GENERAL/SPECIAL COURT-MARTIAL

**UNITED STATES COAST GUARD**

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| UNITED STATES v.AccusedRankxxx xx xxxxU.S. Coast Guard  | )))))))) | **MEMORANDUM OF****PRETRIAL AGREEMENT****(Part I)** |

I, (Accused), USCG, the accused in the court-martial now pending, in exchange for good consideration and after thorough consultation with my defense counsel, do fully understand and agree to the following terms and conditions:

**The specific pleas of the accused must be listed clearly and concisely, and should reflect any modifications made to the original charge sheet, any renumbering of the original charges, and any pleas by exceptions and substitutions, and/or pleas to lesser included offenses. An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions; or not guilty. RCM 910(a). Refer to Appendix 10 of the MCM for examples.**

**PLEAS OF THE ACCUSED**

CHARGE PLEAS

|  |  |
| --- | --- |
| Charge I: Violation of Article \_\_\_\_ | GUILTY/NOT GUILTY |
| Specification\_\_\_\_: Language of Spec. | GUILTY/NOT GUILTY |

**[Examples of pleas w/exceptions and substitutions]**

|  |  |
| --- | --- |
| Spec \_\_: Unauthorized absence Terminated by  ApprehensionSpec\_\_ : Between 22 Jun and 29  Jun 11, at an unknown  location, wrongfully  use cocaine.  | Guilty, except for the words“terminated by apprehension”; of the excepted words, Not Guilty; of the Specification as excepted, Guilty. Guilty, except for the words “unknown location” substituting therefore the words “Norfolk, Virginia”; of the excepted words, Not Guilty; of the substituted words, Guilty of the Specification as excepted and substituted, Guilty.  |

**[Examples of pleas w/LIOs]**

|  |  |
| --- | --- |
| Charge \_\_: Violation of Art 123aSpec \_\_: Uttering checks without sufficient funds | Not Guilty, but Guilty of a violation of Article 134. Not Guilty, but Guilty to the LIO of dishonorable failure to maintain funds. |

1. I agree to enter pleas of GUILTY as indicated above. I assert that I am, in fact, guilty of the offenses to which I am pleading guilty and I am entering into this agreement [freely and voluntarily](#One) and no one has threatened or coerced me into entering this agreement.
2. [This agreement](#Two) (Parts I and II) constitutes all the conditions and understandings of both the government and me regarding the plea in this case. There are no other agreements, written, oral or otherwise implied.
3. I understand that the convening authority in this case may approve any sentence adjudged by the court-martial, or any automatic sentence or portion thereof, but shall order executed only that sentence which does not exceed the lesser of the sentence contained in Part II of this agreement or the sentence adjudged by this court-martial. I also understand that the sentence limitation portion of this agreement addresses [each of the following distinct parts](#Three) of the sentence that may be adjudged in this case: (1) punitive discharge, (2) confinement and restraint, (3) forfeiture and fine, (4) reduction in pay grade, and (5) any other lawful punishment that may be adjudged.
4. I am satisfied with my (all of my) defense counsel, (Defense Counsel), (JAGC, USN)(USCG), individual military counsel, (JAGC, USN)(USCG) and/or civilian defense counsel, (Mr./Mrs. \_\_\_) in all respects and consider him/her/them qualified to represent me at this court-martial. My counsel advised me of the meaning and effect of my guilty plea and I fully understand and comprehend its meaning and all its attendant effects and consequences, including the possibility that I may be processed for an administrative discharge, even if all or part of the sentence, including any punitive discharge, is suspended or disapproved pursuant to this agreement or for any other reason;
5. That [my counsel advised me](#Five) that an administrative discharge may result in an Other Than Honorable characterization of service, and that I may therefore be deprived of virtually all veterans' benefits based upon my current period of active service, and that I may therefore expect to encounter substantial prejudice in civilian life in many situations;
6. That my counsel advised me that while 10 U.S.C. §858a, Article 58a, UCMJ, authorizes automatic [administrative reductions](#Six), Coast Guard Military Justice Manual, COMDTINST M5810.1E, ¶4.E.1 states that the Coast Guard, as a matter of policy, has decided not to effect automatic administrative reductions;
7. That my counsel advised me that if the adjudged sentence includes either confinement for more than six months or death, or confinement for six months or less and a punitive discharge, whether the sentence is suspended or not, Article 58b, UCMJ requires the [automatic imposition of forfeitures](#Seven) of [2/3 pay per month/all pay and allowances] due during any period of confinement, unless the convening authority takes action to limit or defer the automatic forfeitures. Forfeitures, whether adjudged or automatic, take effect upon the convening authority’s action in this case or fourteen days after the sentence is adjudged, whichever is earlier. I understand that I may request in writing that the convening authority defer execution of forfeitures until the convening authority takes action in this case. Additionally, I understand that if I am held in confinement beyond my end of active obligated service (EAOS) date, then I will not receive any pay or allowances by operation of law, regardless of the terms of this agreement;
8. That my counsel has advised me that I may be placed on appellate leave in no pay status under the provisions of 10 U.S.C. § 876a, Article 76a, UCMJ, notwithstanding any provision regarding forfeitures or fines in Part II of this agreement, if the sentence, as approved, includes an unsuspended punitive discharge;
9. I understand that I may ask permission to [withdraw my pleas of guilty](#Nine) at any time before they are actually accepted by the military judge. I also understand that I may ask to withdraw my pleas of guilty after they have been accepted but before the sentence is announced, and the military judge may permit me to do so at [his/her] discretion.
10. I understand that this pretrial agreement may become null and void, and that the [convening authority can withdraw from this agreement](#Ten), if any of the following occur:
11. I fail to plead guilty as set forth in this agreement;
12. The court refuses to accept my plea/any of my pleas of guilty;
13. The court sets aside my plea/any of my pleas of guilty for any reason (including upon my request) before a sentence is announced;
14. I fail to satisfy any material term of this agreement; or
15. I fail to plead guilty as required by this agreement at a rehearing, should one occur.
16. I fully understand that if I engage in misconduct after signing this pretrial agreement, I may forfeit the benefits of this agreement. Misconduct means any act or failure to act that violates the Uniform Code of Military Justice or any act or failure to act by which I fail to comply with this agreement. If I engage in misconduct at any time, between when I sign this pretrial agreement and the time that I complete the sentence approved by the convening authority, including any period of probation or period in which a sentence component is suspended, the convening authority will be able to act on this agreement based on that misconduct. The action the convening authority may take on this agreement depends on when the convening authority acts, if [he/she] chooses to act, not on when the misconduct occurs, so long as the misconduct occurs within the time frame governed by this provision. There are three periods of time during which the convening authority may act on this agreement based on my misconduct: (1) from the time convening authority and I sign this pretrial agreement until the time the military judge accepts my pleas; (2) from the time the military judge accepts my pleas until the convening authority takes [his/her] RCM 1107 action; and (3) from the time the convening authority takes [his/her] RCM 1107 action until I have completed serving my entire sentence (including any period of suspension or probation, if applicable) as finally approved and executed;
17. That I understand that if, based on my misconduct, the convening authority acts on this agreement after [he/she] and I sign this pretrial agreement but before the military judge accepts my pleas, [the convening authority may use such misconduct as grounds to unilaterally withdraw](#Twelve) from this pretrial agreement. Should the convening authority do so, I understand that the pretrial agreement would thereby become null and void, and both the convening authority and I would be relieved of all obligations and responsibilities that either of us would have been required to meet by the terms of this pretrial agreement;
18. That I further understand that if, based on my misconduct, the convening authority acts on this agreement after the time the military judge accepts my pleas but before the time the convening authority takes [his/her] RCM 1107 action, [such misconduct may be the basis for setting aside the sentencing provisions of the pretrial agreement](#Thirteen). Before setting aside the sentencing provisions of this agreement, however, the convening authority shall afford me a hearing, substantially similar to the hearing required by Article 72, UCMJ, and the procedures shall be based on the level of adjudged punishment set forth in RCM 1109(d), (e), (f), or (g), to determine whether the misconduct occurred and whether I committed the misconduct; and
19. That I further understand that if based on my misconduct, the convening authority acts on this agreement after the time the convening authority takes [his/her] RCM 1107 action, but [before I have completed serving the entire sentence](#Fourteen) (including any period of suspension or probation, if applicable) as finally approved and executed, the convening authority may, after compliance with the hearing procedures set forth in RCM 1109, vacate any periods of suspension agreed to in this pretrial agreement or as otherwise approved by the convening authority;
20. I understand that if this agreement becomes null and void, then my offer to plead guilty and to enter into [this agreement cannot be used against me](#Fifteen) in any way to prove whether I am guilty or not guilty of the charge(s) alleged against me at this court-martial. In this regard, the offer to plead guilty includes any statement or proffer made in the course of plea discussions with the convening authority or any counsel for the Government, whether in oral or in a written form.
21. Specially Negotiated Provisions. As consideration for this agreement and after having fully discussed the issue with my defense counsel:

[**(\*See Appendix I for other commonly used specially negotiated provisions for the accused.)**](#Appendix)

1. Notification Provisions. I have been advised of the following potential consequences of my plea(s) of guilty and resultant conviction(s):

[**(\*See Appendix II for commonly used notification provisions that may are applicable for the accused.)**](#Appendixii)

**SIGNATURE PAGE**

By my signature below I acknowledge that I have read this agreement completely, I have discussed it with my counsel, I understand it in all respects, and I am prepared to abide by its terms.

Accused: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_

 (Accused)

 (Rank)

 (USCG)

Defense Counsel:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_

 (Defense Counsel)

 (Rank)

 (JAGC, USN)(USCG)

The foregoing pretrial agreement is approved, including the sentence limitation portion of this agreement.

Convening Authority:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_

 (Convening Authority)

 (Rank)

 (USCG)

 Commanding

GENERAL/SPECIAL COURT-MARTIAL

**UNITED STATES COAST GUARD**

|  |  |  |
| --- | --- | --- |
| UNITED STATES v.(Accused)(Rank)xxx xx xxxxU.S. Coast Guard | )))))))) | **MEMORANDUM OF****PRETRIAL AGREEMENT****(Part II)** |

The [convening authority in this case may approve](#Practicepointers) and order executed any lawfully adjudged sentence awarded by this court-martial, or any automatic sentence or portion thereof, except as specifically limited below:

1. **Punitive Discharge**: May be approved as adjudged. (Should a punitive discharge be adjudged, this provision constitutes my request to be placed on voluntary [appellate leave](#Appellateleave) in accordance with Military Assignments and Authorized Absences, COMDTINST M1000.8, ¶2.A.21. I shall advise my commanding officer of my current mailing address, which I understand will be used to serve or attempt to serve the staff judge advocate’s recommendation and the convening authority’s action. I further understand that if I fail to advise my commanding officer of my current mailing address, my voluntary appellate leave status may be terminated and I will be ordered to return to duty. [select one of the following: Because I have no accrued leave, I will be in a leave without pay status. OR Because I have accrued leave, I understand I may choose to: (a) receive pay and allowances during the period of accrued leave and then continue on unpaid voluntary appellate leave; or (b) receive payment for the accrued leave, as of the day the voluntary appellate leave begins, and serve the entire period of the voluntary appellate leave in a leave without pay status.])

2**.** [**Confinement**](#Confinement): May be approved as adjudged.

3.[**Forfeiture**](#Forfeitures) **or Fine**: May be approved as adjudged.

4. **Reduction**: May be approved as adjudged.

5. **Other lawful punishments**: May be approved as adjudged.

[**\*See Appendix III for other commonly used specially negotiated provisions**](#Appendixiii)

**SIGNATURE PAGE**

I fully understand, and have discussed with my counsel, how this agreement will affect any sentence that I may be awarded by the court-martial.

Accused: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_

 (Accused)

 (Rank)

 USCG

Defense Counsel: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_

 (Defense Counsel)

 (Rank)

 (JAGC, USN)(USCG)

The foregoing pretrial agreement is approved, including the sentence limitation portion of this agreement.

Convening Authority:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_

 (Convening Authority)

 (Rank)

 USCG

 Commanding Officer

**[Appendix I. Examples of Commonly Used Specially Negotiated Provisions:](#speciallynego)**

**[Elect trial by Military Judge alone]**

I agree to request trial and sentencing by military judge alone, and waive my right to a trial by members, including enlisted members.

**[Witness considerations]**

**[1. Stipulation of extenuation & mitigation witness testimony ]**

 I agree not to request, at Government expense, the presence of any witness. In return, the Government agrees to enter into mutually agreed upon stipulation of testimony regarding those potential witnesses. I understand that the stipulation does not admit the truth of the testimony, which may be attacked, contradicted, or explained in the same way as any other testimony. This provision has not interfered with my selection of witnesses or in presenting a complete case in extenuation and mitigation. I agree to provide these stipulations to the trial counsel at least five (5) business days before trial.

**[2. Call certain witnesses only]**

 I intend to request the presence of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ as (a) witness(es) at my court-martial at Government expense. Provided that the convening authority agrees to produce these witnesses, I will not request any other witnesses at Government expense. This provision has not interfered with my selection of witnesses or in presenting a (defense/case in extenuation and mitigation). If I have further material to present, I intend to use alternative means to present this material.

**[**[**3. Call no witness or call only local witnesses**](#Nowitness)**]**

I agree not to request, at Government expense, the presence of any witness located (out of the area)(more than 50 miles from the court-martial location). This provision does not interfere with my ability to present an effective (defense/case in extenuation and mitigation). If I have further material to present, I intend to use alternative means to present this material. (The Government specifically agrees not to object to the admission into evidence of written statements in extenuation and mitigation from witnesses located (out of the area)(more than 50 miles from the court-martial location).

**[Agreement not to object to evidence offered]**

 **[1. Telephonic testimony]**

 The Government and I agree to not object to the Court receiving telephonic testimony in lieu of live testimony offered during the sentencing proceeding. This provision does not preclude objections to the content of the testimony offered.

 **[2. Certain evidence presented on the merits]**

The Government and I agree not to object to (relevant service record documents, relevant medical or autopsy reports, relevant command investigation materials, relevant Coast Guard Investigative Service evidentiary material, etc.) being offered by either party during the merits phase of the trial on the basis of (foundation, hearsay, lack of confrontation, or authenticity). Each party will provide the other party final witness and exhibit lists covered by this paragraph at least five (5) calendar days prior to the scheduled proceeding. This provision does not interfere with my ability to present an effective and complete case during the merits phase of the trial.

**[3. Certain evidence presented on sentencing]**

The Government and I agree not to object to (relevant service record documents, relevant medical or autopsy reports, relevant command investigation materials, relevant Coast Guard Investigative Service evidentiary material, relevant statements offered by the defense in extenuation and mitigation, or relevant statements offered by the Government in aggravation to include written, audio, or videotaped statements or telephonic testimony of any victim or relevant witness, or relevant unsworn testimony offered by a victim in accordance with the R.C.M.s) being offered by either party in the presentencing phase of the trial on the basis of (foundation, hearsay, lack of confrontation, or authenticity). Each party will provide the other party final witness and exhibit lists covered by this paragraph at least five (5) calendar days prior to the scheduled presentencing proceeding. This provision does not interfere with my ability to present an effective and complete case in extenuation and mitigation.

**[Trial date]**

I agree, and am fully prepared, to go to trial and offer to go to trial no later than (date). I understand that this agreement will not be deemed to have been breached if the Government is unprepared or the judiciary cannot schedule the trial by that date.

**[Conditional Waiver of Administrative Board – General Discharge]**

I admit that I committed the offenses that I have agreed to plead guilty to in this pretrial agreement, and that my commission of these offenses meets the criteria to administratively separate me for Misconduct, Commission of a Serious Offense, in accordance with Article 1.B.17.b.(3) of Military Separations, COMDTINST M1000.4. I consent to my Command submitting this pretrial agreement to CG PSC to document the fact that I conditionally waive my right to appear before an administrative separation board. Specifically, I conditionally waive my right to appear before an administrative board on the condition that if I am separated from the Coast Guard, the type of discharge and characterization of service I receive will be a General Discharge (characterization of service as under honorable conditions). In addition, I waive the right to receive the Notice to Respondent and my right to make a statement, as outlined in the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1. I understand that CG PSC may separate me based upon this pretrial agreement alone, without the need for additional supporting documents or evidence to prove that I committed the offenses noted above. I also understand that if CG PSC approves a General Discharge, I may be deprived of some rights and privileges available to honorably discharged veterans under federal or state law, and that as a result I may encounter some prejudice in situations in which the characterization of my service may have a bearing. If CG PSC rejects this conditional waiver, and decides not to approve my separation with an Honorable or General Discharge, I reserve my right to appear before an administrative board to contest my separation under other than honorable conditions. I specifically reviewed this provision with my counsel. I understand the consequences of this waiver and am freely and voluntarily entering in to it.

 (IF ACCUSED IS NEAR OR PAST HIS/HER EAOS, ADD THE FOLLOWING: I specifically agree to remain on active duty past my projected End of Active Obligated Service (EAOS) date of \_\_\_\_\_\_\_\_\_\_\_\_ so that the Government can administratively separate me.) (I agree to deliver to trial counsel not later than one business day prior to trial the completed and signed waiver.)

**[Unconditional Waiver of Administrative Board – OTH]**

I admit that I committed the offenses that I have agreed to plead guilty to in this pretrial agreement, and that my commission of these offenses meets the criteria to administratively separate me for Misconduct, Commission of a Serious Offense, in accordance with Article 1.B.17.b.(3) of Military Separations, COMDTINST M1000.4. I consent to my Command submitting this pretrial agreement to CG PSC to document the fact that I unconditionally waive my right to appear before an administrative separation board. Specifically, I unconditionally waive my right to appear before an administrative board and I understand that based upon this unconditional waiver CG PSC may approve a discharge under other than honorable conditions. In addition, I waive the right to receive the Notice to Respondent and my right to make a statement, as outlined in the Enlisted Personnel Administrative Boards Manual, PSCINST M1910.1. I understand that CG PSC may separate me based upon this pretrial agreement alone, without the need for additional supporting documents or evidence to prove that I committed the offenses noted above. I also understand that if CG PSC approves a discharge under other than honorable conditions, I may be deprived of many or all rights as a veteran under both federal and state law, and that as a result I should expect to encounter substantial prejudice in situations in which the characterization of my service may have a bearing. I specifically reviewed this provision with my counsel. I understand the consequences of this waiver and am freely and voluntarily entering in to it.

(IF ACCUSED IS NEAR OR PAST HIS/HER EAOS, ADD THE FOLLOWING: I specifically agree to remain on active duty past my projected End of Active Obligated Service (EAOS) date of \_\_\_\_\_\_\_\_\_\_\_\_ so that the Government can administratively separate me.) (I agree to deliver to trial counsel not later than one business day prior to trial the completed and signed waiver.)

**[**[**Motion consideration]**](#Motions)

**\*The specific motions waived need to be specified – the language “all waivable motions” is unacceptable.**

 **[1. Single motion]**

 I agree not to raise a motion pursuant to R.C.M. \_\_\_\_\_ to \_\_\_\_\_\_\_\_\_\_\_\_. I have not been compelled to waive my right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to raise the issue of unlawful command influence, or any other motion that cannot be waived.

 **[2. Multiple motions]**

 I specifically agree not to raise the following waivable motions:

1. Relief based on defects in the Article 32 hearing or Article 34 advice;

 (2) Relief from pretrial confinement for violations of R.C.M. 305 and Article 13, UCMJ;

 (3) Relief based on multiplicity and unreasonable multiplication of charges; and

 (4) Suppression of my statement given to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ on \_\_\_\_\_\_\_\_\_\_\_\_.

This provision in no way limits my right to raise any motion. I have not been compelled to waive my right to due process, the right to challenge the jurisdiction of the court-martial, the right to a speedy trial, the right to raise the issue of unlawful command influence, or any other motion that cannot be waived. I have no motions other than those I have previously filed or waived above.

**[Article 32 waiver as part of agreement/GCM only]**

I agree to waive my right to an Article 32, UCMJ, preliminary hearing. I fully understand the nature and purpose of an Article 32 preliminary hearing and the rights that I would have at such a hearing. I understand that upon acceptance of this agreement, the charge(s) and specification(s) may be referred to trial by general court-martial without an Article 32 preliminary hearing.

**[**[**Withdrawal of language and/or charges and specifications to which Accused pled not guilty**](#Withdraw)**]**

I understand and agree that, in return for my pleas of guilty, and following the military judge’s acceptance of my pleas as set forth below, the convening authority will withdraw the language and/or charge(s) and specification(s) to which I have pled not guilty. After announcement of the sentence by the military judge, the withdrawn language, charge(s) and/or specification(s) will be dismissed by the convening authority without prejudice, to ripen into prejudice upon completion of appellate review in which the findings and sentence have been upheld.

**[**[**Government going forward on Not Guilty pleas**](#Government)**]**

I understand and agree that the convening authority, through the assigned trial counsel, may go forward on the (charge(s)) (language) to which I have entered plea**s** of Not Guilty.

**[Stipulation of fact]**

**[1. Stipulation agreed to when PTA signed]**

I agree to enter into the Stipulation of Fact contained in Prosecution Exhibit #1 for use by the military judge during the (providence inquiry)(on the merits) and during the pre-sentencing proceeding. I have reviewed the stipulation completely, agree the facts therein are true and admissible, and have no objections.

**[2. Stipulation to be agreed upon after PTA is signed]**

 I agree to enter into a stipulation of fact for use during the (providence inquiry)(on the merits) and during the pre-sentencing proceeding, which describes the facts and circumstances surrounding the offenses to which I am pleading guilty to include (the aggravating circumstances)(extenuation and mitigation). If I have any objections to the admissibility of any matters contained in the stipulation of fact, I will notify trial counsel prior to signing it. I understand that the failure of the parties to reach a mutually agreed upon stipulation of fact may result in either side withdrawing from this Agreement.

**[Conditional plea(s)]**

I agree, upon written consent of the Government and approval of the military judge, to enter a conditional plea of guilty in writing as to (list applicable Charges and Specifications), preserving the right to review or appeal of any adverse determination on my motion (specify nature of the motion). I understand that if I prevail on further review or appeal, I will be allowed to withdraw my conditional plea(s) of guilty in accordance with R.C.M. 910(a)(2).

**[Confessional stipulation]**

I agree to enter into a confessional stipulation of fact in writing as to all elements of (list applicable Charge(s) and Specification(s)) to which I have entered pleas of not guilty. I understand that a confessional stipulation is tantamount to a guilty plea when it establishes directly, or by reasonable inference, every element of a charged offense and when I and my counsel do not present any evidence to contest any potential remaining issue(s) on the merits of my case. I also understand that this confessional stipulation will relieve the Government and the trial counsel of the burden of proving my guilt beyond a reasonable doubt as to this (these) Charge(s) and Specification(s) and that I may be found guilty of this (these) offense(s) based solely upon this stipulation and be subjected to the punishment(s) authorized for it (them).

**[**[**Testify in another case**](#Testify)**]**

If I am provided a grant of immunity, I agree to testify truthfully if called as a witness in any proceeding regarding Name of 3rd Party Accused, and against any other individual who may be subsequently charged or investigated for offenses arising out of (the incidents that are the subject of the charges or investigation). I further agree to fully and truthfully cooperate in any proceeding, to include in-person interviews with appropriate law enforcement authorities and the trial and defense counsel involved in these cases, as well as any other reasonable request made of me. I also agree to testify fully and truthfully at all such proceedings relating to such persons (subsequent to my being given a grant of immunity) if ordered to do so by the cognizant convening authority or other person authorized to give me an order to so testify. I understand that failure to cooperate on my part constitutes a material breach of this pretrial agreement. The Government agrees to make all reasonable efforts to coordinate in advance, fund, and obtain the physical presence of at least one of my military counsel at all proceedings where I am required to testify under oath. If reasonable efforts fail or scheduling conflicts prevent my military counsel from physically attending one of these events, the Government retains the right to go forward on the date of the scheduled event. I understand I will be allowed to contact one of my military counsel in that event should the need arise. I understand that trial counsel will make my cooperation known to the (military judge / members) at the sentencing portion of my case, if I so request.

**[Agree to join charges post-arraignment]**

 I agree not to object to the referral of the additional charge preferred on DD Month YYYY to the same court-martial as the original charges preferred on DD Month YYYY. I understand that, after arraignment upon the original charges, that no additional charges may be referred to the same court-martial without my consent and I hereby waive such an objection.

**[Forfeiture of property]**

 **[ 1. Forfeiture personal property – 18 U.S.C. § 2253; *United States v. Henthorn*, 58 M.J. 556 (N-M Ct. Crim. App. 2003) (unpublished opinion) (for use in cases where computers and drives contained the child pornography or other forfeitures) ]**

 I agree to forfeit to the United States immediately and voluntarily the following assets: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, which are in the possession of the Coast Guard Investigative Service. I agree to forfeit all interests in the properties as described above and to take whatever steps are necessary to pass clear title to the United States. These steps include, but are not limited to, the surrender of title, the signing of a consent decree of forfeiture, and signing of any documents necessary to pass title to the United States before sentencing. I understand and agree that this provision is not “punishment” as described in RCM 1003, nor does it require me to waive a fundamental right at trial or a fundamental post-trial right. I further hereby waive any claim that I may have that the forfeiture of the aforementioned assets constitutes an excessive fine.

**[ 2. Assignment of any profits or proceeds from publicity – high visibility case or significant media attention expected ]**

 I agree to assign to the United States any profits or proceeds which I may be entitled to receive in connection with any publication or dissemination of information relating to my person, my work with the Coast Guard, my criminal activities, the facts and circumstances leading to my arrest and conviction, or acquired from Coast Guard files, and agree that any such profits and/or proceeds constitutes the proceeds of my (criminal activities) for purposes of [insert offense(s) pleading guilty to]. This assignment shall include all profits and proceeds for my benefit, regardless of whether such profits and proceeds are payable to myself or to others, directly or indirectly, for my benefit or for the benefit of my associates or a current or future member of my family. I shall not circumvent this assignment by assigning the rights to my story to an associate or to a current or future member of my family, or to another person or entity who would provide some financial benefit to me, to my associates, or to a current or future member of my family. Moreover, I shall not circumvent this assignment by communicating with an associate or a family member for the purpose of assisting or facilitating their profiting from a public dissemination, whether or not such an associate or other family member is personally or directly involved in such dissemination.

**[Refer case as noncapital]**

As an inducement for acceptance of this Agreement, the convening authority will authorize trial counsel (pre/post arraignment) to strike through the language “To be tried as a capital case” from the special instructions in the referral block of the charge sheet, and substitute the language “Pursuant to a pretrial agreement, capital punishment is not authorized”. If the convening authority withdraws from this Agreement as provided for in Paragraph 11 above, I understand the Convening Authority or trial counsel by direction of the Convening Authority may strike through the language, “Pursuant to a pretrial agreement, capital punishment is not authorized,” and reinsert the language, “To be tried as a capital case,” in the referral block of the charge sheet.

**[Protective order]**

I agree to avoid any contact with \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. This prohibition includes, but is not limited to unofficial physical, verbal, telephonic, text messaging or communicating with any electronic device, and making contact through third parties (i.e., friends, family, etc.), and written contact. If I come into contact with, or am inadvertently in the physical presence of any of the above-listed members, whether at a residence, restaurant, club, bar, tavern, in the workplace, or any other location, I will immediately vacate the area. I will not enter the residence, home, or apartment of the above-listed personnel, or any other residence, apartment, or building in which the aforesaid individual(s) may be located, or go within one block of the residence, apartment, or building (as measured by the nearest four intersections to the residence).

**[Restitution: select from one of the following 3 paragraphs]**

**[1. Has means to make restitution prior to date of trial]**

 I agree to make restitution by [cashier’s check/money order] in the amount of $\_\_\_\_\_\_, made payable to the economic victim of my misconduct, (Name(s) of Victim(s)). The [cashier’s check/money order] will be delivered to the trial counsel at least seven calendar days prior to the date of trial. I fully understand that failure on my part to meet this obligation may serve as the basis for the convening authority to seek to withdraw from this Agreement, making the Agreement ineffective.

**[OR]**

**[2. Will have means to make restitution after trial]**

 I agree to make restitution by [cashier’s check/money order] in the amount of $\_\_\_\_\_\_\_, made payable to the economic victim of my misconduct, (Names(s) of Victim(s)). I understand that my paying restitution to the victim is a material term of this agreement. The [cashier’s check/money order] will be delivered to the trial counsel by DD Month YYYY. I fully understand that failure on my part to meet this obligation may serve as the basis for the convening authority to seek to withdraw from this Agreement, making the Agreement ineffective, or may serve as the basis for the convening authority to vacate any or all previously suspended portions of my sentence, causing me to have to serve that previously suspended sentence.

**[OR]**

**[3. Make restitution in installments]**

 I agree to make restitution in the amount of $\_\_\_\_\_\_\_, to the economic victim of my misconduct, (Name(s) of Victim(s)), by DD Month YYYY. I expressly represent that I will have the economic means to make full restitution by DD Month YYYY. I will provide the trial counsel or staff judge advocate with a [cashier’s check/money order] made payable to (Name(s) of Victim(s)), no later than the second working day following the 1st and 15th of each month, in the amount of $\_\_\_\_\_\_. These partial payments will begin on DD Month YYYY and will be completed by DD Month YYYY. I fully understand that failure on my part to meet this obligation may serve as the basis for the convening authority to seek to withdraw from this Agreement, making the Agreement ineffective, or may serve as the basis for the convening authority to vacate any or all previously suspended portions of my sentence, causing me to have to serve that previously suspended sentence.

**[Deployed case]**

As inducement to the convening authority for acceptance of this agreement, I agree to request deferment of my confinement from the date of trial to the date that I arrive at a military detention facility in the United States. I understand that the time in transit from the (Deployment – MARCENT AOR) to the United States will not be credited towards any confinement I may receive at court-martial.

[**Appendix II. Notification provisions**](#notification)

**[\* Make sure each subparagraph is labeled with lower case letters for easy reference \*]**

**[Rape/sex assault pleas]**

My defense counsel has advised me that a guilty plea to the offense of rape, sexual assault, rape of a child, sexual assault of a child, forcible sodomy, or an attempt to commit any of these offenses, requires the sentencing authority to adjudge a dishonorable discharge/dismissal.

**[Lautenberg Amendment – use in the following cases: (1) if a crime of domestic violence; or (2) if the maximum punishment for one of the offenses in the chart at Appendix 12 is a dishonorable discharge or more than one (1) year.]**

 b. My defense counsel has advised me that my guilty pleas to the Charges and Specifications contained in this agreement may preclude me from the ownership, receipt, or transport of any firearm that has been transported in interstate or foreign commerce under 18 U.S.C. § 922(g).

**[Repayment for advanced education – use if Accused received advanced financial education assistance and could be discharged prior to fulfilling service obligation.]**

 c. My defense counsel has advised me that my guilty pleas to the Charges and Specifications contained in this agreement may result in my discharge from the USCG for misconduct, either by punitive or administrative means. This may require me to repay the Government for any and all advanced educational assistance benefits that I have received. This repayment will occur in the case that my early separation from the USCG precludes me from fulfilling any additional service requirements that were required as consideration for this advanced educational assistance.

**[Sex offender registration – Use if Accused is pleading guilty to sex offense/kidnapping**. ***See United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006); *United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013).]**

 d. My defense counsel has advised me that, as a result of my pleas, I may be required to register as a sexual offender in any state in which I am domiciled regardless of whether I remain in the Coast Guard or if I am separated. I have reviewed DoD Instruction 1325.07 (series) with my counsel, and I understand that I am entering a plea of guilty to an offense requiring sex offender registration processing within the meaning of Appendix 4 to Enclosure 2 of that instruction. Further, my counsel has advised me that, in accordance with 42 U.S.C. § 14071(d), my information in the offender registry may be accessible by the public, and I understand that I may encounter substantial prejudice from being classified as a sex offender. After discussing these requirements and the potential adverse consequences of registering as a sex offender, I believe that pleading guilty is in my best interest, and I do so voluntarily and without any coercion.

**[Retirement/VA benefits – use if Accused is close to or retirement eligible.]**

 e. My defense counsel has advised me that any punitive discharge that is adjudged and ultimately approved in my case may adversely affect my ability to receive retirement pay and any and all other veterans’ benefits accrued as a result of my military service.

f. My defense counsel has advised me that any punitive discharge that is adjudged and ultimately approved in my case may adversely affect my ability to receive veterans’ and all other benefits accrued as a result of my military service.

**[Hiss Act, 5 U.S.C § 8312 – use if Accused pleading guilty to case involving classified information or giving defense information to unauthorized person, and Accused is close to or retirement eligible.]**

 g. My defense counsel has advised me that my plea(s) of guilty may adversely affect my ability to receive retirement pay and any and all other benefits accrued as a result of my military service under the Hiss Act, 5 U.S.C. § 8312.

**[Padilla v. Kentucky, 130 S.Ct. 1473 (U.S. 2010) – Use if Accused is not a citizen of the United States or if eligible for revocation of citizenship pursuant to 18 USC** § **1439(f).]**

 h. My defense counsel has advised me that my plea(s) of guilty may adversely affect my ability to naturalize, may cause my citizenship to be revoked, or may result in other unfavorable immigrant status in the United States, and the United States could initiate deportation proceedings against me.

**[Appendix III. Examples of commonly negotiated provisions for Part II of the PTA:](#partii)**

**[Mitigate DD for BCD – GCMs only]**

1. **Punitive Discharge**: May be approved as adjudged. However, if a dishonorable discharge is adjudged, the convening authority agrees to approve only a bad conduct discharge.

 **[OR – Disapprove any punitive discharge]**

1. **Punitive Discharge:** If adjudged, any punitive discharge will be disapproved.

 **[OR – Suspend the discharge for specified number of months after CA’s action]**

1. **Punitive Discharge**: May be approved as adjudged. However, if a punitive discharge is adjudged, it will be suspended for a period of \_\_\_\_\_\_\_\_ months from the date of the convening authority’s action, at which time, unless sooner vacated, the suspended punitive discharge will be remitted without further action.

 **[OR – Suspend the discharge until EAOS]**

1. **Punitive Discharge**: May be approved as adjudged. However, if a punitive discharge is adjudged, it will be suspended until my current end of obligated service (EAOS), at which time, unless sooner vacated, the suspended punitive discharge will be remitted without further action.

 **[OR – Suspend discharge until ADSEP completed]**

1. **Punitive Discharge**: May be approved as adjudged. However, if I voluntarily waive my right to an administrative separation proceeding, the punitive discharge will be suspended until the administrative separation process is completed, and I have been discharged, at which time, unless sooner vacated, the suspended punitive discharge will be remitted without further action.

**[OR – Reduce mandatory dishonorable discharge to a bad conduct discharge]**

1. **Punitive Discharge:** The mandatory adjudged dishonorable discharge will be commuted to a bad conduct discharge.

 [**OR – Disapprove mandatory discharge in recognition of substantial assistance provided]**

1. **Punitive Discharge**: The mandatory adjudged [dishonorable discharge/dismissal] will be disapproved in accordance with the recommendation of the trial counsel in recognition for my substantial assistance in the investigation and prosecution of \_\_\_\_\_\_\_\_\_\_\_\_\_\_.

 [**OR – Suspension of mandatory discharge in recognition of substantial assistance provided]**

1. **Punitive Discharge**: The mandatory adjudged [dishonorable discharge/dismissal] will be suspended until the completion of the court-martial of United States v. \_\_\_\_\_\_\_\_\_\_\_, provided that I testify truthfully at the court-martial and in accordance with my M.R.E. 410 proffer. The trial counsel agrees that my truthful testimony in accordance with the M.R.E. 410 proffer is recognized as substantial assistance in the prosecution of another individual. [Consider use in conjunction with testimonial immunity paragraph above.]

**2. Confinement:**

**[Suspension:]** May be approved as adjudged; however, all confinement in excess of [# days/months] will be suspended for a period of **12 months** after the date of the convening authority’s action, at which time, unless sooner vacated, the suspension portion will be remitted without further action. This agreement constitutes my request for, and the convening authority’s approval of, deferment of all confinement suspended pursuant to the terms of this agreement. The period of deferment will run from the date of sentence until the date the convening authority acts on the sentence.

2. **Confinement**: May be approved as adjudged.

 **[OR – Disapprove confinement]**

2. **Confinement**: If adjudged, any confinement will be disapproved upon the convening authority’s action. This agreement constitutes my request for, and the convening authority’s approval of, deferment of all confinement awarded. The period of deferment will run from the date of sentence until the date the convening authority acts on the sentence.

 **[OR –** [**Place a cap on confinement with the excess suspended**](#Lambclause)**]**

2. **Confinement**: May be approved as adjudged. However, all confinement in excess of [\_\_\_ days/months/years] will be suspended for the period of confinement adjudged plus \_\_\_\_\_\_\_ months thereafter, at which time, unless sooner vacated, the suspended portion will be remitted without further action. This Agreement constitutes my request for, and the convening authority’s approval of, deferment of all confinement suspended pursuant to the terms of this Agreement. The period of deferment will run from the date of sentence of the court-martial until the date the convening authority acts on the sentence.

**[OR – Place a cap on confinement with the excess suspended only if a punitive discharge is awarded and Accused requests appellate leave]**

1. **Confinement**: May be approved as adjudged. However, if a punitive discharge is adjudged and I request voluntary appellate leave within \_\_\_ days of the sentence being adjudged, all confinement in excess of [\_\_\_ days/months/years] will be suspended for the period of confinement adjudged plus \_\_\_\_\_\_\_ months thereafter, at which time, unless sooner vacated, the suspended portion will be remitted without further action. This Agreement constitutes my request for, and the convening authority’s approval of, deferment of all confinement suspended pursuant to the terms of this Agreement. The period of deferment will run from the date of sentence of the court-martial until the date the convening authority acts on the sentence.

**3. Forfeiture or Fine**:

 **a. Adjudged Forfeiture:** Any adjudged forfeiture will be disapproved upon the convening authority’s action. This agreement constitutes my request for, and the convening authority’s approval of, deferment of all forfeitures awarded. The period of deferment will run from the date of sentence until the date the convening authority acts on the sentence.

 **b. Automatic Forfeiture**: Automatic forfeiture of any pay and allowances I am due during my enlistment (in the amount of $\_\_\_\_ per month) will be deferred and waived provided that I establish and maintain a dependent’s allotment in the total amount of the deferred and waived forfeiture amount during the entire period of deferment. I understand that my enlistment is projected to end on \_\_\_\_\_\_\_\_\_ and that if I am in confinement after that date, I will not receive any pay and allowances pursuant to the Coast Guard Pay Manual, COMDTINST M7220.29 (series), Chapter 2(J)(4)(c). This Agreement constitutes my request for, and the convening authority’s approval of, deferment and waiver of automatic forfeitures (in the amount of $\_\_\_\_\_ per month) pursuant to Article 58b(a)(1), UCMJ. The period of deferment will run from the date automatic forfeiture would otherwise become effective under Article 58b(a)(1), UCMJ, until the date the convening authority acts on the sentence. The deferred and waived forfeiture shall be paid to \_\_\_\_\_\_\_\_\_\_, who is my dependent. I must provide proof of this allotment to the convening authority before the convening authority acts to defer any adjudged forfeitures under this Agreement. I agree to notify the convening authority in writing if the Coast Guard fails to defer or waive the forfeitures. I understand that the period of waiver may not exceed six (6) months from the date of convening authority’s action. The convening authority agrees that the period of waiver will run for \_\_\_ months from the date of the convening authority’s action.

 **c. Fine:** Any fine will be disapproved.

**[OR Adjudged forfeiture deferred and suspended and automatic deferred/waived and fine suspended]**

**3. Forfeiture or fine**:

 **a. Adjudged Forfeitures:** See above.

 **b. Automatic Forfeitures**: See above.

 **c. Fine:** May be approved as adjudged; however, the adjudged fine will be suspended for [\_\_\_\_ months] from the date of the convening authority's action, at which time, unless sooner vacated, the suspended portion of the fine will be remitted without further action.

**[OR - Fine will be mitigated to forfeiture]**

 **c. Fine:** May be approved as adjudged; however, the adjudged fine will be mitigated to forfeiture, which I shall pay in the amount of $\_\_\_\_\_\_\_\_ pay per month [note: cannot be more than 2/3rds pay per month if SPCM]for \_\_\_\_\_ months (until the entire amount of the originally adjudged fine has been satisfied).

4. **Reduction**:

 a. **Adjudged Reduction**: May be approved as adjudged. [However, any adjudged reduction (below the pay grade of E-\_\_\_\_) will be disapproved.]

 b. **Automatic Reduction**: The automatic reduction (below the pay grade of E-\_\_\_\_) will be remitted.

 **[OR - Suspend adjudged and automatic]**

4. **Reduction**:

a. **Adjudged Reduction**: May be approved as adjudged; however, any adjudged reduction (below pay grade \_\_\_\_) will be suspended for \_\_\_\_\_\_\_ months from the date of the convening authority’s action, at which time, unless sooner vacated, the part of the adjudged reduction that was suspended will be remitted without further action. This Agreement constitutes my request for, and the convening authority’s approval of, deferment of that adjudged reduction which is to be suspended pursuant to the terms of this Agreement and would otherwise become effective under Article 57(a)(1), UCMJ. The period of deferment will run from the date the adjudged reduction would otherwise become effective until the date of the convening authority’s action.

b. **Automatic Reduction**: The automatic reduction in pay grade (below pay-grade \_\_\_\_) will be suspended for \_\_\_\_\_\_\_ months from the date of the convening authority’s action, at which time, unless sooner vacated, the part of the automatic reduction that was suspended will be remitted without further action.

 **[OR – Disapprove other lawful punishments]**

5. **Other lawful punishments**: If adjudged, any other lawful punishment will be disapproved.

 **[OR** - **Suspend other lawful punishments]**

5. **Other lawful punishments:** May be approved as adjudged, however any [restriction, hard labor without confinement, etc.] will be suspended for \_\_\_\_\_\_\_ months from the date of the convening authority’s action, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

**[Bareback special provision – special courts-martial only]**

6. I fully understand that in return for my pleas of guilty as indicated in Part I of this Agreement, the only consideration that I will receive under this Agreement is the referral of the charges and specifications in my case to a special court-martial rather than a general court-martial. I also understand that in the event that I fail to plead guilty as indicated in Part I of this Agreement, or if I fail to comply with any of the material terms of this Agreement, or if the Agreement becomes null and void for any reason, then the convening authority is free to convene an Article 32, UCMJ, preliminary hearing concerning these charges and, ultimately, to refer all charges and specifications for trial before a general court-martial.

**Annotations to Provisions: Part I**

**1.** This provision expresses the voluntary nature of the agreement. Appellant's agreement to plead guilty must be both voluntary and intelligent. RCM 705(c)(1)(a). *See also* *United States v. Burnell*, 40 M.J. 175, 176 (C.M.A. 1994). Voluntariness necessarily implies an accused must be free to accept or reject any offer made by the Government and not be induced by threats, improper harassment, misrepresentation, or promises that are by their nature improper as having no proper relationship to the prosecutor's business." *Burnell*, 40 M.J. at 176. An intelligent plea generally requires that an accused fully understands the impact of his plea and the rights he/she is waiving by entering a plea of guilty. RCM 910(c). Language stating that the offer to plead guilty originated with the defense is not required. The accused, defense counsel, trial counsel, the SJA, or the convening authority may initiate negotiation. RCM 705(d). Nevertheless, such language may be included where the pretrial agreement contains a novel provision that could be seen as contrary to public policy, as appellate courts may be more likely to uphold such a provision if it originated with the defense.

**2.** This provision indicates that the language of the pretrial agreement constitutes the entire agreement between the parties and that there are no sub rosa agreements. All terms, conditions, and promises between the parties must be in writing. RCM 705(d)(2). The military judge must ensure that the pretrial agreement encompasses all the understandings of the parties. RCM 910(f)(3, 4); *United States v. Smith*, 56 M.J. 271, 272-73 (C.A.A.F. 2002).

**3.** This provision communicates the Accused’s understanding about the potential sentence components that may be limited by the agreement. Each category should be addressed. *United States v. Sutphin*, 49 M.J. 534, 536 (C.G. Ct. Crim. App. 1998); *see United States v. Edwards*, 20 M.J. 439, 439 (C.M.A. 1985) (a fine could not be imposed where the pretrial agreement did not expressly state that a fine could be imposed). Although “other lawful punishment” is rarely imposed and does not appear to be a fertile source of appellate litigation, it should be addressed. If such a punishment is likely or of concern to an accused, the agreement should explicitly state what will and will not be approved.

This language operates to impose a limit on each divisible portion of the sentence. A sentence limitation in a pretrial agreement may operate in one of two ways, depending upon the intent of the parties: (1) a limit on each divisible portion of the sentence; or (2) a limit only on the overall severity of the sentence. *United States v. Sparks*, 15 M.J. 895, 895 (A.C.M.R. 1983) (citing [*United States v. Brice,* 17 U.S.C.M.A. 336,](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967003567&pubNum=3431&originatingDoc=Id887e36fb12911d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) 38 C.M.R. 134 (1967)). For example, if a convening authority agrees to disapprove any sentence in excess of a BCD and six months of confinement and the accused is sentenced to twelve months of confinement but no BCD, under the first approach the convening authority could approve only six months of confinement. Under the second approach, however, he could approve twelve months of confinement because, by law, twelve months of confinement is less severe than a BCD. *See Frazier v. McGowan*, 48 M.J. 828 (C.G. Ct. Crim. App. 1998). There is nothing inappropriate about drafting a pretrial agreement so that it operates only as a cap on the overall sentence. However, given the uncertain application of this concept and the potential for misunderstanding, the intent to do so must be clearly stated. The following language is recommended:

I understand, and the sentence limitation portion of this agreement addresses, each of the following distinct parts of the sentence that may be adjudged in this case: (1) punitive discharge, (2) confinement and/or restraint, (3) forfeiture and/or fine, (4) reduction in pay grade, and (5) any other lawful punishment. I further understand that, for purposes of this agreement, the sentence is to be considered as a whole and that nothing in this agreement shall preclude the convening authority from exercising the independent powers to commute, mitigate, or otherwise change any or all of the sentence, so long as the severity of the whole adjudged sentence is not increased thereby and so long as the convening authority does not by the action exceed the total agreed or adjudged sentence, whichever is less.

**5.** These provisions establish that the accused clearly understands the full effect of his or her guilty plea. A plea is not provident if the collateral consequences are major and the appellant's misunderstanding of the consequences (a) results foreseeably and almost inexorably from the language of a pretrial agreement; (b) is induced by the trial judge's comments during the providence inquiry; or (c) is made readily apparent to the judge, who nonetheless fails to correct that misunderstanding. *United States v. Smith*, 56 M.J. 271, 273 (C.A.A.F. 2002).

**6.** This provision explicitly states the Coast Guard’s policy regarding administrative reductions. *See* Coast Guard Military Justice Manual, COMDTINST M5810.1E, ¶4.E.1 (“[t]he administrative action of automatic reduction to the lowest enlisted pay grade authorized under Article 58a, UCMJ, shall as a matter of policy not be effected in the Coast Guard”). It is important to include this provision to avoid ambiguity and possible oversight by other service counsel and military judges since administrative reductions are common in the other services.

**7.** This provision explains the operation of adjudged and automatic forfeitures. It also clarifies that the accused will not receive any pay if confined beyond his EAOS. This prevents any misunderstanding over pay issues, which can render a plea improvident. *United States v. Perron*, 58 M.J. 78, 86 (C.A.A.F. 2003). *See* [*United States v. Williams,* 53 M.J. 293 (2000)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000480383&pubNum=509&originatingDoc=I289bf8f2b12f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*United States v. Hardcastle,* 53 M.J. 299 (2000)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000480385&pubNum=509&originatingDoc=I289bf8f2b12f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). For a special court-martial, the applicable amount of forfeitures is 2/3 pay; for a general court-martial, total forfeitures apply.

**9.** This provision restates RCM 705(d)(4)(A). It effectively counters an argument on appeal that the accused desired to change his plea to not guilty, but thought the guilty plea was irrevocable.

**10.** This provision recites the obligations of the accused to perform under the agreement. The agreement will be null and void regardless of why the convening authority or the accused withdraws. Note, however, that a convening authority may not be able to withdraw if there has been detrimental reliance or substantial performance by an accused. RCM 705(d)(4)(B); *United States v. Dean*, 67 M.J. 224, 227 (C.A.A.F. 2009).

**12**. IAW RCM 705(d)(4)(B), “[t]he convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement . . . .” However, the convening authority does not have unfettered discretion to unilaterally withdraw from a PTA before trial. A convening authority will generally be bound by an agreement once an accused relied upon the agreement and performed some affirmative act or omission amounting to detrimental reliance. *See generally United States v. Villareal*, 52 M.J. 27 (C.A.A.F. 1999) (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). *See also* [Major Mary M. Foreman, *Let’s Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 Mil. L. Rev. 53, 99–105](http://web2.westlaw.com/find/default.wl?DB=1603&SerialNum=0287790466&FindType=Y&AP=&RS=WLW4.05&VR=2.0&FN=_top&SV=Split&MT=MaritimeLaw&UTid=%7b802F11E4-0F39-4880-9E2A-A4F0BF2BAD76%7d&RLT=CLID_FQRLT5943186) (2001) (discussing the specific performance of the pretrial agreement).

Practice Note: The precise process involved when a convening authority decides that withdrawal is appropriate is not well defined. It appears that a reasonable approach is for the convening authority to make a determination to withdraw and convey, in writing to the accused, the decision to withdraw. The accused must then move for appropriate relief. *See Villareal*, 52 M.J. at 29; R.C.M. 705(b)(2)(C) (discussion). The burden then shifts to the Government to prove by a preponderance of the evidence that there was a material breach of the agreement. *See* *United States v. Bulla,* 58 M.J. 715, 721-22 (C.G. Ct. Crim. App. 2003).

**13**. These provisions address how misconduct by the accused that occurs after signing the pretrial agreement, but before the convening authority’s action is taken, will impact the agreement. RCM 705(c)(2)(D). The procedural rules associated with vacating a suspended sentence (*see* R.C.M. 1109 and Article 72, UCMJ) apply under these circumstances in order to satisfy due process requirements. *Bulla,* 58 M.J. at 719-20. The misconduct must constitute a “material breach” of the pretrial agreement and must be established by a preponderance of the evidence, looking at the parties’ reasonable expectations upon entering the agreement. *Id.* at 720.

Practice Note: The Coast Guard Court of Criminal Appeals (CGCCA), in dicta, expressed concern about the use of this misconduct provision when Part II of the PTA states that the convening authority agrees to disapprove part of a sentence, rather than agrees only to suspend punishment. *Id.* at 723-24. However, the CGCCA has not yet readdressed the issue.

**14**. This provision requires the convening authority comply with the procedural rules contained in Art. 72, UCMJ, and R.C.M. 1109 before vacating or setting aside a suspended sentence and places the accused on notice that the convening authority can move to vacate any suspended sentence due to post-trial misconduct. This ensures that post-trial misconduct clauses must comply with minimum due process protections.

**15**. This provision restates M.R.E. 410 to ensure that the accused will be unsuccessful arguing on appeal that he wanted to withdraw from the agreement but did not feel comfortable doing so because he thought the agreement would be used against him in some way.

**Annotation Provisions: Part II**

**Withdraw** **language to which accused pled Not Guilty.** Charges should normally be dismissed without prejudice. This preserves the government’s ability to resurrect the charges in the event of a subsequent breach. Should the Accused breach the agreement after charges are dismissed (e.g., the military judge reopens providency during sentencing and sets aside a guilty plea), the government would not have the option of reinstituting charges that had been dismissed with prejudice.

**Government** **going forward on Not Guilty pleas.** Unless the pretrial agreement specifically states the government will not go forward on certain charges, it may be presumed that the government retains the option of proving any offense to which the accused pleaded not guilty. To eliminate any potential misunderstanding, the pretrial agreement should contain language explicitly stating that the government intends to go forward on other charges.

Practice Pointer: The disposition of charges to which an accused pleads not guilty is a source of frequent error. If the government agrees to withdraw specifications, this must be done after the military judge accepts the guilty pleas, but before the entry of findings. The military judge then should not enter findings on the withdrawn specifications. If the government agrees to not “go forward,” the charges and specifications remain before the military judge. Since the government will not have introduced any evidence on these specifications, the military judge must enter findings of “not guilty.” Double jeopardy precludes the government from resurrecting any charges where a not guilty finding has been entered, even if the accused subsequently breaches the pretrial agreement.

**Waive** **Administrative Discharge Board.** Practice Pointer: A waiver of an administrative discharge board cannot predate the date that the member is formally notified of the administrative separation action. Commands have the option of initiating administrative separation action and securing the waiver prior to the court-martial. Administrative separation action can be initiated even while a court-martial is pending; although the command must ensure that final action is stayed pending the outcome of the court-martial. Alternatively, the command could await the results of the court-martial and initiate administrative separation if a punitive discharge is not adjudged. Pursuant to this term of the pretrial agreement, the accused will be obligated to submit a written waiver; however, if the adjudged punishment is less than the cap provided in the PTA, he will have little incentive to do so.

**Testify With Grant** **of Immunity in another case**. A promise to testify as a witness in the trial of another person is permissible, so long as the clause only requires the accused to testify or testify truthfully. The clause will likely be invalid if it requires the accused to testify in conformity with his pretrial statements. *See United States v. Conway*, 42 C.M.R. 291, 294 (C.M.A. 1970).

**Testify Without Grant** **of Immunity in another case.** Caution: Although this is probably a permitted term, this has not been clearly decided. *See United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997). A provision such as this arguably compromises an accused’s right against self-incrimination and should be used with caution. The government should not propose this term. However, if this term is used, the agreement should clearly state that the offer to testify without a grant of immunity originated with the defense.

**Call** **no witness** **or call only local witnesses.** The accused must have an opportunity to present evidence on sentencing. If the PTA precludes out-of-area witnesses, alternative means of introducing evidence must be afforded. *See* [*United States v. Sunzeri*, 59 M.J. 758 (N.M. Ct. Crim. App. 2004)](http://web2.westlaw.com/find/default.wl?RS=WLW4.05&VR=2.0&RP=%2ffind%2fdefault.wl&Cite=59+mj+758&FindType=F&TR=C8EA112A-DF38-46D8-B12F-DFD4ACD8E811&Rlt=CLID_FQRLT4159186&SV=Split&MT=MaritimeLaw&UTid=%7B802F11E4%2D0F39%2D4880%2D9E2A%2DA4F0BF2BAD76%25) (provision in pretrial agreement prohibiting accused from presenting at sentencing the testimony of witnesses located outside of Hawaii, either in person, by telephone, by letter, or by affidavit, violated court-martial rule prohibiting enforcement of term or condition in pretrial agreement which deprives accused of “the right to complete sentencing proceedings).

**Agreement to Waive Certain Motions**. Agreements to waive pretrial motions are the most problematic area of pretrial agreements. In a PTA, an accused cannot waive 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, and the complete and effective exercise of post-trial and appellate rights in a pretrial agreement. RCM 705(c)(1)(b). Similarly, a pretrial agreement that prohibits the accused from making pretrial motions may also be improper. R.C.M. 705(c)(1)(b) (discussion). Thoroughly research current case law before inserting such a provision to waive certain motions.

The agreement should clearly specify which motions are waived. To avoid appellate challenges, agreements to waive motions should be as specific as possible; the use of “all waivable motions” language is unacceptable, even in light of CAAFs decision in *United States v. Gladue*, 67 M.J. 311, 315 (C.A.A.F. 2009) (upholding PTA term waiving “all waivable motions”).

An accused can likely waive the following motions, which should originate from the accused:

1. Challenges to search and seizure and out-of-court identification. *United States v. Jones*, 23 M.J. 305, 306 (C.M.A. 1987) (record established that pretrial agreement providing that defense counsel would not make motions contesting legality of search and seizure or challenging legality of out-of-court identifications was *freely conceived defense product*, and thus did not render improvident plea pursuant to agreement);
2. Unlawful pretrial punishment. *United States v. McFadyen*, 51 M.J. 289, 289 (C.A.A.F. 1999) (Article 13 waiver was not against public policy because accused was fully aware of the implications and the waiver was voluntary. However, the military judge “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”);
3. Evidentiary objections. *United States v. Rivera*, 46 M.J. 52, 54 (C.A.A.F. 1997);
4. Statute of limitations. *United States v. Clemens*, 4 M.J. 791, 793 (N.M.C.M.R. 1978), *pet.* *denied*, 5 M.J. 207 (C.M.A. 1978) (statute of limitations does not raise a jurisdictional question; rather, it is a matter in defense that may be taken advantage of as a plea in bar of trial or punishment and that may be the subject of an informed waiver);
5. Multiplicity and unreasonable multiplication of charges. *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009);
6. Right to challenge the underlying pretrial agreement. *United States v. McFadyen*, 51 M.J. 289, 290-91 (C.A.A.F. 1999); and
7. Unlawful command influence during preferral of charges. [*United States v. Weasler*, 43 M.J. 15, 19 (C.A.A.F. 1995)](http://web2.westlaw.com/find/default.wl?DocName=43+M%2EJ%2E+15&Findtype=5&SerialNum=1995193501&CaseCite=46+M%2EJ%2E+52&RS=WLW4.05&VR=2.0&SV=Split&FN=_top&MT=MaritimeLaw&UTid=%7b802F11E4-0F39-4880-9E2A-A4F0BF2BAD76%7d&RLT=CLID_FQRLT566186) (where unlawful command influence in the preferral of charges was alleged, it was permissible for the accused to offer to waive unlawful command influence). Caution: Even a valid waiver in a PTA of UCI during preferral of charges can be reviewed by appellate courts “when there are actions by commanders that undermine public confidence in our system of justice or affect the rights of an accused.” *Id*.

**PRACTICE POINTERS ON SENTENCE LIMITATIONS:**

Punishments may be suspended for a stated period of time or until the occurrence of an anticipated future event, but the period of suspension may not be unreasonably long. R.C.M. 1108(d). The most common “anticipated future event” is release from confinement. Thus, it is common to suspend confinement for the entire duration of the confinement served, plus some period, typically 1 year). (e.g., “confinement shall be suspended from the date of the convening authority’s action until 1 year from the date the accused is released from confinement pursuant to this agreement.”).

Do not mix units of measurement. One month is not necessarily the same as thirty days; nor is twelve months necessarily the same as one year. *See* [SECNAVINST 1640.9C](http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-600%20Performance%20and%20Discipline%20Programs/1640.9C.pdf), Chapter 9. If the military judge announces a sentence using days, for example, but the pretrial agreement uses months, ensure all parties understand the precise impact of the agreement.

It is a good practice for both trial and defense counsel to compute the exact date the accused will be released from confinement accounting for all applicable credits and then ensure such happens. Brigs have been known to err in this calculation – both long and short. A calculation which errs on the long side most assuredly will create issues on appeal. *See* *United States v. Weber*, 56 M.J. 736 (C.G. Ct. Crim. App. 2002). For instructions on how to calculate the proper release date, see [SECNAVINST 1640.9](http://neds.nebt.daps.mil/1640.htm)C, Chapter 9.

**Appellate** **leave**. Appellate leave is an excess leave status and the accused is not entitled to pay or allowances. See COMDINST M1000.8, ¶2.A.21. If an accused is sentenced to a punitive discharge but the convening authority has not yet approved the sentenced, the member may request appellate leave. If the member does not request appellate leave, he must generally be retained in a pay status until the convening authority takes action on the case, unless he is beyond his EAOS. Once the punitive discharge has been approved, the member may be required to take appellate leave until the discharge is executed. The language requiring the accused to submit a request for appellate leave should be used whenever there is a possibility an accused will be out of confinement before the convening authority’s action, to preclude the possibility the government will have to return the member to duty.

**Confinement.** When the parties agree to a cap in confinement, they must consider and come to an agreement on whether any confinement that is contingent upon payment of an adjudged fine is included in the confinement cap. Fines may be adjudged with fine-enforcement provisions, even if there has been no unjust enrichment, as long as the combination of fines and forfeitures does not exceed the court’s jurisdictional authority and the total period of confinement does not exceed the maximum punishment authorized for the offense. *See, e.g., United States v. Gonzalez,* 64 M.J. 650, 652 (C.G. Ct. Crim. App. 2007).

Problems arise when there is a cap in confinement and also confinement contingent upon paying a fine. Without clarity, appellate issues arise as to whether the disapproval or suspension of confinement applies to this contingent confinement. *See, e.g., Tillman v. United States,* 32 M.J. 962 (A.C.M.R. 1991). Trial counsel must ensure that the convening authority fully understands whether his action to suspend/disapprove confinement affects the contingent confinement, and both parties should make sure that it is addressed on the record with the military judge. The cap can apply to all confinement or only to confinement that is not contingent, as long as it is addressed on the record and the parties have come to an agreement. If counsel anticipates that there may be an issue with contingent confinement, especially if confinement will be capped at less than one year or the defendant was unjustly enriched, they should feel free to contact CG-0946 for further guidance. Additionally, a white paper on this issue is forthcoming.

**Lamb** **Clause**. The Lamb Clause ensures the accused will be released from confinement when called for in the pretrial agreement, even if the release date precedes the action. Confinement begins to run on the date it is adjudged, whether or not an accused is actually confined, unless the confinement is suspended or deferred. The convening authority cannot suspend the sentence until he/she takes action. [*United States v. Lamb*, 22 M.J. 518, 518-19 (N.M.C.M.R. 1986)](http://web2.westlaw.com/find/default.wl?DocName=22+M%2EJ%2E+518&Findtype=5&SerialNum=1986117663&CaseCite=55+M%2EJ%2E+588&RS=WLW4.05&VR=2.0&SV=Split&FN=_top&MT=MaritimeLaw&UTid=%7b802F11E4-0F39-4880-9E2A-A4F0BF2BAD76%7d&RLT=CLID_FQRLT2713186). Thus, the Lamb clause defers that portion of the sentence which is to be suspended, until such time as the convening authority actually suspends it (i.e., at CA action). The Lamb clause also preserves that portion of the confinement to be suspended. Without deferral, confinement would continue to run uninterrupted even after the accused was released pursuant to the agreement. *See United States v. Riggs*, 59 M.J. 614 (C.G. Ct. Crim. App. 2003); *United States v. Anderson*, 55 M.J. 588 (C.G. Ct. Crim. App. 2001).

**Forfeitures** The interplay between adjudged and automatic forfeitures can be complicated and both trial and defense counsel must understand how these provisions work.