constitutes waiver of the issue."[189] The court held that, because the waiver originated with the defense and because "there was no unlawful command influence that affected either the findings or the sentence in this case,"[190] the waiver was valid.

Writing for the majority, Judge Crawford distinguished between unlawful command influence in the preferral or referral of charges and unlawful command influence that may permeate the findings and sentence of a court-martial. The opinion cited the court's earlier holding in *United States v. Hamilton*[191] that "defects in the forwarding process are waived if not challenged at trial."[192] The *Weasler* court thus held that an accused may waive such defects as part of a pretrial agreement so long as the defects relate to the accusatory process—the process of getting the charges to trial—rather than the adjudicative process—the actual litigation of the facts in issue and determination of the sentence.

Judge Wiss, while concurring in the result, vigorously objected to the majority's rationale.

> The *greatest* risk presented by unlawful command influence has nothing to do with the stage at which it is wielded; it has nothing to do with whether an accused is bludgeoned with it or whether, in an exercise of ironic creativity, an accused is able to turn the tables and actually use it to his advantage. Instead, it is in its insidiously pernicious character.[193]

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188. *Id*. at 18.
189. *Id*. at 19.
190. *Id*.
191. 41 M.J. 32, 36 (C.M.A. 1994).
192. *Weasler*, 43 M.J. at 19.
193. *Id.* at 21 (Wiss, J., concurring).

Chief Judge Sullivan also wrote a separate concurring opinion, noting "the 'contract' rationale proffered by the majority is dead wrong."[194]

The defense counsel in *Weasler* cited *United States v. Corriere*[195] in support of the accused's waiver of unlawful command influence. In *Corriere*, the ACMR held that the accused's waiver of an unlawful command influence issue was permissible as a *sub rosa* term of a pretrial agreement because it was clear from the record that "the waiver of motions was a freely conceived defense product, in the best interests of the accused, and part of a 'strategic defense initiative' to achieve a successful case outcome."[196] The unlawful command influence alleged by the accused arose from his arrest during a mass apprehension at Pinder Barracks in Germany.[197] After sending the case back for a limited rehearing to determine the existence, if any, of a *sub rosa* or "gentlemen's" agreement regarding the unlawful command influence, the court found that Captain Corriere was aware of the motion and of its waiver as part of a pretrial agreement, and that he was a party to the waiver.[198]

In *Corriere*, the Army court referred to its earlier decision in *United States v. Treakle*,[199] which vacated the sentence after a guilty plea due to evidence of unlawful command influence that was first raised on appeal. In *Treakle*, the appellant established that, on multiple occasions, the convening authority directed his subordinate commanders to "apprise company level commanders of the general inconsistency of recommending a GCM or BCD and discharge of the accused, and then testifying to the effect that the accused should be retained."[200] Appellate defense counsel offered evidence of how these comments were perceived by company commanders and noncommissioned officers as discouraging favorable character testimony at courts-martial. The situation was aggravated when, after trial, the division command sergeant major distributed a memorandum throughout the division containing such statements as: "Once a soldier has been 'convicted,' he then is a convicted criminal. There is no way he can be called a 'good soldier'. . . . The NCO Corps does not support

194. *Id.* (Sullivan, C.J., concurring).

195. 24 M.J. 701 (A.C.M.R. 1987).

196. *Id.* at 707.

197. *See* United States v. Cruz, 25 M.J. 326 (C.M.A. 1987) (outlining the circumstances surrounding the apprehension).

198. *Corriere*, 24 M.J. at 707.

199. 18 M.J. 646 (A.C.M.R. 1984).

200. *Id.* at 649.

'convicted criminals.'"[201] Finding the claim of unlawful command influence colorable, the court vacated the sentence.

The Army court's decision in *Treakle* clearly establishes that a guilty plea does not by itself waive a colorable claim of unlawful command influence. While *Corriere* stands for the proposition that unlawful command influence may be waived under certain circumstances, as a practical matter, such waivers should be made part of a written pretrial agreement.

The *Weasler* court warned subsequently, "Our holding in this case does not foreclose the Court from stepping in when there are actions by commanders that undermine public confidence in our system of justice or affect the rights of an accused."[202] Clearly, whether an unlawful command influence claim may be waived as part of a pretrial agreement depends on the nature of the conduct alleged and its impact on the integrity of the military justice system. In *Corriere*, the Army court allowed a *sub rosa* agreement to waive unlawful command influence because the record contained sufficient evidence to establish that the claim was without merit, and the accused willfully, knowingly, and voluntarily chose to waive raising it. In *United States v. Bartley*,[203] however, the CAAF set aside both the findings and the sentence after evidence of unlawful command influence was revealed on appeal, despite an apparent *sub rosa* waiver as part of a pretrial agreement. As recently as 1999, in *United States v. Sherman*,[204] the CAAF returned a case for a *DuBay* hearing to determine whether a *sub rosa* agreement to waive unlawful command influence existed.

While a knowing waiver of an unlawful command influence motion that does not relate to the adjudicative process may be permissible, the waiver must be disclosed to the military judge at trial. When unlawful command influence is waived *sub rosa*, the trial court is unable to determine whether the waiver was made freely and knowingly, and whether the waiver is permissible given the court's guidance as to the types of unlawful command influence that may be waived. If the court is unable to discern the voluntariness of the waiver or the nature of the unlawful command influence alleged, its only remedy is to remand the case for a rehearing. This remedy is required because "deprivation of the opportunity to present

201. *Id.* at 651.
202. United States v. Weasler, 43 M.J. 15, 19 (1995).
203. 47 M.J. 182 (1997).
204. 51 M.J. 73 (1999).

evidence on the issue of unlawful command influence constitutes prejudicial error."[205]

E. Misconduct Provisions

Rule for Courts-Martial 705(c)(2)(D) permits a term promising "to conform the accused's conduct to certain conditions of probation by the convening authority as well as during any period of suspension of the sentence."[206] Before the inclusion of this provision in the 1984 *Manual*, the courts viewed such "misconduct provisions" warily because of their susceptibility to ambiguity.

The COMA first addressed the issue of the accused's conduct before and after trial in *United States v. Cox*.[207] The court held that the convening authority's performance of the terms of a pretrial agreement was not conditional upon the accused's good conduct between the trial and final action. Instead, the court concluded, "[w]e reject any interpretation that produces an implied covenant or condition of good behavior in the pretrial agreement."[208]

In *United States v. Lallande*,[209] the court considered a post-trial "misconduct provision" as a term of the pretrial agreement in which the accused agreed to several terms and conditions of probation. Specifically, the accused agreed to "conduct himself in all respects as a reputable and law-abiding citizen," to not associate with known drug users, and to submit to search at any time without a warrant, when requested by his commanding officer.[210] In return, the convening authority agreed to suspend execution of certain portions of the accused's sentence. While the court expressed concern with the vagueness of the provision, it found that the accused consented to (and in fact, offered) the provision, and that the provision did not require the accused to "surrender a constitutional right that could affect his

205. United States v. Alexander, 19 M.J. 614, 616 (A.C.M.R. 1984) (case returned for limited rehearing into unlawful command influence where the military judge's "unduly restrictive ruling . . . effectively deprived the appellant of his opportunity to litigate his motion").

206. MCM, *supra* note 2, R.C.M. 705(c)(2)(D).

207. 46 C.M.R. 69 (C.M.A. 1972).

208. *Id.* at 70, 71.

209. 46 C.M.R. 170 (C.M.A. 1973).

210. *Id.* at 173.

guilt or the legality of his sentence."[211] Rather, it was similar to terms used in civilian criminal practice and was appropriate for use in courts-martial, notwithstanding its waiver of fundamental probation rights. The court specifically rejected appellant's argument on appeal that these conditions violated public policy, comparing them to similar federal probation terms and finding that "the convening authority has power to impose at least the same conditions allowable to a judge in a federal civilian criminal court."[212]

In *United States v. Goode*,[213] the accused agreed that he would not commit "any act of misconduct" between the date of trial and the date of the convening authority's action. When the accused went AWOL for three days in the month following trial, the convening authority rescinded those portions of the sentence that he had agreed to suspend as part of the pretrial agreement and did not suspend the accused's punitive discharge, as the agreement provided. On appeal, the accused argued that the convening authority was required to conduct a hearing to determine whether the accused engaged in misconduct before deciding to not fulfill his part of the agreement. The COMA upheld the validity of the "misconduct provision," and it found that the accused was not entitled to a formal hearing before the convening authority on the question of a departure from the terms of his pretrial agreement in the action on the sentence. The *Goode* court added, however, that the "[r]easons for the departure from the agreed sentence must appear in the post-trial review and the accused must be given the opportunity to rebut them."[214]

The COMA again looked at misconduct provisions in *United States v. Dawson*,[215] where the court asked if post-trial misconduct provisions were "void as a matter of public policy or law."[216] Such provisions, like the one in *Goode*, bound the convening authority to the sentence limitation only if the accused did not commit "any violation of the Uniform Code of Military Justice"[217] between the date of trial and the date of the convening author-

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211. *Id.*

212. *Id.* Judge Duncan specifically disagreed with this position in his dissent, stating, "Unlike federal district judges, convening authorities have not been specifically granted the power by Congress to set *terms and conditions of probation as they deem best*." *Id*. at 176 (Duncan, J., dissenting).

213. 1 M.J. 3 (C.M.A. 1975).

214. *Id*. at 6.

215. 10 M.J. 142 (C.M.A. 1981).

216. *Id*. at 144.

217. *Id*. at 143.

ity's action. In *Dawson*, illegal drugs were discovered in Private Dawson's clothing upon his arrival at the confinement facility immediately after trial. Consequently, the SJA advised the convening authority that he was no longer bound by the agreement. This advice was provided to defense counsel, who challenged the finding of criminal knowledge required to establish Private Dawson's culpability. The convening authority withdrew from the agreement and approved the adjudged sentence.[218]

The COMA found the misconduct provision unenforceable because it provided no means or standards for determining whether the accused had actually committed misconduct in violation of the provision. Citing *Goode*, the government argued that the parties "intended the convening authority to be the ultimate finder of fact based on the post-trial review and rebuttal submitted by defense counsel."[219] Writing for the majority, Judge Fletcher offered several reasons to find the provision void. Of greatest importance, the agreement did not address whether the accused could withdraw his plea of guilty should the convening authority activate the misconduct provision.[220] Moreover, the court found that the provision allowed the convening authority "to summarily punish service members for violations of the Code."[221] Enforcement of the agreement also required a contractual application of the clause that was contrary to the court's attempts to prevent "a marketplace mentality from pervading the plea-bargaining process and to prevent contract law from dominating the military justice system."[222] Finally, the provision purported to waive "constitutional and codal rights of similar magnitude, which concern subsequent alleged violations of the military criminal code."[223]

In light of *Dawson* and *Goode*, the Rules for Courts-Martial now allow a pretrial agreement term that requires the accused to conform his "conduct to certain conditions of probation . . . provided that the requirements of RCM 1109 [are] complied with before an alleged violation of

218. *Id.*
219. *Id.* at 146.
220. *Id.* at 146-47.
221. *Id.* at 147
222. *Id.* at 150.
223. *Id.*

such terms may relieve the convening authority of the obligation to fulfill the agreement."[224]

F. Public Policy and *Sub Rosa* Agreements

In addition to the terms prohibited by RCM 705 and by appellate case law, courts also look to whether a pretrial agreement is fundamentally fair and in accordance with public policy in determining its enforceability. The COMA held in *United States v. Green*[225] that trial judges must ensure that pretrial agreements comply "with statutory and decisional law as well as adherence to basic notions of fundamental fairness."[226] As the Navy-Marine Court of Military Review (NMCMR) noted in *United States v. Cassity*,[227] however, "determining what provisions violate 'public policy' is potentially more troublesome" than determining what provisions violate appellate case law.[228]

The NMCMR in *Cassity* articulated its framework for determining the propriety of a pretrial agreement as follows:

> The United States Court of Military Appeals has observed that a pretrial agreement that "substitutes the agreement for the trial, and indeed, renders the latter an empty ritual" would violate public policy. Beyond that, however, the Court of Military Appeals "has not articulated any general approach to pretrial agreement conditions that can be used to determine which conditions are permissible and which are to be condemned." An analysis of the cases suggests, however, that the court will disapprove those conditions that it believes are misleading or [abridge] fundamental rights of the accused.[229]

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224. MCM, *supra* note 2, R.C.M. 705(c)(2)(D). Rule for Courts-Martial 1109 sets out the requirements for vacation of suspension of the sentence of a court-martial where there is a violation of the conditions of the suspension. *Id.* R.C.M. 1109. *See also* United States v. Perlman, 44 M.J. 615, 617 (N-M. Ct. Crim. App. 1996) (doubtful that accused can waive full extent of rights under R.C.M. 1109 as part of a pretrial agreement).

225. 1 M.J. 453 (C.M.A. 1976).

226. *Id*. at 456.

227. 36 M.J. 759 (N.M.C.M.R. 1992).

228. *Id*. at 761.

229. *Id*. (citing FRANCIS A. GILLIGAN & FREDERICK I. LEDERER, COURT-MARTIAL PROCEDURE sec. 12-25.20 (1991)).

In addition to finding waivers of specific rights unenforceable, as discussed earlier, the courts have found certain types of agreements, though not involving waiver of specific rights, contrary to public policy and fundamental fairness.

One problem area has been agreements that involve a promise to testify against another accused. Although a permissible term under RCM 705(c)(2)(B),[230] an agreement to testify should be limited to a promise to provide truthful testimony. In *United States v. Gilliam*,[231] the COMA held as contrary to public policy an agreement that required an accomplice to testify a certain way against the accused in exchange for a reduced sentence to confinement. In this case, one of the appellant's two accomplices agreed to testify against the appellant in exchange for such a confinement cap. The accomplice agreed "to render testimony . . . which would establish conspiracy and premeditation by such individuals and would be able to identify the implements used by [the second accomplice] and [appellant]."[232] The court found this improper, because it required the accomplice to testify in a certain manner and thereby made the accomplice an "incompetent witness"[233] against the appellant. Finding that the agreement required the accomplice to testify without regard to his oath as a witness, the court held that "[s]uch limitations and conditions on the giving of testimony should play no part in a pretrial agreement."[234]

Similarly, *United States v. Stoltz*[235] involved an agreement between a witness and the convening authority in which the convening authority granted the witness immunity in return for the witness' promise to testify in accordance with his pretrial statement. The COMA found that the agreement required the witness "to testify under oath to the particular matters extracted from his written pretrial statement . . . regardless of the truth of the matters concerning which he had knowledge,"[236] and reversed the decision.

An even more egregious pretrial agreement existed in *United States v. Scoles*,[237] where the agreement provided for reduction of the accomplices'

230. MCM, *supra* note 2, R.C.M. 705(c)(2)(B).
231. 48 C.M.R. 260 (C.M.A. 1974).
232. *Id*. at 263.
233. *Id.*
234. *Id*. at 264.
235. 34 C.M.R. 241 (C.M.A. 1964).
236. *Id.* at 244.
237. 33 C.M.R. 226 (C.M.A. 1963).

confinement sentence by one year for each occasion that the accomplice testified against his co-accused. Finding that the agreement "offer[ed] an almost irresistible temptation to a confessedly guilty party to testify falsely in order to escape the adjudged consequences of his own misconduct,"[238] the COMA found that this agreement violated public policy and reversed.

Agreements involving indeterminate terms may also be found to be fundamentally unfair. In *United States v. Spriggs*,[239] the pretrial agreement provided for suspension of confinement and punitive discharge until such time as appellant completed a sexual offender program at his own expense. Because of the financial difficulties resulting from his no-pay status, the appellant began, but was unable to complete the sexual offender program. The convening authority vacated the suspension, and appellant was placed in confinement. The COMA held that a condition that could take the appellant up to fifteen years to complete—the sexual offenders program and follow-up—was an "unreasonably long" period of time within the meaning of RCM 1108(b).[240]

In *United States v. Gansemer*,[241] the COMA found that a pretrial agreement, in which the accused waived his right to an administrative separation board if the court did not adjudge a punitive discharge, did not violate public policy considerations or due process. Judges Wiss and Sullivan, however, while agreeing with the holding of the court due to the absence of prejudice, found this was an inappropriate purpose for pretrial agreements because it "seeks to use these criminal proceedings as a vehicle for the accused's waiving his right to due process at a future administrative proceeding."[242]

Terms involving fines are sometimes included in pretrial agreements. In a case not involving a pretrial agreement, but indicative of the court's view of fine provisions, the Army Court of Criminal Appeals (ACCA) held in *United States v. Smith* that "there is no legal requirement that an accused realize an unjust enrichment from the offense(s) he committed before a fine may be adjudged."[243] The military judge, after Smith was convicted of felony murder, adjudged a fine that Smith was required to pay by the time he was considered for parole; otherwise he would be further confined

238. *Id*. at 232.
239. 40 M.J. 158 (C.M.A. 1994).
240. *Id*. at 162.
241. 38 M.J. 340 (C.M.A. 1993).
242. *Id*. at 344.
243. 44 M.J. 720, 722 (Army Ct. Crim. App. 1996).

for fifty years from that date, until the fine was paid or until Smith died, whichever occurred first. The court found the contingent confinement provision of the adjudged fine to be "void as a matter of public policy" because it presented an "undue intrusion into the parole authority of the Secretary of the Army . . . and the Army Clemency and Parole Board."[244]

In *United States v. Marsters*,[245] the Coast Guard Court of Military Review found that a waiver of the right to civilian and individual military counsel was an unenforceable term of an agreement. In *United States v. Sharper*,[246] the Army Court of Military Review approved of the *Marsters* holding.

In *United States v. Cassity*,[247] the NMCCA found an agreement unenforceable because of a provision concerning the relationship between a discharge and the adjudged confinement. The appellant's pretrial agreement stated that, in exchange for a guilty plea, the convening authority would suspend a bad-conduct discharge provided that more than four months' confinement was also adjudged. At trial by military judge alone, trial counsel argued for a bad-conduct discharge and three months' confinement, while defense counsel argued for no bad-conduct discharge in return for "the maximum jail time allowed."[248] The appellant received less than four months' confinement, and the convening authority did not suspend the bad-conduct discharge. Finding that "[t]he agreement here, when taken together with the parties' arguments, reduced the sentencing process to a paradox,"[249] the court agreed with the trial judge's conclusion that "the condition on suspension was fundamentally unfair and violated public policy."[250] The NMCCA in *Cassity* ultimately proposed the following standard for determining whether an agreement violates public policy: "Pretrial agreement provisions are contrary to 'public policy' if they interfere with court-martial fact-finding, sentencing, or review functions or

244. *Id*. at 725.

245. 49 C.M.R. 495 (C.G.C.M.R. 1974).

246. 17 M.J. 803 (A.C.M.R. 1984).

247. 36 M.J. 759 (N.M.C.M.R. 1992).

248. *Id.* at 763.

249. *Id.* at 764. As noted by the court, the paradox referred to by the military judge was "a product of the ignorance of the military judge as to the terms of the sentence limitation before announcement of the sentence, linkage between the various forms of punishment, and the argument of the counsel in this case." *Id.*

250. *Id*. at 765.

undermine public confidence in the integrity and fairness of the disciplinary process."[251]

The courts have applied a similar analysis to the enforceability of *sub rosa* agreements. The COMA first addressed such agreements in *United States v. Troglin*,[252] where the defense counsel's agreement to waive three pretrial motions as part of the pretrial agreement was never reduced to writing and was unbeknownst to the accused at the time of trial. Two of the motions involved speedy trial and former jeopardy. The court held that "the facts of this case are sufficiently similar to those presented in *Cummings* to justify the same result."[253] The court found the unwritten nature of the agreement "all the more insidious since, being unrecorded, it was ostensibly hidden from the light of judicial scrutiny."[254]

Both the *Manual for Courts-Martial* and the *Benchbook* incorporate the foregoing guidance. Rule for Courts-Martial 705(c)[255] now provides that the accused must freely and voluntarily agree to each term in a pretrial agreement; RCM 705(d)(2) requires that "all terms, conditions, and promises between the parties shall be written;"[256] and RCM 910(f)(3) mandates that, if a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted. The *Benchbook* further requires the military judge to inquire of both parties and the accused as to the existence of any agreement not contained in the written pretrial agreement.[257] While this guidance seems clear, its practical application continues to generate litigation, in part because there is no specific requirement that pretrial agreements not involving a guilty plea be disclosed to the

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251. *Id*. at 762.

252. 44 C.M.R. 237 (C.M.A. 1972).

253. *Id*. at 242.

254. *Id*. As one commentator recognized, while *Troglin* "reaffirms the public policy of ensuring the effectiveness of appellate review by prohibiting waiver of the right to present motions that will not be waived at trial and therefore, may be raised on appeal in the first instance," it is unclear how the court would have held had the accused been aware of the waiver of former jeopardy and had he acknowledged such waiver at trial. *See* Smith, *supra* note 154, at 10, 14.

255. MCM, *supra* note 2, R.C.M. 705(c).

256. *Id.* R.C.M. 705(d)(2). *See also* United States v. Mooney, 47 M.J. 496 (1998). The COMA found no prejudice to the appellant when the military judge accepted his guilty plea in accordance with an oral pretrial agreement that was fully disclosed at trial and was otherwise permissible under R.C.M. 705. *Id.*

257. BENCHBOOK, *supra* note 4, at 20, 24. In a contested trial, the *Benchbook* does not provide for an inquiry into the existence of any pretrial agreements.

military judge.[258] Nonetheless, the courts have uniformly condemned *sub rosa* agreements, whether involving a plea agreement or a pretrial agreement that does not involve a guilty plea.

In *United States v. Elmore*,[259] the COMA qualified its decision in *Troglin* by holding that it "would not hesitate to strike down such a [gentlemen's] agreement, if the undisclosed meaning violated public policy."[260] The ACMR, in *United States v. Corriere*,[261] interpreted the COMAs' decision in *Elmore* to require scrutiny of the unwritten agreement itself before determining whether its existence is legally objectionable.[262] In *Corriere*, discussed earlier in the context of waiver of unlawful command influence, the appellant alleged that his defense counsel had agreed not to raise issues at trial concerning "discovery, constitutional issues, and unlawful command influence"[263] and that this agreement was made without appellant's knowledge. While acknowledging that *Troglin* required that "unwritten or so called gentlemen's agreements. . . be revealed to the trial judge,"[264] the court in *Corriere* held that "whether in a particular case a *sub rosa* agreement is legally objectionable depends on the nature and content of its specific provisions."[265] The court returned the case to The Judge Advocate General for corrective action, not because of the existence of a *sub rosa* agreement per se, but because the record was unclear as to the terms of the unwritten agreement involved. The court noted that "if these type provisions cannot be included in a plea bargain, they cannot be the subject of a *sub rosa* agreement upon which the plea bargain is conditioned."[266]

That the courts have not adopted a per se rule requiring corrective action in cases involving *sub rosa* agreements is illustrated in *United States v. Myles*.[267] In *Myles*, the COMA found a *sub rosa* plea agreement that called for the government's withdrawal of certain charges and specifica-

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258. As noted by Judge Vowell in *United States v. Rhule*, 53 M.J. 647 (Army Ct. Crim. App. 2000), RCM 705 does not explicitly require disclosing pretrial agreements not involving a guilty plea to the military judge. Similarly, RCM 910(f) requires only that plea agreements be disclosed. MCM, *supra* note 2, R.C.M. 910(f).

259. 1 M.J. 265 (C.M.A. 1976).

260. *Id*. at 264.

261. 20 M.J. 905 (A.C.M.R. 1985), *aff'd*, 24 M.J. 701 (A.C.M.R. 1987).

262. The court also cited *United States v. Myles*, 7 M.J. 132 (C.M.A. 1979).

263. 20 M.J. 905, 907 (A.C.M.R. 1985), *aff'd*, 24 M.J. 701 (A.C.M.R. 1987).

264. *Id.*

265. *Id*. at 908.

266. *Id*. Specifically cited were issues regarding unlawful command influence and the admissibility of a pretrial statement by the accused.

267. 7 M.J. 132 (C.M.A. 1979).

tions in return for the accused's plea of guilty to the remaining offenses. Distinguishing the case from *Green*[268] and *King*,[269] which required judicial inquiry into each term of a plea agreement, the court held, "This was not a case of judicial error, but of counsel error."[270] Finding no prejudice to the appellant, the court affirmed the findings and sentence. The court, however, made clear its view of counsels' knowing nondisclosure of an agreement to the court.

> [T]his finding does not in any way place our condonation on the practice followed by the counsel herein. Circumstances similar to this nondisclosure of a pretrial agreement could give rise to the assertion that counsel did not act within the parameters of the American Bar Association Code of Professional Responsibility as adopted by the armed services.[271]

As discussed above, *sub rosa* agreements involving waiver of unlawful command influence issues are especially problematic and must be avoided. The court set aside the findings and sentence in *United States v. Bartley* upon discovery that the appellant's pretrial agreement may have involved the *sub rosa* waiver of an unlawful command influence motion.[272] While the appellant's guilty plea was found to be provident and voluntary, the court reversed because it was unable to ascertain whether the alleged unlawful command influence had induced the guilty plea.[273] Similarly, the court ordered a *DuBay* hearing in *United States v. Sherman*[274] to determine whether a *sub rosa* agreement had prevented the accused from raising an unlawful command influence motion as part of a pretrial agreement. Thus, while not all *sub rosa* agreements will result in corrective action, those involving unlawful command influence that is not adequately developed on the record will most likely result in remand or reversal.

The ACCA addressed *sub rosa* agreements most recently in *United States v. Rhule*,[275] in which the appellant's forum selection was the product of a *sub rosa* agreement. Rhule, a warrant officer assigned to Fort Clayton,

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268. 1 M.J. 453 (C.M.A. 1976).
269. 3 M.J. 458 (C.M.A. 1977).
270. *Myles*, 7 M.J. at 133.
271. *Id.* at 134.
272. 47 M.J. 182 (1997).
273. *Id.* at 187.
274. 51 M.J. 73 (1999).
275. 53 M.J. 647 (Army Ct. Crim. App. 2000).

Panama, entered into a pretrial agreement with the convening authority in which he agreed to plead guilty to several offenses and to be tried by military judge alone. During the providence inquiry, however, he made statements inconsistent with his pleas, and the military judge ultimately found his pleas improvident and entered pleas of not guilty.[276]

Defense counsel was aware that Rhule had engaged in additional misconduct that might result in additional charges should the trial be delayed, and that a delay of several weeks was probable if Rhule did not proceed to trial immediately. As the military judge was in Panama only on temporary duty, defense counsel was also aware that the government was anxious to try the case, and that trial counsel might be amenable to dismissing several of the charges should Rhule proceed to trial immediately before the same judge. After consultation with appellant, defense counsel offered to proceed to a judge-alone trial immediately, and the trial counsel agreed to dismiss several charges in return. This agreement was neither reduced to writing nor brought to the attention of the military judge.[277]

While appellant did not raise the impropriety of such an agreement on appeal, the Army court suspected the existence of a *sub rosa* agreement and ordered affidavits. Most troubling to the court was appellant's affidavit, in which he expressed concern about his decision to be tried by military judge alone, notwithstanding his counsel's advice. As noted by the court, "The appellant's affidavit reflects the problem with *sub rosa* agreements in general, but particularly so with regard to agreements involving waivers of trial rights."[278] When the existence of a pretrial agreement is brought to the attention of the military judge, the court may then examine any waivers to expose and resolve any conflicts.[279]

In *Rhule*, the appellant apparently had a conflict with his waiver of trial by members, but the military judge was unable to resolve this conflict due to his lack of awareness of the agreement. While the court found no prejudice to the appellant in this case, Judge Vowell reminded counsel that: "pretrial agreements, like plea agreements, must be disclosed to the military judge. As our superior court noted in *Green*, judicial scrutiny at the trial level will enhance public confidence in the bargaining process and

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276. *Id.* at 650.
277. *Id.* at 650-51.
278. *Id*. at 652.
279. *Id.*

will permit clarification of any ambiguities that 'lurk within the agreements.'"[280] Judge Vowell continued:

> We recognize that, in the "give and take" of preparations for any criminal trial, counsel may come to common understandings. We do not wish to discourage counsel from discussing the issues and arriving at mutually agreeable decisions. Nor do we wish to discourage counsel from agreeing to contest at trial only those issues that are truly in dispute and central to the fact-finding process. What we do wish to discourage is the formation of secret or undisclosed agreements that involve such terms or conditions as those listed in R.C.M. 705(c)(2).[281]

The clear message from the courts is that a pretrial agreement may exist only between the accused and the convening authority.[282] Secret, *quid pro quo* agreements between counsel concerning fundamental rights such as forum selection, witness production, stipulations, and waiver of procedural rights are contrary to the disclosure provisions of the Rules for Courts-Martial. They undermine public confidence in the integrity of the court-martial process, and they may implicate professional and ethical standards. *Sub rosa* agreements involving claims of unlawful command influence will not be tolerated, regardless of a showing of prejudice. While *Myles* and *Rhule* were affirmed notwithstanding the existence of *sub rosa* agreements, parties should avoid entering into such agreements as they violate the Rules for Courts-Martial and potentially jeopardize the finality of the case.

F. Stipulations of Fact

Most pretrial agreements require that the accused enter into a written stipulation of fact with the trial counsel concerning the facts and circumstances underlying the offenses to which the accused is offering to plead guilty.[283] This document is usually drafted by the trial counsel and generally contains aggravation and other evidence allowed under RCM 1001,

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280. *Id*. at 655 (citing United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976)).

281. *Id*. at 653-54.

282. MCM, *supra* note 2, R.C.M. 705(a).

283. A pretrial agreement may require that the accused enter into a stipulation of fact concerning offenses for which he also enters a confessional stipulation. *See* United States v. Bertelson, 3 M.J. 314, 315 (C.M.A. 1977). This article does not address confessional stipulations.

often in an effort to avoid having to call impact witnesses or present evidence of injury or trauma. The use of a stipulation of fact is expressly authorized by RCM 705(c)(2)(A),[284] and the government is permitted to require a stipulation of fact as part of a pretrial agreement.[285] Often in issue, however, is whether uncharged misconduct may or should be included in the stipulation of fact, and whether the facts offered by the trial counsel are matters "directly relating to or resulting from"[286] an offense of which the accused has been found guilty.

Uncharged misconduct that is not related to the charged offenses is generally not permitted at trial; however, the trial counsel will often attempt to include such uncharged misconduct in a stipulation of fact to ensure that the defense does not "beat the deal," or achieve a sentence lower than the agreed cap. When confronted with a stipulation of fact, the military judge is required under RCM 811[287] to inquire as to whether the parties understand and agree to the uses of the stipulation of fact, as well as its contents.

Before 1988, different views existed among practitioners and military judges regarding the authority of the military judge to deal with inadmissible evidence contained in a stipulation of fact. As former trial judge Colonel (COL) Herbert J. Green wrote in 1988, military case law was divided, at best. [288] One view was that the military judge had no authority to rule on the admissibility of matters contained in a stipulation of fact, as this would improperly involve the military judge in the negotiation of the pretrial agreement. As COL Green noted, this view and its supporting cases held that "the proper place to consider the contents of stipulations is in counsel's office prior to trial. The military judge is not an arbiter in pre-

284. MCM, *supra* note 2, R.C.M. 705(c)(2)(A).

285. *See also* United States v. Harrod, 20 M.J. 777, 779 (A.C.M.R. 1985) ("The government is prohibited neither by law nor by public policy from requiring an accused, pursuant to the terms of an pretrial agreement, to stipulate to aggravating circumstances surrounding the offenses to which the accused will plead guilty."); United States v. Sharper, 17 M.J. 803, 807 (A.C.M.R. 1984) ("a comprehensive stipulation of fact promotes a fair and just trial by ensuring that the sentencing authority will consider not just the bare conviction of the accused, but those facts 'directly related to the offense for which an accused is to be sentenced so that the circumstances surrounding the offense or its repercussions may be understood . . . .'") (citing United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982)).

286. MCM, *supra* note 2, R.C.M. 1001(b)(4).

287. *Id.* R.C.M. 811.

288. Colonel Herbert J. Green, *Stipulations of Fact and the Military Judge*, ARMY LAW., Feb. 1988, at 40.

trial negotiations and by entertaining such motions, he improperly inserts himself into such negotiations."[289] This view was adopted in 1984 by the ACMR in *United States v. Taylor*,[290] where the court held that, if the parties could not agree to the contents of the stipulation, it should not be admitted into evidence.

A contrasting view was that a military judge's refusal to rule on a motion regarding admissibility of evidence, including that contained in a stipulation of fact, was "an abrogation of his responsibility to ensure cases are fairly decided upon relevant, admissible evidence."[291] This view was adopted by the ACMR in its 1987 decision, *United States v. Glazier*, which held, "A procedure which places an accused in a position wherein he or she may be required to agree to the admission of inadmissible uncharged misconduct in order to benefit from a pretrial agreement is fundamentally flawed."[292] By this approach, the military judge would be required to rule on any defense motion to redact statements contained in a stipulation of fact. Uncertain, however, was whether the military judge also had the actual authority to redact evidence he found inadmissible, or if he was limited to merely informing the accused of his ruling and allowing the parties to then react accordingly.

The COMA resolved this matter in 1988 when *Glazier* came before it for review. The court expressly rejected *Taylor* for its holding that the military judge cannot act on objections to matters contained in the stipulation. In *Glazier*, the stipulation of fact was silent regarding whether the parties stipulated to the admissibility of the facts contained therein, or merely to the accuracy of the facts. The court found that in the absence of a "provision dealing with the admissibility of any of the facts contained therein . . . admissibility of any fact so stipulated is governed by the Military Rules of Evidence."[293] The military judge in *Glazier* had denied the defense motion for the redaction of several statements in the stipulation of fact. The court held that "it is true that if an accused withdraws from the stipulation, it fails, as does the agreement underlying the stipulation. However,

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289. *Id.*

290. 21 M.J. 1016 (A.C.M.R. 1986).

291. United States v. Glazier, 24 M.J. 550, 554 (A.C.M.R. 1987), *aff'd*, 26 M.J. 268 (C.M.A. 1988).

292. *Id.* at 554.

293. 6 M.J. 268, 270 (C.M.A. 1988).

merely because counsel, with the consent of the accused, agreed that something is true does not make that fact *per se* admissible."[294]

In his concurring opinion in *Glazier*, Chief Judge Everett went one step further and wrote that, even if the motion had been successful and the statements had been redacted, such altering of the stipulation would not entitle the government to withdraw from the pretrial agreement. Thus, it is the government's burden to include in the stipulation of fact a provision regarding admissibility of the matters contained therein; otherwise, as in *Glazier*, the accused may object to inadmissible matter contained in the stipulation, and, at least according to Chief Judge Everett, he would not lose the benefit of his agreement inasmuch as "making such an objection successfully does not violate a pretrial agreement requiring the accused to enter into a stipulation of fact and does not entitle the government to abrogate the pretrial agreement."[295] The COMA ultimately found that the challenged misconduct in the stipulation was admissible in sentencing and therefore provided no relief.[296]

The court in *Glazier* indicated, however, that there is no prohibition against including otherwise inadmissible evidence in a stipulation of fact if both parties consent to the inclusion, especially "in a negotiated guilty plea where the accused is willing to stipulate to otherwise inadmissible testimony in return for a concession favorable to him from the Government, assuming no overreaching by the Government."[297] Relying on the *Glazier* decision, the ACMR in *United States v. Vargas* found that, while the stipulation of fact contained otherwise inadmissible evidence, that evidence "established a continuing and pervasive criminal enterprise by the appellant" and was therefore not "so unreasonable as to be unconscionable."[298]

The COMA was faced with the same issue two years later in *United States v. Mullens*,[299] which went to trial before the COMA's decision in *Glazier.* In *Mullens*, the stipulation of fact had been signed by both parties and did not contain any provision concerning "'judicial modification of the stipulation' of fact."[300] At trial, defense counsel objected to certain acts of

294. *Id*.
295. *Id.* at 271 (Everett, C.J., concurring).
296. *Id.* at 270.
297. *Id*.
298. 29 M.J. 968, 971 (A.C.M.R. 1990).
299. 29 M.J. 398 (C.M.A. 1990).
300. *Id*. at 399.

uncharged misconduct contained in the stipulation, but the military judge, citing *Taylor*,[301] refused to rule on the objection. In accordance with *Glazier*, which rejected the *Taylor* rationale, the COMA held that Article 51(b), UCMJ, requires a military judge to rule on defense objections to a stipulation of fact and that the military judge should have done so in *Mullens.*[302]

The court has recently indicated that certain impermissible evidence may not be included in a stipulation of fact. In *United States v. Clark*,[303] the CAAF found that the military judge erred by admitting a stipulation of fact that contained a reference to the accused's having taken a polygraph examination. Citing the Supreme Court's decision in *United States v. Scheffer,*[304] upholding Military Rule of Evidence 707's ban against the use of polygraph evidence in courts-martial, Judge Effron for the majority held that the military judge should have struck the reference to a polygraph test from the stipulation. Senior Judge Everett, while concurring in the result, disagreed with the majority's conclusion that the military judge erred, noting that the Supreme Court has upheld the right of a defendant to waive the exclusion of otherwise impermissible evidence.[305]

V. Specific Performance of the Pretrial Agreement

The Supreme Court, in *Santabello v. New York*,[306] recognized the right of a defendant to the benefit of his bargain in a plea agreement. This, of course, assumes that the defendant performs in accordance with his promises and satisfies his end of the deal, which Santobello had done. The Supreme Court vacated the lower court's judgment and remanded *Santabello* after the prosecutor failed to fulfill his part of the bargain.[307]

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301. *See* United States v. Taylor, 21 M.J. 1016 (A.C.M.R. 1986).

302. As in *Glazier*, the court ultimately found no prejudice, as the uncharged misconduct was proper aggravation evidence under RCM 1001(b)(4). *Id.*

303. 53 M.J. 280 (2000).

304. 523 U.S. 303 (1998).

305. *Clark*, 53 M.J. at 284 (Everett, S.J., concurring). In *United States v. Mezzanatto*, 513 U.S. 196 (1995), the Supreme Court held that the defendant could waive his right against the government's use of statements he made during pretrial agreement negotiations, evidence otherwise barred by Federal Rule of Evidence 410. *See infra* text accompanying note 371.

306. 404 U.S. 257 (1971).

307. *Id.* at 263.

Rule for Courts-Martial 705(d)(4) permits either an accused or a convening authority to withdraw from a pretrial agreement. The power of a convening authority to withdraw, however, is more limited than that of an accused.[308] Rule for Courts-Martial 705(d)(4)(B) provides, in part, that the convening authority may withdraw from a pretrial agreement "at any time before the accused begins performance of promises contained in the agreement, [or] upon the failure by the accused to fulfill any material promise or condition in the agreement."[309] While the appellate courts initially expressed reluctance in applying contract law principles to pretrial agreements, they have consistently applied the concept of "detrimental reliance" in the context of RCM 705 to determine whether ordering specific performance is appropriate when the convening authority unilaterally withdraws from an otherwise enforceable pretrial agreement.[310]

The first case in which a military appellate court ordered, in effect, specific performance of a pretrial agreement was *United States v. Penister*, where, in an opinion written by Chief Judge Everett, the COMA gave a convening authority the choice of standing by his original pretrial agreement or withdrawing and dismissing the charges.[311] The accused had agreed to enter pleas of guilty to an aggravated assault charge in return for the convening authority's referral of the charges to trial by special court-martial. At trial, the accused entered pleas of guilty as agreed. During the providence inquiry, he stated that while he did not specifically remember firing the weapon involved in the assault, he did remember seeing the victim fall out of a chair after being shot, and that he was confident after reviewing all of the evidence that he had unlawfully fired the weapon and that he was guilty of the charged offense. Upon completion of the providence inquiry, the trial counsel requested that the military judge reject the plea of guilty, arguing that the accused's statements during the providence inquiry failed to establish specific intent. The military judge agreed and rejected the plea. The accused then entered pleas of guilty to a lesser-

308. MCM, *supra* note 2, R.C.M. 705(d)(4)(A), 910(h)(1).

309. *Id.* R.C.M. 705(d)(4)(B).

310. In *Cummings*, Judge Ferguson warned against allowing pretrial agreements to become "contractual type documents" that substituted for the trial process itself. 38 C.M.R. 174, 178 (C.M.A. 1968). Similarly, Judge Fletcher expressed his concerns that a "marketplace mentality" would "pervad[e] the plea-bargaining process" in *United States v. Dawson*, 10 M.J. 142, 150 (C.M.A. 1981). Chief Judge Sullivan flatly rejected the "contract rationale proffered by the majority" in *Weasler*, as "dead wrong." 43 M.J. 15, 21 (1995). The court has, nonetheless, adopted many aspects of contract law, including the concept of detrimental reliance, in determining the enforceability of pretrial agreements and the intent of the parties.

311. 25 M.J. 148, 153 (C.M.A. 1987).

included offense to save the pretrial agreement, but the government withdrew from the agreement, withdrew the charges, and re-referred them to trial by general court-martial.[312] Before his second trial, the accused entered into a new pretrial agreement with a new convening authority. Before trial began, however, he requested specific performance of the original agreement. The military judge denied the motion, and the accused entered pleas of guilty pursuant to the new pretrial agreement. The military judge accepted the accused's plea and entered findings of guilty.[313]

On appeal, the COMA found that "the judge's erroneous rejection of the guilty plea was not a 'failure by the accused,'"[314] and that the accused had done "all within his power to assure fulfillment of the pretrial agreement . . . [, but that] trial counsel—a representative of the convening authority—initiated action that prevented fulfillment of a condition of the pretrial agreement."[315] While recognizing the military judge's duty to ensure a provident plea, the court also noted that the military judge "may not arbitrarily reject a guilty plea."[316] Accordingly, the court held that the convening authority was not free to withdraw from the original pretrial agreement and that the accused was entitled to relief. The COMA affirmed the lower court ruling, which set aside the findings and the sentence, and returned the record of trial to the convening authority, "who was authorized either to direct special court-martial proceedings or to dismiss the charge and specification."[317]

Three months after deciding *Penister*, the COMA decided *United States v. Manley*[318] where it found that an appellant had completed his performance under a pretrial agreement and was therefore entitled to the agreement's promised benefit. The accused entered into a pretrial agreement to plead guilty to several charges and specifications in return for the government's agreement not to present evidence at trial about an additional charged offense.[319] At trial, the military judge found the accused's guilty plea to one of the charges improvident; however, the trial counsel indicated that the convening authority would be bound by the agreement nonetheless. The trial counsel modified the pretrial agreement in accordance with

312. *Id.* at 151.
313. *Id.*
314. *Id*. at 153.
315. *Id.* at 152.
316. *Id.*
317. *Id*. at 149.
318. 25 M.J. 346 (C.M.A. 1987).
319. The agreement also included a sentence limitation.

the accepted plea and entered into a revised stipulation of fact, which deleted all references to the circumstances surrounding the improvident offense. Before proceeding, however, trial counsel informed the court of "changed circumstances" and that the government no longer intended to be bound by the amended pretrial agreement.[320] Over defense objection, the military judge agreed, and the case proceeded to trial two weeks later.

On appeal, the COMA held that while the government could have withdrawn from the agreement when the appellant's plea was determined improvident, it instead elected to modify the pretrial agreement and entered into a revised stipulation of fact. As such, "the accused not only had begun performance of the promises contained in the agreement—as that agreement had been modified at trial—but he had completed his performance."[321] Citing *Penister* with approval, the court held that in accordance with RCM 705(d)(5), "a convening authority may not withdraw after an accused has performed all the material promises and conditions in the agreement."[322]

The most recent case discussing specific performance of a pretrial agreement is *United States v. Villareal*.[323] In that case, the CAAF held that the accused failed to demonstrate substantial prejudice as a result of the convening authority's withdrawal and was not entitled to relief. The convening authority withdrew from a pretrial agreement based on pressure he received from the victim's family, as well as advice he received from his "old friend and shipmate,"[324] the superior convening authority. After the withdrawal, the case was transferred to a different convening authority.

On appeal, the appellant argued that unlawful command influence had caused the revocation of his pretrial agreement. The court addressed the unlawful command influence issue separately, finding that transferring the charges to a new convening authority cured any appearance of unlawful command influence.[325] Writing for the majority, Chief Judge Cox noted that "appellant knew of the withdrawal from the pretrial agreement before

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320. *Id*. at 349.

321. *Id*. at 351.

322. *Id*.

323. 52 M.J. 27 (1999).

324. *Id*. at 29.

325. *Id*. at 30. Judges Sullivan and Effron vehemently disagreed with this finding. Judge Effron commented that the original convening authority's failure to transfer the case with the pretrial agreement placed appellant in the unfair position of having to negotiate a new agreement. *Id.* at 32.

he had an opportunity to rely on it in a manner that would legally prejudice his right to a fair trial."[326] Citing *Penister*,[327] he agreed that "under certain circumstances, specific performance of a preexisting pretrial agreement will be ordered when an accused has relied upon the agreement and performed some affirmative act or omission equating to detrimental reliance."[328] In support of its finding of no detrimental reliance, Chief Judge Cox pointed out that no "pleas of guilty were entered in reliance on the agreement's mitigating action," but the court addressed no other factors that might constitute detrimental reliance in such cases.[329]

In an earlier case, *Shepardson v. Roberts*,[330] Chief Judge Everett articulated additional factors that the CAAF might consider in determining whether specific performance was appropriate. In *Shepardson*, shortly after the accused and the general court-martial convening authority entered into a pretrial agreement, the convening authority was replaced.[331] The new convening authority ultimately withdrew from the pretrial agreement, advising defense counsel that in his opinion, the pretrial agreement did not "meet a standard of fairness to both the accused and the United States."[332] At trial, the accused raised the issue of a pre-existing pretrial agreement, and the court allowed both parties to present argument. In the end, the court allowed the government to withdraw from the pretrial agreement.[333]

On appeal, the court briefly discussed detrimental reliance, which "includes any action taken by an accused in reliance on a pretrial agreement which makes it significantly more difficult for him to contest his guilt on a plea of not guilty."[334] Chief Judge Everett noted that, while the accused averred that he had made incriminating admissions because of his pretrial agreement, the military judge indicated that he would exclude any evidence of such admissions, thereby preventing such "reliance" from becoming detrimental. He distinguished this from a case where an accused, in reliance upon his pretrial agreement, provides "detailed infor-

326. *Id.* at 31.

327. 25 M.J. 148 (C.M.A. 1987).

328. *Villareal*, 52 M.J. at 30, 31.

329. *Id.* at 31.

330. 14 M.J. 354 (C.M.A. 1983).

331. The court's opinion indicated that this change was unrelated to the original general court-martial convening authority's exercise of discretion as a general court-martial convening authority. *Id.*

332. *Id.* at 355.

333. *Id.*

334. *Id.* at 358.

mation—perhaps in the form of a confessional stipulation—which was not previously available to the Government and would materially aid its case."[335] The court recognized that where an accused has "let the cat out of the bag," he may then be "practically and psychologically . . . in an inferior position either for plea bargaining or for defending his case."[336] Finding no such detrimental reliance in *Shepardson*, the court denied the accused's petition for relief.[337]

Before *Villareal* and *Shepardson*, in *United States v. Kazena*,[338] the convening authority withdrew from a pretrial agreement when the accused engaged in additional misconduct after entering the pretrial agreement, but before referral of charges. The convening authority then entered into a subsequent pretrial agreement that included a charge related to the additional misconduct. On appeal, the appellant challenged the failure of the convening authority to take the action promised in the original agreement. The COMA found that the appellant failed to demonstrate detrimental reliance in that he had no realistic expectation, based on the additional charge, of receiving the benefit of his original agreement. Moreover, the appellant failed to "show that he was hindered in the preparation of his defense because of his reliance on the earlier agreement."[339] In his concurring opinion, Chief Judge Everett noted appellant's "failure to call witnesses as to guilt or innocence who might otherwise have been available,"[340] indicating a lack of detrimental reliance.

While the court has attempted—through *Kazena*, *Shepardson*, and *Villareal*—to define detrimental reliance, it has set a high standard. *Villareal*, which resulted in a three-two split on the court, held that even the appearance of unlawful command influence in withdrawing from a pretrial agreement is not sufficient to overcome a lack of detrimental reliance. Although Chief Judge Fletcher argued persuasively in the *Dawson* case that contract law principles should not be applied within the military justice system,[341] reading *Penister* and *Villareal* together invariably leads to

335. *Id.*
336. *Id.*
337. *Id.*
338. 11 M.J. 28 (C.M.A. 1981).
339. *Id.* at 33.
340. *Id.* at 35 (Everett, C.J., concurring).
341. *See* United States v. Dawson, 10 M.J. 142, 150 (C.M.A. 1981); *see also* United States v. Penister, 25 M.J. 148 (C.M.A. 1987).

the conclusion that contract principles do apply, at least insofar as the lawfulness of unilateral withdraw.[342]

Noteworthy in this context is *United States v. Bray*,[343] where the accused pleaded guilty as part of a pretrial agreement but then withdrew to pursue a defense suggested by a defense sentencing witness. Later, the accused again decided to plead guilty and renegotiated a new agreement with the convening authority for a higher sentence cap than contained in the original pretrial agreement. Citing *Shepardson* and *Penister*, Bray argued on appeal that, because "he began performance of his promises and did everything within his power to assure fulfillment of the initial pretrial agreement," he should receive the benefit of the lower sentence cap.[344] The CAAF, however, agreed with the lower court's finding that the appellant had withdrawn from his original pretrial agreement at his own risk, "as a result of informed, counseled choices he made, and for which he alone is responsible."[345] The court further held that "having properly withdrawn from a pretrial agreement, a convening authority can enter a new agreement with a higher sentence limitation than in the original agreement."[346] The court also noted that appellant had not shown detrimental reliance on the first pretrial agreement.[347]

VI. Post-Trial Negotiation

Pretrial agreements are, by definition, agreements made before completion of the trial. As discussed above, most involve waiver of certain rights, before or during trial, in return for specific action by the convening authority. Nevertheless, in its 1999 term, the CAAF decided two cases out of the same general court-martial jurisdiction upholding negotiation of agreements after trial. These decisions continue to reflect the CAAF's rejection of Judge Ferguson's restrictive view of pretrial agreements in

342. Indeed, the COMA held in *United States v. Acevedo*, that "we look to the basic principles of law when interpreting pretrial agreements." 50 M.J. 169, 172 (1999).

343. 49 M.J. 300 (1998).

344. *Id.* at 307.

345. *Id.*

346. *Id*.

347. *Id.*

Cummings[348] and allow a great deal of flexibility in negotiations between the accused and the convening authority.

In *United States v. Dawson*,[349] the pretrial agreement provided that the first thirty days of any adjudged confinement would be converted into one and a half days of restriction for each day of confinement and that any confinement in excess of thirty days would be suspended. At trial, Private Dawson received 100 days of confinement and was placed on restriction immediately after trial, as provided under the agreement. While on restriction, she missed a muster and was informed that a proceeding would be held to vacate the suspended sentence based on her breaking restriction. She then absented herself from her unit and was eventually placed in desertion status.[350]

During her absence and without counsel present, the command held a proceeding under RCM 1109 and vacated the suspended sentence. Private Dawson was eventually apprehended, placed in confinement, and charged with unauthorized absence. At this point, the convening authority had not yet taken initial action on the sentence concerning the original offenses. Private Dawson, in an initiative separate from her RCM 1105 matters on the original charges, entered into an agreement with the convening authority in which she agreed (after the fact) to waive her right to be present at the hearing to vacate the original suspension. She also agreed that the convening authority would no longer be bound by the pretrial agreement, that the convening authority could approve the original sentence in return for his agreement to withdraw the new charge for unauthorized absence, and that she would receive day-for-day credit toward her sentence for all of the time served in confinement for the post-trial offense. Her defense counsel specifically requested that the convening authority approve this agreement.[351]

Judge Effron wrote for all five judges of the court and opened his discussion by stating that *Dawson* "does not involve post-trial renegotiation of a judicially approved pretrial agreement; nor does it otherwise threaten to undermine the purposes of the judicial inquiry under *United States v. Care* . . . ."[352] Rather, the post-trial agreement in *Dawson* "involves sepa-

348. *See* United States v. Cummings, 38 C.M.R. 174 (C.M.A. 1968) (citing United States v. Allen, 25 C.M.R. 8 (C.M.A. 1957)).

349. 51 M.J. 411 (1999).

350. *Id.* at 411.

351. *Id.* at 411-12.

352. *Id.* at 412-13.

rate, post-trial proceedings that are subject to appellate review, but are not subject to review by the military judge who presided over the trial."[353] While the terms of the post-trial agreement clearly implicated those of the pretrial agreement by requiring the accused to remain bound by them while relieving the convening authority of his obligations, the real changes involved matters arising post-trial that were independent of the trial and solely within the convening authority's discretion. Both the RCM 1109 vacation proceeding and the convening authority's decision regarding the disposition of the post-trial offense of unauthorized absence were matters before the command, and Private Dawson freely chose to negotiate with the command regarding these matters.[354] While it is unclear whether her defense counsel advised her to enter such an agreement, the court viewed her counsel's endorsement of the agreement as evidence that Private Dawson made this decision with the advice of counsel. The command decisions involved in this post-trial agreement, therefore, did not require inquiry by a military judge.[355]

Argued a day later and decided the same day as *Dawson*, *United States v. Pilkington*[356] also involved post-trial negotiation with the convening authority. In this case, however, the accused offered post-trial to exchange his suspended bad-conduct discharge for a cap on his term of confinement. The original agreement provided that in return for the appellant's pleas, the convening authority would suspend any adjudged discharge for a period of twelve months following trial. Lance Corporal Pilkington's sentence included a bad-conduct discharge and 150 days of confinement. After trial and contrary to his defense counsel's advice, the accused offered to exchange the suspension of the punitive discharge for a ninety-day cap on his term of confinement. The CAAF looked to *Dawson* and its holding that "because an arms-length negotiation had been conducted, there was no reason not to affirm [appellant's] decision to enter into the agreement,"[357] Judge Cox, writing for the majority in a three-two split, defined the issue as "whether appellant was operating of his own free will by proposing this new agreement while being confined."[358] Noting that Lance Corporal Pilkington had received the advice of his counsel and already knew the elements of his adjudged sentence, the court found that

353. *Id*. at 413.

354. Judge Effron wrote that, "In that regard, it is important to note that a vacation proceeding is collateral to the court-martial and is held within the command structure." *Id*.

355. *Id.*

356. 51 M.J. 415 (1999).

357. *Id*. at 416.

358. *Id*.

it "was solely [his] choice to approach the convening authority to bargain for less confinement . . . and it is not for us to substitute our judgment on this personal matter in place of his."[359]

Judges Sullivan and Effron filed a joint dissent, writing, "Judicial scrutiny of a pretrial agreement is well established in the military justice system . . . [whereas] the majority allows alteration of the pretrial agreement in this case by means of a post-trial modification without such judicial scrutiny."[360] In response to the majority's sanctioning of "such an alteration, simply because appellant submitted a request to do so,"[361] the dissent noted that "[m]utual assent of the parties is not sufficient to render a pretrial agreement valid."[362] Distinguishing this case from *Dawson*, Judges Sullivan and Effron found that Lance Corporal Pilkington's pretrial agreement was "undermined and turned into an 'empty ritual' because the post-trial agreement supplanted it."[363]

VII. Trends

Several trends are evident in the cases dealing with pretrial agreements. Chief Judge Everett noted in *United States v. Schaffer*[364] that "many courts and legislatures now seem willing to allow increasing flexibility in plea bargains."[365] He expressed a similar view in his concurring opinion in *United States v. Mitchell*,[366] where he took issue with the majority's holding that "we cannot condone a command practice which expands the normal scope of plea bargaining,"[367] language that echoes the holdings of *Cummings*[368] and *Holland*.[369] His approach to the role of the pretrial agreement in military criminal litigation marked a noticeable turn from the conservative *Cummings* court, which discouraged the use of the pretrial agreement for anything but bargaining on the charges and sentence. Chief

359. *Id*.
360. *Id*. at 417 (Sullivan and Effron, JJ., dissenting).
361. *Id.*
362. *Id*.
363. *Id*.
364. 12 M.J. 425 (C.M.A. 1982).
365. *Id*. at 427.
366. 15 M.J. 238 (C.M.A. 1983).
367. *Id*. at 240.
368. *See* United States v. Cummings, 38 C.M.R. 174 (C.M.A. 1968) (citing United States v. Green, 25 C.M.R. 8 (C.M.A. 1957)).
369. *See* United States v. Holland, 1 M.J. 58 (C.M.A. 1975).

Judge Everett wrote in *Mitchell* that "[as] long as the trial and appellate processes are not rendered ineffective and their integrity is maintained . . . some flexibility and imagination in the plea-bargaining process have been allowed by our Court."[370]

The Supreme Court made similar comments about pretrial agreements in *United States v. Mezzanatto*.[371]

> The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government "may encourage a guilty plea by offering substantial benefits in return for the plea." "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'"

Another discernible trend is in the area of blanket waivers where the courts have recently taken a less paternalistic view of their role in policing the terms of pretrial agreements. Where the ACMR found the blanket waiver in *Elkinton* to be "contrary to public policy and therefore void,"[372] the CAAF, in both *Rivera* and *Forester*, found similar waiver provisions, while overly broad, to be enforceable so long as the provisions did not prejudice the appellant's exercise of his rights.[373]

Similarly, recent decisions place responsibility squarely on the parties to draft pretrial agreements that clearly communicate their intent. Applying a contract law framework to interpreting pretrial agreements, the CAAF looks to the "four corners" of the pretrial agreement and the conduct of the parties at trial to determine the intended result.

In *United States v. Acevedo*,[374] for example, the pretrial agreement provided for suspension of a dishonorable discharge. It did not specify whether a bad-conduct discharge, if adjudged, would be suspended. The

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370. *Mitchell*, 15 M.J. at 241 (Everett, C.J., concurring).

371. 513 U.S. 196, 209-10 (1995) (internal citations omitted).

372. United States v. Elkinton, 49 C.M.R. 251, 254 (A.C.M.R. 1974).

373. United States v. Rivera, 46 M.J. 52, 54 (1997); United States v. Forrester, 48 M.J. 1, 4 (1998).

374. 50 M.J. 169 (1999).

accused was sentenced to a bad-conduct discharge, which the convening authority approved. The court rejected appellant's claim that the discharge should have been suspended and, while indicating that the trial judge might have created a clearer record on this point, held that "[t]he plain language of appellant's pretrial agreement does not prohibit the approval of an unsuspended bad-conduct discharge."[375] While the language was ambiguous, the CAAF was able to ascertain the intent of the parties by examining the record, in which defense counsel indicated his understanding that a bad-conduct discharge, if adjudged, would not be suspended.[376]

The dissenters in *Acevedo* took a more paternalistic approach, interpreting the agreement to provide that a suspended dishonorable discharge was the most severe form of discharge that the appellant could receive and that an unsuspended bad-conduct discharge is more severe than a suspended dishonorable discharge. The majority flatly rejected this interpretation, holding that "while the terms of the agreement, as proposed by the defense, create something of crapshoot with respect to discharge, ours is not to second-guess the parties in this regard."[377] The companion case to *Acevedo*, tried before the same trial judge one day later, *United States v. Gilbert*,[378] involved the same language in its pretrial agreement and yielded the same result.

The Coast Guard Court of Criminal Appeals took a similar approach to interpreting ambiguous terms in a pretrial agreement a year before *Acevedo*, in *United States v. Sutphin*.[379] There, the service court held that an adjudged fine must be set aside when there is no evidence that the accused understood that he could receive a fine under the terms of his pretrial agreement. In *Sutphin*, the pretrial agreement categorized the types of punishment affected by the pretrial agreement, including a category named "forfeiture or fine." That category included a limitation on forfeitures of pay and allowances but did not mention the possibility of a fine. The last category provided that "[a]ll other lawful punishments, if adjudged, may be approved."[380] The military judge did not inquire as to whether the

375. *Id.* at 172. The court also noted several avenues of relief that defense counsel could have pursued but did not, such as informing the court of any discrepancy between his and the court's understanding of the pretrial agreement, or raising the matter in appellant's R.C.M. 1105 or 1106 matters. *Id.* at 173.

376. *Id.*

377. *Id.* at 174.

378. 50 M.J. 176 (1999).

379. 49 M.J. 534 (C.G. Ct. Crim. App. 1998).

380. *Id.* at 535.

accused understood his pretrial agreement to allow imposition of a fine; however, when defense counsel stated for the record his calculation of the maximum punishment, it did not include a fine. Trial counsel concurred with the defense's calculation. In holding that the pretrial agreement precluded approval of a fine, the Coast Guard court relied on *United States v. Williams*, in which the COMA held that "a general court martial may not include a fine in addition to total forfeitures in a guilty-plea case unless the possibility of a fine has been made known to the accused during the providence inquiry."[381] The court also noted that the conduct of the parties at trial indicated their understanding that the pretrial agreement precluded the convening authority from approving a fine.[382]

In United States v. Mitchell,[383] the CAAF addressed the enforcement of an agreement in which the intent of the parties was clear, but deprived the accused of the benefit of his bargain. Based on the application of an Air Force regulation unbeknownst to any of the parties to the pretrial agreement, the appellant's service terminated after his trial, and he entered a no-pay status. This frustrated the intent of the pretrial agreement, which was designed to allow the appellant's family to continue to receive his pay and allowances.[384] The crafting of the monetary terms of the pretrial agreement were premised on all parties' understanding that appellant's enlistment extension was effective, and that he would therefore continue to draw pay and allowances even if confined. Based on the application of the Air Force regulation, this intent was frustrated when appellant unexpectedly entered a no-pay status. The CAAF returned the case to the Air Force court and held that, if the Secretary of the Air Force was unable to provide sufficient relief to appellant, the lower court "may set aside the findings, as well as the sentence, and authorize a rehearing based on appellant's improvident plea."[385]

The *Mitchell* decision stood in stark contrast to *United States v. Williams*,[386] a case decided by the NMCCA just four months earlier. In *Williams*, the appellant entered into a pretrial agreement that required him to plead guilty to numerous bad check offenses. In return, the convening

381. *Id*. (citing United States v. Williams, 18 M.J. 186, 189 (C.M.A. 1984)).

382. *Id.*

383. 50 M.J. 79 (1999).

384. The offenses for which Master Sergeant Mitchell was tried occurred on 12 July 1994, before the effective date of Article 58(b), UCMJ, which now provides for automatic forfeiture of pay and allowances in conjunction with confinement. UCMJ art. 58(b) (2000).

385. *Mitchell*, 50 M.J. at 83.

386. 49 M.J. 542 (N-M. Ct. Crim. App. 1998), *rev'd* 53 M.J. 293 (2000).

authority would agree to suspend any fine or forfeitures for a period of twelve months and to waive automatic forfeitures pursuant to Article 58b, UCMJ. The appellant stated in a post-trial affidavit that the only reason he entered into the pretrial agreement was in return for these financial concessions. The appellant was on legal hold at the time of his court-martial, as his term of service had expired two weeks earlier. Unbeknownst to all parties to the agreement, a Department of Defense regulation provided that sailors in a legal hold status, who are later convicted of an offense under the UCMJ, forfeit the right to accrue pay or allowances after their conviction.[387]

The NMCCA held that "the convening authority did not have a duty to determine the collateral consequences of the appellant's legal hold status"[388] to ensure that the bargain would be meaningful. Because the court found that "the Government did not actively induce the appellant to enter into a potentially ineffective pretrial agreement through misrepresentation," the pretrial agreement was held valid and enforceable.[389] The decision was short-lived, however. In August 2000, the CAAF reversed Williams, holding:

> Where, as here, an accused pleads guilty relying on incorrect advice from his attorney on a key part of the pretrial agreement (entitlement to pay), and the military judge shares that misunderstanding and fails to correct it, a plea can be held improvident. Ignorance of the law on a material matter cannot be the prevailing norm in the legal profession or in the court-martial process.[390]

Decided the same day as *Williams*, *United States v. Hardcastle*[391] was a CAAF case that involved a similar fact pattern. Lance Corporal Hardcastle's pretrial agreement contained two forfeiture provisions providing that the convening authority would defer and waive forfeitures in excess of $400 pay per month so that the accused could support his wife and son. During the providence inquiry, the military judge indicated that the terms were proper and that it was the understanding of all of the parties that the accused would be able to receive $400 pay per month under the agreement. Unbeknownst to any of the parties, the accused's enlistment expired eleven

387. *Id.* at 545.
388. *Id.* at 547.
389. *Id*.
390. United States v. Williams, 53 M.J. 293 (2000).
391. United States v. Hardcastle, 53 M.J. 299 (2000).

days after trial, resulting in a no-pay status; as a result, he was unable to receive the $400 pay per month for which he had bargained. Citing *United States v. Bedania*,[392] in which the court held that relief is appropriate when the appellant's misunderstanding of a major collateral consequence of his conviction is induced by the military judge's comments during the providence inquiry, the CAAF set aside the findings and the sentence and returned the case to The Judge Advocate General of the Navy.[393]

Hardcastle relied upon *United States v. Olson*,[394] a case in which the appellant's pretrial agreement included a promise to "make restitution to the United States of any monies owed by him as a result of the charges against him."[395] Under the agreement, Olson pleaded guilty and agreed to make restitution for the false claim specification that originally alleged $1806 worth of bad vouchers, but that was amended before trial to reflect only $646.50. After trial, the local finance office administratively recouped an additional $1107.07 and advised the appellant that he could contest this action through administrative channels. The appellant protested this action and requested that the military judge and the convening authority order a subsequent hearing to litigate the providence of his guilty plea, in light of the unforeseen recoupment from his pay.

Citing *Bedania* for the proposition that "an accused is not entitled to relief when, after pleading guilty, he discovers that there are unforeseen collateral consequences of his conviction,"[396] the court found that "instead of being collateral to the court-martial, the financial obligation to 'make restitution' has been interjected into the criminal proceeding by the pretrial agreement and by the parties' interpretation of the agreement."[397] Accordingly, the *Olson* court found that a "meeting of the minds never occurred with respect to the restitution provision" and that "appellant is entitled to have his pleas of guilty withdrawn or to have the agreement conformed, with the Government's consent, to appellant's understanding."[398]

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392. 12 M.J. 373, 376 (C.M.A. 1982).

393. Based on *Mitchell*, the government conceded on appeal that "because appellant did not receive the benefit of his bargain, his pleas were improvident." *Williams*, 53 M.J. at 302.

394. 25 M.J. 293 (C.M.A. 1987).

395. *Id*. at 294.

396. *Id*. at 297.

397. *Id*.

398. *Id*. at 298.

The court's remedy was to set aside the adjudged $1000 fine as a means of providing the appellant with the benefit of his bargain.[399]

Chief Judge Everett noted in *Schaffer* that "despite our pronouncements [to limit pretrial agreements to bargaining only on the charges and the sentence], increasingly sophisticated plea bargains have been devised."[400] The forfeiture provisions in *Hardcastle*, designed to avoid the consequences of Articles 57(a) and 58(b), UCMJ,[401] are an example of such complex terms. The *Hardcastle* case serves as a warning that, where complex bargaining terms are part of the pretrial agreement, all parties must understand the rules and regulations that govern those terms if the accused is to receive the benefit of the agreement. While the *Acevedo* and *Gilbert* decisions reflect the court's increasingly hands-off role in interpreting pretrial agreements, *Hardcastle* and *Olson* demonstrate the court's willingness to step in when the parties fail to demonstrate clearly a meeting of the minds as to the underlying terms of the pretrial agreement.

Consistent throughout the development of case law surrounding the pretrial agreement, however, has been the CAAF's opposition to provisions that impinge upon the fundamental rights of an accused. Specifically, the court has focused on the accused's right to fully prepare his defense fully and to litigate matters fully—such as unlawful command influence—that are inherent in a fair trial and a reliable result. While Chief Judge Everett encouraged a more liberal use of pretrial agreements in *Mitchell*, he agreed with the majority's holding that the convening authority's agreement to grant clemency, if trial were completed within fifteen days of referral, was objectionable due to its "tendency to discourage an accused from carefully preparing his defense and fully litigating his case at the court-martial."[402] Whether such terms violate public policy or threaten fundamental rights inherent in a fair trial remains a matter of case-by-case analysis.

The CAAF decision in *United States v. Davis*[403] perhaps best demonstrates the court's present view towards its role in overseeing pretrial agreements. In *Davis*, the accused entered into a pretrial agreement that provided for a confessional stipulation and an agreement to present no evidence on the merits. Sergeant Davis entered pleas of not guilty but also

399. *Id.*
400. United States v. Schaffer, 12 M.J. 425, 427 (C.M.A. 1982).
401. UCMJ arts. 57(a), 58(b) (2000).
402. United States v. Mitchell, 15 M.J. 238, 240 (C.M.A. 1983).
403. 50 M.J. 426 (1999).

agreed to a confessional stipulation that established virtually every element of each charged offense. In return, the convening authority agreed to limit his sentence to confinement. On appeal, Sergeant Davis asserted that his pretrial agreement "'turned his court-martial into an empty ritual,' deprived him of due process in violation of RCM 705(c)(1)(B) . . . [,] circumvented Article 45(a), U.C.M.J., 10 U.S.C. 845(a), R.C.M. 910(c), and *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969); and compromised the integrity of the court-martial."[404] Based on his failure to establish what, if any, evidence he would have presented had the military judge rendered the agreement illegal, and in the absence of any evidence of government overreaching, the CAAF found no prejudice and granted no relief. While the court noted that "we do not condone or encourage [the procedures employed in this case], we are satisfied that no relief is warranted."[405] Thus, *Davis* is consistent with the trend, and it exemplifies the CAAF's increasingly hands-off approach when reviewing pretrial agreements.

VIII. Conclusion

Judge Ferguson of the COMA, in a dissenting opinion in *United States v. Villa*[406] wrote: "The pretrial agreement itself is an aberration in the law, peculiar to military justice alone. It has been employed in military trials since 1953. Although this court has approved its use, such approval has not been without reservation."[407] Judicial fears concerning the propriety of such agreements and their potential for abuse gave rise to a long journey for the pretrial agreement, from the conservative views of the *Ferguson* court, to the more expansive interpretations under Chief Judge Everett, to the decisions of the current CAAF dealing with complex factual scenarios and bargaining agreements that far surpass the parameters initially set by the courts first dealing with pretrial agreements in the 1960s and 1970s.

While the *Military Judges' Benchbook* and caselaw now provide much more guidance and uniformity than existed when the plea bargain first made its appearance in 1953, counsel continue to formulate new ways of negotiating that continue to challenge the appellate courts to define and

404. *Id.* at 428
405. *Id.* at 431.
406. 42 C.M.R. 166 (C.M.A. 1970).
407. *Id.* at 172 (Ferguson, J., dissenting).

delineate further the convening authority's power to strike a deal with an accused.

While the COMA initially expressed great concern with the potential for abuse in the pretrial negotiation process and for violation of the rights of the accused, today's CAAF has allowed the playing field to develop substantially, moving away from holding pretrial agreements to the letter of the RCM and applying instead a due process, fundamental fairness analysis to determine their validity. By departing from a strict adherence to negotiating solely on the charges and the sentence, the CAAF has paved the way for much broader discretion on the part of convening authorities for entering into pretrial agreements with innovative terms. Its decision in *Davis* makes clear that even a term found to be contrary to public policy will not invalidate a pretrial agreement absent prejudice to the accused. Given such parameters, the playing field has never before been so broad, affording both the accused and the convening authority unlimited opportunities to bargain with each other within the confines of fair play.