

## Pretrial Agreements: Going Beyond the Guilty Plea

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*A defendant can “maximize” what he has to “sell” only if he is permitted to offer what the prosecutor is most interested in buying.<sup>1</sup>*

### I. Introduction

Since the founding of the modern Uniform Code of Military Justice (UCMJ), the use of pretrial agreements in military justice has constantly evolved.<sup>2</sup> Once the red-headed stepchild of military justice, pretrial agreements are now viewed as a significant piece of the military justice system.<sup>3</sup> Drafting and reviewing pretrial agreements are critical skills for every military justice practitioner.

Counsel who lack the requisite experience often make one of two errors. The first, but rare, mistake is to insert an improper term, creating unnecessary appellate issues and possibly jeopardizing the findings and sentence on appeal. While uncommon, when an appellate court sets aside the finding or sentence because of a poorly drafted pretrial agreement term, it can be a spectacular mistake. The second (but arguably greater) harm is caused by counsel who are too timid when considering the terms of a pretrial agreement. These counsel may fail to come to an agreement or negotiate a less satisfactory agreement than is otherwise possible because they insist on sticking to boiler-plate guilty plea language (e.g., an agreement to plead guilty in exchange for a simple sentence limitation) due to inexperience.

While the dangers of having an appellate court scrutinize an agreement's erroneous term are clear, the dangers of being too cautious when drafting agreements are less clear and warrant discussion. When attorneys fail to consider all the permissible terms when considering a pretrial agreement, they unnecessarily handicap themselves. First, there is clear judicial economy anytime parties can avoid litigating an issue. The parties can narrow the contested issues by agreeing to waive motions, to elect trial by military judge alone, to stipulate to facts, or to otherwise

resolve witness production and evidence issues. Second, the defense rarely ever actually, rather than tactically, disputes every element of the Government's case.<sup>4</sup> For example, background facts in many cases remain undisputed, and only one or two elements are actively contested. By stipulating to the uncontested facts in exchange for a limitation on sentence—albeit a limitation not nearly as favorable as if the accused had plead guilty—both sides get a bargained for benefit: The Government is relieved of having to prove elements that, although not directly challenged, could be administratively burdensome, and the defense, in stipulating to facts they did not plan to contest, has reduced the accused's punitive exposure. Both sides, in making this agreement, have narrowed the contested issues, allowing the parties and the system to focus the trial on issues actually in contention.

Accordingly, this paper seeks to provide military justice practitioners with the tools necessary to draft comprehensive pretrial agreements. First, the paper will examine the regulatory limits governing pretrial agreements. These limits, though clear, must be understood by attorneys practicing in military courts. Second, this paper will distill a few basic rules from case law which, if followed, should ensure that almost any term in a pretrial agreement will survive appellate scrutiny. By knowing both the strictures of the Rules for Courts-Martial (RCM) and those established by the appellate courts, counsel should have the skills to negotiate and implement any pretrial agreement with confidence.

### II. The Bright Line—Terms Permitted by the Rules for Courts-Martial

Before even talking to opposing counsel about a pretrial agreement, new practitioners should review both old agreements and the RCM. Pretrial agreements are governed by RCM 705, which specifies both permissible and impermissible terms.<sup>5</sup> Specified permissible terms include

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<sup>1</sup> *United States v. Mezzanatto*, 513 U.S. 196, 208 (1995).

<sup>2</sup> For an excellent summary of the history of pretrial agreements, see Major Mary M. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53 (2001).

<sup>3</sup> To see how far the use of pretrial agreements has changed in military justice, compare *United States v. Schmeltz*, 1 M.J. 8, 11 (C.M.A. 1975) (rejecting the use of a term requiring trial by judge alone in the pretrial agreement), with *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(c)(2)(e)* (2008) [hereinafter MCM] (specifically allowing trial by military judge alone).

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<sup>4</sup> For example, in many rape cases, the parties may agree about everything except whether there was consensual intercourse. In such cases, the parties can stipulate to all the uncontroverted facts leading up to and following the alleged rape. This could include stipulating to the DNA test results, crime scene photos, how much alcohol was consumed, and any prior relationship between the victim and accused. The sentence limitation would be proportional to the extent of the stipulation, and in some cases, it would never be in the accused's interest to enter into such a deal, regardless of the punitive exposure. Of course, since the case remains contested, such stipulations should be drafted using neutral language.

<sup>5</sup> MCM, *supra* note 3, R.C.M. 705.

promises to stipulate to certain facts, testify as a witness, provide restitution to victims, refrain from committing additional misconduct, waive the right to an Article 32 investigation, waive the right to forum selection, and waive the Government's requirement to produce sentencing witnesses.<sup>6</sup> Impermissible terms include any term that is not voluntarily entered into by the accused.<sup>7</sup> Additionally, a pretrial agreement may not deprive the accused of "the right to counsel; the right of 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."<sup>8</sup> Finally, RCM 705 allows the relevant service Secretary to prescribe limitations on the use of pretrial agreements.<sup>9</sup>

Though small, the proscription on the use of impermissible terms still imposes a cost. For example, prohibiting an accused from bargaining away his appellate rights, even in cases with no appealable issues, creates two costs. First, the accused is denied the opportunity to receive a lighter sentence in exchange for knowingly waiving a right.<sup>10</sup> Second, since few accused waive appellate review

(given the strict prohibition on receiving anything in return), the appellate system is forced to divert resources from reviewing contested cases to reviewing guilty pleas.<sup>11</sup>

Finally, in addition to the enumerated list of impermissible terms, RCM 705 also prohibits any term which is contrary to "public policy."<sup>12</sup> Since RCM 705 clearly delineates many permissible and impermissible terms, most appellate litigation on pretrial agreements focuses on whether a term or condition violates public policy.<sup>13</sup>

### III. Beyond the Bright Line—When Does a Term Violate Public Policy?

The terms expressly permitted by RCM 705 are clear enough and should not pose a problem to most attorneys. They are, however, hardly comprehensive. Attorneys who confine themselves to drafting only agreements that strictly conform with the RCM severely limit their practice. Critically, RCM 705 is permissive in nature, and "terms or conditions . . . which are not prohibited" are allowable under the rule.<sup>14</sup> While the rule prevents the accused from bargaining away "certain fundamental rights," it allows "the accused substantial latitude to enter into terms or conditions as long as the accused does so freely and voluntarily."<sup>15</sup>

Not surprisingly, appellate courts have approved terms other than those expressly contained in the *Manual for Courts-Martial*. In this section, I will analyze those cases and define the rules that govern what makes a pretrial agreement term permissible or impermissible. The rules are remarkably few, and if followed, they allow practitioners almost free reign in writing pretrial agreements.

<sup>6</sup> *Id.* R.C.M. 705(c)(2); *see also* United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978) (finding term in pretrial agreement requiring the accused enter into a stipulation of fact was not an illegal collateral condition); United States v. Reynolds, 2 M.J. 887, 888 (A.C.M.R. 1976) (finding a provision requiring the accused to testify truthfully in other proceedings to be permissible); United States v. Callahan, 8 M.J. 804, 806 (N.M.C.M.R. 1980) (allowing a term requiring that the accused pay cash restitution to victims acceptable and cautioning against restitution "in-kind," such as labor); United States v. Dawson, 10 M.J. 142, 150 (C.M.A. 1982) (approving "no misconduct" provision in plea deal, but convening authority must give accused due process before setting aside sentence limitation); United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982) (finding that it is permissible to waive the Article 32 Investigation as part of a pre-trial agreement); United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975) (approving a plea deal in which the accused was required to request trial by judge alone); United States v. Mills, 12 M.J. 1 (C.M.A. 1981) (allowing accused to waive Government production of sentencing witnesses as part of pretrial agreement and allowing, but finding burdensome, a term that deferred confinement and clemency until after all appeals were complete).

<sup>7</sup> MCM, *supra* note 3, R.C.M. 705(c)(1)(A); *see, e.g.*, United States v. Care, 40 C.M.R. 247 (1969) (finding the accused's plea was not knowing when the accused claimed that he would not have pled guilty to desertion if the trial court had explained that the charge required he had the "intent to remain away permanently").

<sup>8</sup> MCM, *supra* note 3, R.C.M. 705(c)(1)(B); *see also* United States v. Holland, 1 M.J. 58 (C.M.A. 1975) (reversing findings because the pretrial agreement infringed on military judge's role by requiring accused to enter pleas before making any motions).

<sup>9</sup> MCM, *supra* note 3, R.C.M. 705(a). Army regulations impose no restrictions on the types of pretrial agreements. *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (16 Nov. 2005) (failing to discuss any limitation on pretrial agreement types). In fact, rather than limiting an agreement's terms, regulations affirmatively require convening authorities to consider requiring the accused to pay restitution. *Id.* para. 18-16c ("Court-martial convening authorities will consider the appropriateness of requiring restitution as a term and condition in pretrial agreements.").

<sup>10</sup> *See* John F. O'Connor, *Foolish Consistencies and the Appellate Review Of Courts-Martial*, 41 AKRON L. REV. 175, 188 (2008) (discussing the costs of appellate review). However, "the court-martial rules . . . prohibit the accused from trading away his appellate rights as part of plea negotiations

and prohibit the government from offering the accused any inducement at all, such as sentencing relief, in return for a waiver of appellate review." *Id.* at 191-92.

<sup>11</sup> *Id.* at 188.

<sup>12</sup> MCM, *supra* note 3, R.C.M. 705(d)(1) ("Either the defense or the government may propose any term or condition not prohibited by law or public policy.").

<sup>13</sup> *See, e.g.*, United States v. Sunzeri, 59 M.J. 758, 759 (N-M. Ct. Crim. App. 2004) (finding provision that prohibited accused from presenting sentencing evidence violated public policy); United States v. Thomas 60 M.J. 521, 527 (N-M. Ct. Crim. App. 2004) (discussing whether an accused may waive clemency in a pretrial agreement); United States v. Mitchell, 62 M.J. 673, 675 (N-M. Ct. Crim. App. 2006) (discussing whether pretrial agreement waiving accused's right to file unreasonable multiplication of charges motion violates public policy).

<sup>14</sup> MCM, *supra* note 3, R.C.M. 705(b)(1).

<sup>15</sup> *Id.* R.C.M. 705(c) analysis, at A21-40.

## A. A Brief History—The Retreat from Paternalism

In the initial years of the UCMJ, courts were extraordinarily paternalistic in reviewing pretrial agreements.<sup>16</sup> Terms that RCM 705 now expressly permit, such as the promise not to engage in post-trial misconduct, were initially viewed as potentially violative of public policy.<sup>17</sup> Appellate courts once scrutinized and expressly frowned upon any pretrial agreement that contained any term other than a limitation on sentence.<sup>18</sup>

The appellate courts have since (at least in this regard) abandoned their past paternalism and now have an expansive and permissible attitude towards pretrial agreements.<sup>19</sup> Courts suggest that “an otherwise valid guilty plea will rarely, *if ever*, be invalidated on the basis of plea-agreement provisions proposed by the defense.”<sup>20</sup> Even when the Government proposes a term, “[o]nly actions which may reasonably be construed as attempts to orchestrate the trial proceeding”<sup>21</sup> or terms that attempt to turn “the trial proceedings into an empty ritual”<sup>22</sup> will be rejected. This relative flexibility should benefit both sides of the bargaining table. When the courts prohibit a term, the prosecutor’s hands are tied and the accused is prevented from benefiting from the otherwise agreed upon term.<sup>23</sup>

## B. Rule #1—The Rules Governing Courts-Martial Are Presumptively Waivable by the Accused in a Pretrial Agreement

After the Supreme Court’s decision in *United States v. Mezzanatto*,<sup>24</sup> the Court of Appeals for the Armed Forces (CAAF) retreated further from its past paternalism. In *Mezzanatto*, the defendant was arrested in a sting operation for trying to sell a pound of methamphetamine to an

undercover narcotics agent.<sup>25</sup> Three months later, the defendant and his attorney requested to meet prosecutors.<sup>26</sup> At the meeting, “the prosecutor informed respondent that . . . if he wanted to cooperate he would have to be completely truthful. . . . [and] would have to agree that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial.”<sup>27</sup> During the subsequent discussions with the prosecutor, the defendant admitted that he knowingly attempted to sell methamphetamine to the undercover agent but attempted to minimize his role.<sup>28</sup> Convinced that the defendant was not being completely truthful about his culpability in the narcotics trade, the prosecutor broke off negotiations.<sup>29</sup> During the subsequent contested trial the defendant took the stand and claimed that “he was not involved in methamphetamine trafficking.”<sup>30</sup> The prosecutor then confronted the accused with his earlier statements, made during plea negotiations, where he had admitted to knowingly attempting to sell methamphetamine.<sup>31</sup>

Federal Rule of Evidence 410, which is substantively identical to Military Rule of Evidence 410, prohibits using admissions made during plea negotiations at trial.<sup>32</sup> In *Mezzanatto*, the Supreme Court had to decide whether a prosecutor could require a defendant to waive Rule 410’s protections as a precondition to entering plea negotiations.<sup>33</sup> In determining that the agreement was enforceable, the Court held that the rules governing evidence and criminal procedure were “presumptively waivable.”<sup>34</sup> In *United States v. Rivera*, the CAAF found this presumption applies also to courts-martial.<sup>35</sup>

In *Rivera*, the court determined that Article 36, UCMJ, “sets out the congressionally mandated policy” that court-martial procedures, to the extent practicable, mirror the

<sup>16</sup> See, e.g., *United States v. Schmeltz*, 1 M.J. 8, 11 (C.M.A. 1975) (agreeing that pretrial agreement provisions for a trial by judge alone had “the appearance of evil”).

<sup>17</sup> See *United States v. Dawson*, 10 M.J. 142, 148-49 (C.M.A. 1981) (“We do not believe, however, that this pretrial agreement clause is a proper tool to [prohibit post-trial misconduct].”).

<sup>18</sup> Compare *United States v. Cummings*, 38 C.M.R. 174, 177 (C.M.A. 1968) (concluding that agreements should be limited to “bargaining on the charges and sentence”), with *United States v. Rivera*, 46 M.J. 52, 54 (C.A.A.F. 1997) (enforcing any agreement not prohibited by the rules).

<sup>19</sup> The hesitancy among Army practitioners to consider aggressive pretrial agreements may in part be the result of institutional inertia stemming from the courts’ past paternalism. While the courts have evolved, some practitioners may be reluctant to abandon their tried and true ways.

<sup>20</sup> *United States v. Gibson*, 29 M.J. 379, 382 (C.M.A. 1990) (citing *United States v. DeYoung*, 29 M.J. 78, 81 (C.M.A. 1989) (emphasis added)).

<sup>21</sup> *United States v. Jones*, 23 M.J. 305, 307 (C.M.A. 1987).

<sup>22</sup> *Id.* at 307 n.4.

<sup>23</sup> *Rivera*, 46 M.J. at 54.

<sup>24</sup> 513 U.S. 196 (1995).

<sup>25</sup> *Id.* at 198.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 198–99.

<sup>29</sup> *Id.* The respondent attempted to minimize his role in the manufacture of methamphetamine by claiming that he had not visited the drug lab for at least a week before his arrest. Police surveillance proved otherwise. As the prosecutor believed that the respondent was not fulfilling his commitment to be truthful, he ended negotiations immediately. *Id.* at 199.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> FED. R. EVID 410 (“[E]vidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who . . . was a participant in the plea discussions: . . . any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.”).

<sup>33</sup> *Mezzanatto*, 513 U.S. at 198–99.

<sup>34</sup> *Id.* at 201.

<sup>35</sup> *United States v. Rivera*, 46 M.J. 52, 53 (C.A.A.F. 1997)

procedures used in the U.S. district courts.<sup>36</sup> Since the Supreme Court found that the rules of criminal procedure were presumptively waivable in district court, under Article 36, the rules of criminal procedure should be similarly waivable in a court-martial.<sup>37</sup>

*Rivera* reveals the extent to which the accused may trade away his rights for leniency.<sup>38</sup> In *Rivera*, the accused agreed to make no motions and agreed to testify in any trial related to his case *without* a grant of immunity.<sup>39</sup> While the court found these terms expansive, the CAAF refused to nullify a pretrial agreement because of the “mere potential for abuse of prosecutorial bargaining power.”<sup>40</sup> Rather, the court stated that only when a “case-by-case” inquiry finds evidence that the accused’s waiver of rights was “the product of fraud or coercion” will the accused be entitled to a remedy.<sup>41</sup>

*United States v. Francisco* provides another example.<sup>42</sup> The court refused to even consider the accused’s claim that the charge failed to state an offense because it found “that the appellant ha[d] waived his right to complain about the specification, on appeal, when he agreed to a pretrial agreement in which he agreed to waive all waivable claims.”<sup>43</sup> Amazingly, the court found that, absent plain error, the accused had even waived the right to contest the validity of a charged specification.<sup>44</sup>

The extent to which the CAAF is willing to let an accused waive his rights recently became clear when the court decided *United States v. Gladue*.<sup>45</sup> In *Gladue*, the accused, as part of a pretrial agreement for the attempted murder of court-martial witnesses, agreed to “waive any

waivable motions.”<sup>46</sup> During a colloquy with defense counsel, the military judge asked which motions the defense was waiving.<sup>47</sup> The defense counsel mentioned several motions that the accused intended to waive, but never expressly discussed the possibility of waiving motions concerning the unreasonable multiplication of charges.<sup>48</sup> On appeal, for the first time, the accused claimed that the charges were unreasonably multiplied.<sup>49</sup> In response, the Government argued that the accused had waived this issue when he agreed to waive any waivable motions.<sup>50</sup>

The central issue the CAAF decided was whether a waiver of an issue is “knowing” when the issue is never explicitly discussed in court. Put differently, can an accused knowingly waive issues he is unaware of? The CAAF ruled in the affirmative, holding that the accused had knowingly waived his rights when he agreed to waive any waivable motions.<sup>51</sup> Even though “motions relating to multiplicity and unreasonable multiplication of charges were not among those subsequently discussed by the military judge and the civilian defense counsel,” the waiver was still valid.<sup>52</sup> Consequently, all Government counsel should bargain for a similar provision in future pretrial agreements. Such a provision can only strengthen the Government’s case on appeal.

It should now be clear that when drafting pretrial agreements, practitioners should start with the assumption that the accused is free to waive almost any rule or right, and an accused is free to bargain away these rights in exchange for leniency. Of course, this presumption has its limits.

### C. Rule #2—Do Not Try to Hide Anything from the Judge or Fact-Finder

Naturally, certain terms are so “fundamental to the reliability of the factfinding process that they may never be waived without irreparably ‘discredit[ing] the . . . courts.’”<sup>53</sup> For example, in *United States v. Josefik*, the Court speculated that an agreement that provided for the defendant to be tried by twelve orangutans would be invalid, notwithstanding the defendant’s consent.<sup>54</sup>

<sup>36</sup> *Id.*

<sup>37</sup> *Mezzanatto*, 513 U.S. at 201; UCMJ art. 36 (2008). While the President may prescribe the rules and procedures for courts-martial, the rules “shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” UCMJ art. 36 (2008).

<sup>38</sup> *See Rivera*, 46 M.J. at 53.

<sup>39</sup> *Id.* Admittedly, the court found the provision to waive all motions to be overly broad. *Id.* at 54. As discussed, RCM 705 prohibits the accused from waiving his right to make, for example, speedy trial or jurisdictional motions. *See infra* Part II. However, since the facts of the case did not raise any speedy trial or jurisdictional issues, the pretrial agreement was enforceable. *Rivera*, 46 M.J. at 54.

<sup>40</sup> *Id.* at 54.

<sup>41</sup> *Id.* Ironically, although the accused traded away many of his rights, because of the limited sentence he received from the military judge, the sentencing limitation bargained for in the pretrial agreement was never triggered.

<sup>42</sup> 2009 WL 3060207 (A.F. Ct. Crim. App. Aug. 4, 2008) (unpublished).

<sup>43</sup> *Id.* at \*3.

<sup>44</sup> *Id.*

<sup>45</sup> 67 M.J. 311 (C.A.A.F. 2009).

<sup>46</sup> *Id.* at 314 (quoting the pretrial agreement).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 313 (noting that the defense counsel had considered motions for a continuance, a suppression motion, and the potential for raising an entrapment defense).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 314.

<sup>52</sup> *Id.*

<sup>53</sup> *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995).

<sup>54</sup> 753 F.2d 585, 588 (7th Cir. 1985). The *Mezzanatto* Court cited to *Josefik*, including a quotation about the orangutans. *Mezzanatto*, 513 U.S. at 204.

In addition to restricting apes from sitting on juries, the *Mezzanatto* Court gave some meaningful guidance on what terms are impermissible as a matter of public policy. Generally, appellate courts treat terms that permit the use of otherwise impermissible evidence differently from terms that restrict the use of otherwise admissible evidence.<sup>55</sup> Allowing *more* evidence “enhances the truth-seeking function of trials,” whereas hiding otherwise admissible evidence from the fact-finder may subvert justice.<sup>56</sup> For example, in *Mezzanatto*, the court reasoned that allowing the prosecution to introduce statements made during plea negotiations

enhances the truth-seeking function of trials and will result in more accurate verdicts. . . . [O]nce a defendant decides to testify, he may be required to face impeachment on cross-examination, which furthers the function of the courts of justice to ascertain the truth. . . . A contract to deprive the court of relevant testimony . . . stands on a different ground than one admitting evidence that would otherwise have been barred by an exclusionary rule. One contract is an impediment to ascertaining the facts, the other aids in the final determination of the true situation.<sup>57</sup>

Likewise, in *United States v. Gallaspie*, the accused agreed to waive any hearsay objections to Government sentencing evidence.<sup>58</sup> At trial, the accused objected to the admissibility of written statements by the accused’s commanding officer.<sup>59</sup> However, since the agreement expanded the amount of admissible evidence, the court found that the accused’s waiver of his rights was valid.<sup>60</sup>

On the other hand, in *United States v. Sunzeri*,<sup>61</sup> a pretrial agreement limited the accused from presenting evidence (of any kind) from any witness who lived outside the island of Oahu.<sup>62</sup> Specifically, the agreement stated that

the accused agreed “not to call any off island witnesses for presentencing, either live or telephonically. Furthermore, substitutes for off island witness testimony, including, but not limited to, Article 32 testimony, affidavits, or letters will not be permitted or considered when formulating an appropriate sentence in this case.”<sup>63</sup> Thus, according to the pretrial agreement, the accused was prohibited from presenting relevant evidence in his sentencing case. In accordance with the Supreme Court’s guidance in *Mezzanatto*, the court found that by limiting the evidence in front of the fact finder, this provision denied the accused the right to complete sentencing proceedings.<sup>64</sup>

This is not to say that pretrial agreements can never restrict the presentation of evidence; it only means that caution should be duly exercised. For example, in *United States v. Edwards*,<sup>65</sup> the accused had specifically intended to present evidence in mitigation claiming that he had been illegally interrogated by Air Force investigators.<sup>66</sup> However, as part of his pretrial agreement, the accused agreed that he would not mention the illegal interrogation in either the *Care*<sup>67</sup> inquiry or during his unsworn statement.<sup>68</sup> The CAAF analyzed these two terms (limiting the *Care* inquiry and limiting the unsworn statement) separately.<sup>69</sup>

Predictably, the court found that the pretrial agreement’s limitation on the *Care* inquiry was “not . . . appropriate.”<sup>70</sup> Parties cannot limit a judicial inquiry into the providency of pleas, nor can parties limit the judicial inquiry into a plea agreement itself. To allow parties to limit the *Care* inquiry is equivalent to allowing them to negotiate away the fundamental processes and protections of the court-martial. Just as parties cannot agree to a jury of orangutans, parties cannot handcuff the judge’s inquiry into the facts of a guilty plea.<sup>71</sup> However, since the trial judge had ignored the pretrial agreement’s restriction on the *Care* inquiry, the illegal term had no effect, and the accused did not receive any relief.<sup>72</sup>

<sup>55</sup> *Mezzanatto*, 513 U.S. at 204–05.

<sup>56</sup> *Id.* at 204.

<sup>57</sup> *Id.* at 204–05 (internal quotations and citations omitted).

<sup>58</sup> 63 M.J. 647, 648 (N-M. Ct. Crim. App 2006).

<sup>59</sup> *Id.* While the accused objected to the evidence under the confrontation clause, the courts found that his objection was subsumed by his hearsay waiver. *Id.*

<sup>60</sup> *Id.*; see also *United States v. Gibson*, 29 M.J. 379 (C.M.A. 1990) (permitting a pretrial agreement in which the accused waived his rights to object to hearsay and confrontation clause issues).

<sup>61</sup> 59 M.J. 758 (N-M. Ct. Crim. App. 2004)

<sup>62</sup> As discussed in Part II, RCM 705(c)(2)(E) does allow an accused to waive the Government’s production of sentencing witnesses. In such cases, the defense remains free to present alternative means of testimony or to have the witness testify at no expense to the Government. See *infra* Part II. There is a significant difference between preventing the accused from

presenting sentencing evidence and merely relieving the Government of the burden of production.

<sup>63</sup> *Sunzeri*, 59 M.J. at 760.

<sup>64</sup> *Id.*

<sup>65</sup> 58 M.J. 49 (C.A.A.F. 2003). At the time, prior to 2006, investigators could not talk to a Soldier without first coordinating with a defense counsel. See *United States v. Finch*, 64 M.J. 118 (C.A.A.F. 2006).

<sup>66</sup> *Edwards*, 58 M.J. at 50.

<sup>67</sup> See *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

<sup>68</sup> *Edwards*, 58 M.J. at 50.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 51.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

Interestingly, the court did not object to the pretrial agreement's limitation on the accused's unsworn statement.<sup>73</sup> Noting that the accused entered the agreement voluntarily and knowingly, the court did not find that the agreement's limitations on the accused's unsworn statement deprived him of a "complete sentencing proceeding" under RCM 705.<sup>74</sup>

However, even though the CAAF may have accepted a pretrial agreement term restricting the evidence an accused could present in an unsworn statement, adopting a similar term is probably not advisable. First, the *Edwards* decision relied heavily on the specific facts of the case.<sup>75</sup> The accused's contemplated unsworn statement concerned matters that were unrelated to the charges and were outside the scope of evidence specifically permitted by RCM 1001,<sup>76</sup> which is rarely the case. Second, attempting to limit the admission of evidence in a pretrial agreement is often a fruitless exercise. In reviewing the pretrial agreement with the accused, the military judge must discuss the terms of the agreement thoroughly.<sup>77</sup> In doing so, the military judge will usually become aware of most issues, even those not technically admitted into evidence.

#### D. Rule #3—Ensure the Terms of the Agreement Are Clear

Admittedly, ensuring that the pretrial agreements are clear is easier said than done. It is a tripartite effort, requiring the attention of government and defense counsel, as well as the military judge.<sup>78</sup> Generally, the less specific the term, the more scrutinized the case will be on appeal. Additionally, if the parties have a material misunderstanding over what the terms of the pretrial agreement were, a guilty plea entered based on the plea agreement may be found improvident.<sup>79</sup>

The CAAF all but encouraged parties to draft clear terms in *United States v. Spaustat*.<sup>80</sup> In this case, the

accused received three separate confinement credits, and the parties disagreed as to whether the *Suzuki*<sup>81</sup> credit—for pretrial confinement under harsh conditions—should be applied to the adjudged sentence or to the cap provided for in the pretrial agreement.<sup>82</sup> While the CAAF resolved the dispute in that particular case, the court noted, in dicta, that the parties could have resolved the issue by including it as a term in the pretrial agreement.<sup>83</sup>

The importance of clarity when drafting a pretrial agreement was also clear in the CAAF's decision in *United States v. Acevedo*.<sup>84</sup> In this case, the CAAF had to parse the language of a tricky term concerning the suspension of a discharge.<sup>85</sup> In exchange for pleas of guilty, the convening authority agreed that a "punitive discharge may be approved as adjudged. If adjudged and approved, a dishonorable discharge will be suspended for a period of 12 months from the date of court-martial at which time, unless sooner vacated, the dishonorable discharge will be remitted without further action."<sup>86</sup> At trial, the accused received a bad conduct discharge.<sup>87</sup> The issue on appeal was whether the terms of the agreement that required the suspension of a dishonorable discharge also required the convening authority to suspend the bad conduct discharge.<sup>88</sup>

The CAAF interpreted the agreement literally and found that the convening authority promised only to suspend the dishonorable discharge.<sup>89</sup> It was obvious to the CAAF (as it is to any practitioner) that the terms of the agreement created unusual incentives.<sup>90</sup> If the accused received a dishonorable discharge and committed no additional misconduct, the discharge would be vacated. If, on the other hand, the accused received a bad conduct discharge, it could be imposed without suspension.<sup>91</sup> The CAAF acknowledged this irony and called the result a "crapshoot" for the accused.<sup>92</sup> However, the CAAF refused "to second-guess the parties in this regard, provided the punishments proposed

<sup>73</sup> *Id.* at 53.

<sup>74</sup> *Id.* (finding that it was not relevant for mitigation purposes, as the interrogation did not concern the charged offenses).

<sup>75</sup> *See id.*

<sup>76</sup> *Id.*

<sup>77</sup> *See* MCM, *supra* note 3, R.C.M. 705(d)(4) (stating military judge reviews pretrial agreement terms to ensure there are no material disagreements as to the meaning of terms).

<sup>78</sup> *See id.*; *see also* *United States v. Resch*, 65 M.J. 233 (C.A.A.F. 2007) (holding that before a plea of guilty may be accepted, the military judge must ensure that the accused understands the pretrial agreement provisions and ensures that the parties agree to the terms set forth in the agreement).

<sup>79</sup> *See* *United States v. Hardcastle*, 53 M.J. 299 (C.A.A.F. 2000) (finding mutual mistake in agreement made pleas improvident); *United States v. Williams*, 53 M.J. 293 (C.A.A.F. 2000) (finding pleas improvident where defense counsel and military judge misunderstood accused's administrative status).

<sup>80</sup> 57 M.J. 256 (C.A.A.F. 2002).

<sup>81</sup> *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983) (providing for additional credit for pretrial confinement under harsh conditions).

<sup>82</sup> *Spaustat*, 57 M.J. at 261–62.

<sup>83</sup> *Id.* at 264 n.6 ("[W]e note that . . . the convening authority may require that the agreement provide that any [*Suzuki*] credit ordered by the military judge will be applied against the adjudged sentence, not the sentence cap in the pretrial agreement.")

<sup>84</sup> 50 M.J. 169 (C.A.A.F. 1999)

<sup>85</sup> *Id.* at 172.

<sup>86</sup> *Id.* at 171.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 173.

<sup>90</sup> *See id.* at 173–74.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 174.

are lawful.”<sup>93</sup> Practitioners should take some comfort in knowing that even when agreements are bizarre, as long as they are not illegal, they remain enforceable.

#### E. Rule #4—Keep the Promises You Make

It goes without saying that both the accused and the convening authority must abide by the terms of a signed pretrial agreement. Additionally, “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”<sup>94</sup> If a convening authority fails to keep his side of the bargain, the accused will almost certainly get some form of relief.<sup>95</sup> Not surprisingly, it is almost unheard of for a convening authority to intentionally break a pretrial agreement without just cause, but sometimes, a convening authority may unintentionally break an agreement because of negligence in post-trial processing.<sup>96</sup> More often, however, errors are caused when a convening authority makes a promise that he lacks the power to enforce.

The CAAF addressed a series of cases from the Navy in which all parties believed their pretrial agreements would enable the accused to continue collecting pay while in confinement.<sup>97</sup> Unfortunately, as all accused were past their expiration of service, Navy regulations prohibited them from collecting additional pay.<sup>98</sup> In all of these cases, the CAAF set aside the findings and sentence because the accused did not receive the benefit of their bargains.<sup>99</sup>

Likewise, in *United States v. Smead*, the convening authority promised, as part of a pretrial agreement, that the accused would be confined at the Marine Corps Air Station Miramar Base Brig and enrolled in a sex offender treatment program.<sup>100</sup> Unfortunately, however, the convening

<sup>93</sup> *Id.*

<sup>94</sup> *Santobello v. New York*, 404 U.S. 257 (1971).

<sup>95</sup> *See, e.g., United States v. Smith*, 56 M.J. 271, 280 (C.A.A.F. 2002). *But see United States v. Grizzard*, 2003 WL 22803438 (N-M. Ct. Crim. App. Nov. 25, 2003) (unpublished) (finding harmless error when convening authority failed to suspend confinement as required by the pretrial agreement because accused was never confined).

<sup>96</sup> *See generally Grizzard*, 2003 WL 22803438.

<sup>97</sup> *See States v. Williams*, 53 M.J. 293 (C.A.A.F. 2000); *United States v. Hardcastle*, 53 M.J. 299 (C.A.A.F. 2000); *United States v. Albert*, 30 M.J. 331 (C.M.A. 1990); *United States v. Smith*, 56 M.J. 271, 280 (C.A.A.F. 2002). The Army, unlike the Navy, agreed on appeal to specifically perform the terms of the pretrial agreement. *See United States v. Lundy*, 63 M.J. 299 (C.A.A.F. 2006). This required obtaining the Secretary of the Army’s personal approval to pay the accused’s family the money they were due under the pretrial agreement. *Id.*

<sup>98</sup> *See United States v. Williams*, 53 M.J. 293 (C.A.A.F. 2000); *United States v. Hardcastle*, 53 M.J. 299 (C.A.A.F. 2000); *United States v. Albert*, 30 M.J. 331 (C.M.A. 1990); *Smith*, 56 M.J. at 280.

<sup>99</sup> *See United States v. Williams*, 53 M.J. 293 (C.A.A.F. 2000); *United States v. Hardcastle*, 53 M.J. 299 (C.A.A.F. 2000); *United States v. Albert*, 30 M.J. 331 (C.M.A. 1990); *Smith*, 56 M.J. at 280.

<sup>100</sup> 60 M.J. 755, 756 (N-M. Ct. Crim. App. 2004).

authority lacked the authority to determine the location of confinement, and the accused was confined elsewhere.<sup>101</sup> As the convening authority made a promise he could not keep, the court overturned the convictions and remanded the case.<sup>102</sup>

Similarly, in *United States v. Tate*, the court found that the convening authority exceeded his authority when the pretrial agreement required the accused to reject clemency from the Secretary of the Navy.<sup>103</sup> The court found that the convening authority cannot sign an agreement which infringes on his superior’s rights to exercise clemency power.<sup>104</sup>

Of course, an accused who fails to fulfill his half of the bargain likewise does so at his peril. An accused who fails to plead guilty as required will simply not get the benefit of his bargain. Meanwhile, an accused who pleads guilty and then subsequently violates the pretrial agreement by, for example, committing post-trial misconduct can suffer drastic consequences.<sup>105</sup> In such cases, the accused may be bound by his guilty plea, but the convening authority will no longer be constrained by the sentencing limitation of the plea agreement.<sup>106</sup> Wise defense counsel will consider whether their clients will be able to keep their end of the bargain.

#### IV. Conclusion

Imagine a trial counsel reporting to a new installation and being handed a case file. The accused was caught, on camera, using a fellow Soldier’s ATM card to steal \$300. Based on recent contested cases with similar facts, the trial counsel estimates that the accused can expect a sentence of four to five months confinement and a punitive discharge. The case is ripe for a guilty plea, and the defense counsel has been calling, trying to probe what kind of deal he can strike. After consulting with his boss, the trial counsel thinks he will try to strike a deal for three to five months.

Now imagine that in addition to pleading guilty, requesting trial by judge alone, and signing a stipulation of fact, the accused agrees to several additional terms: The accused will provide restitution to the victim before trial and will refrain from committing any misconduct prior to the convening authority taking initial action. The accused also agrees to waive all waivable motions, waive Article 13

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 758.

<sup>103</sup> 64 M.J. 269, 271–72 (C.A.A.F. 2007).

<sup>104</sup> *Id.* at 272.

<sup>105</sup> *See, e.g., United States v. Hunter*, 64 M.J. 571 (C.G. Ct. Crim. App. 2007) (finding accused can lose benefit of agreement when he fails to abide by a no-misconduct provision).

<sup>106</sup> *See, e.g., id.*

confinement credit, and relieve the Government from the requirement to produce defense witnesses at sentencing. Finally, the accused agrees to stipulate to the expected testimony of a Government sentencing witness who is currently deployed in Iraq, the authenticity and admissibility of the videotape, and two previous Article 15s. Now what is the case worth? Undoubtedly, by agreeing to additional terms the accused has made the Government's job easier. Accordingly, the accused should get a more favorable sentencing cap. Perhaps most importantly for the Government, by limiting the issues at trial and agreeing to waive all waivable motions, the case is also *more* likely to survive the appellate process.

While there can be pitfalls when drafting pretrial agreements, the benefits of pretrial agreements almost always outweigh any potential harm. Long gone are the times when pretrial agreements could only address limitations on sentence. The CAAF's paternalism, at least in this area of the law, has been in full retreat for well over a decade. Of course, some who adhere to the old rules may

refuse to consider any pretrial agreement that addresses anything other than a limitation on sentence. This continued conservativeness may have several explanations. For instance, appellate court decisions rarely discuss successful pretrial agreements, and practitioners who read only cases finding fault with pretrial agreements may be left with the false impression that pretrial agreements are routinely the source of appellate error. However, given the sheer number of pretrial agreements signed every year, appellate courts apparently find fault with relatively few.

Whatever their reasons, counsel who only consider simplistic pretrial agreements—a guilty plea in exchange for a sentence limitation—handicap their own practice. They essentially squander their bargaining chips. Whether they represent the Government or the accused, counsel who refuse to consider all options during plea negotiations do not maximize their position and ill-serve their clients.