52d MILITARY JUDGES COURSE

PLEAS & PRETRIAL AGREEMENTS

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PLEAS AND PRETRIAL AGREEMENTS

Outline of Instruction

I. PLEAS.

A. **FIVE (5) RECOGNIZED PLEAS**. R.C.M. 910(a)(1).

1. ***Not Guilty***: "Your honor, the accused, SPC Snuffy, pleads, to all Charges and Specifications, Not Guilty."

**** Not Guilty Only by Reason of Lack of Mental Responsibility***: Not recognized in R.C.M. 910(a)(1); treated as irregular plea under R.C.M. 910(b), which equates to a plea of not guilty. "The accused , SPC Snuffy, pleads as follows: To the Specification: Not Guilty only by reason of lack of mental responsibility."

2. ***Guilty***: "Your honor, the accused, SPC Snuffy, pleads as follows: To the Specification and to The Charge: Guilty."

3. ***Guilty by Exceptions***: "Your honor, the accused, Specialist Snuffy, pleads as follows: To the Specification: Guilty except the words, 'he was apprehended.' To the excepted words: Not Guilty. To the Charge: Guilty."

4. ***Guilty by Exceptions and Substitutions***: "Your honor, the accused, SPC Snuffy, pleads as follows: To the Specification: Guilty, except the word 'steal,' substituting therefor the words 'wrongfully appropriate.' To the excepted word: Not Guilty; to the substituted words: Guilty. To the Charge: Guilty."

5. ***Guilty to a Named Lesser Included Offense***: "Your honor the accused, SPC Snuffy, pleads as follows: To the Specification: Not Guilty, but guilty to the lesser included offense of wrongful appropriation."

B. **HOW TO ENTER PLEAS**.

1. Step 1: Plead to the Specification;

2. Step 2: Plead to the excepted words or figures (if applicable);

3. Step 3: Plead to the substituted words or figures (if applicable); and

4. Step 4: Plead to the Charge.

C. **EFFECT OF PLEAS**.

1. ***Government's burden of proof***. Plea of not guilty places burden upon government to prove elements of the charges offense(s). A guilty plea relieves government of burden to prove elements of offense(s).

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(j) *Waiver.* Except as provided in subsection (a)(2) of this rule [conditional pleas], a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

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2. ***Waiver***. Under R.C.M. 910(j), a plea of guilty that results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt. A provident plea of guilty waives appellate review of all defects not raised at trial that are neither jurisdictional nor tantamount to a denial of due process. A plea of guilty will *not* cure a fatally defective specification or waive defective court composition.

a) ***Overview***. A plea of guilty that results in a finding of guilty waives any objection regarding an accused's guilt to that offense. This waiver also applies to motions to suppress evidence (even those fully litigated at trial). A plea of guilty does not waive jurisdictional defects or issues tantamount to a denial of due process.

b) ***Waiver of factual disputes relating to guilt***. In *United States v. Stokes*, 65 M.J. 651 (A. Ct. Crim. App. 2007), accused pled guilty to stealing military property; on appeal, defense attempted to present evidence that property was not "military" so the accused was not guilty of the offense. Government and defense agreed that the credit card obligations at issue were not "military property." ACCA confined its evaluation of the factual predicate for the plea to the record of trial itself. While the court relied on Article 66(c), which limits appellate review to the "entire record," as opposed to R.C.M. 916(j), the result is the same. *See also United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980) ("[E]vidence from outside the record will not be considered by appellate authorities to determine anew the providence of the plea. . . . [P]rovidence of a tendered plea of guilty is a matter to be established one way or the other at trial.").

3. ***Other issues waived by unconditional guilty plea***.

a) ***Motion to suppress confession***. M.R.E. 304(d)(5) (unconditional guilty plea "waives and all privileges against self incrimination and all motions and objections under this rule with respect to that offense regardless of whether raised prior to plea"); *United States v. Hinojosa*, 33

M.J. 353 (C.M.A. 1991) (guilty plea waived right to contest motion denying suppression of confession).

b) ***Speedy trial***. *United States v. Tippit*, 65 M.J. 69 (C.A.A.F. 2007) (unconditional guilty plea waives speedy trial rights provided under Sixth Amendment and R.C.M. 707 as well as Article 10 challenges not raised at trial; however, properly-litigated Article 10 motion is *not* waived); R.C.M. 707(e) (unconditional guilty plea "waives any speedy trial issue as to that offense").

4. ***Issues <u>not</u> waived by unconditional guilty plea***.

a) ***Unlawful command influence***. *United States v. Johnston*, 39 M.J. 242 (C.M.A. 1994) (UCI issues not waived by guilty plea).

b) ***Jurisdiction***. *United States v. Coffey*, 38 M.J. 290 (C.M.A. 1993) (jurisdictional issues not waived by accused's failure to raise them at trial).

c) ***Ineffective assistance of counsel***.

d) ***Properly-litigated Article 10 motion***. *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005). After being held in pretrial confinement for 117 days the military judge, applying an erroneous test, denied the accused's Article 10 speedy trial motion. After this ruling, the accused entered an unconditional guilty plea to all charges. CAAF ruled that waiver does not apply where an accused unsuccessfully litigates an Article 10 speedy trial motion at court-martial because of Article 10's unique nature and legislative importance. "A fundamental, substantial, personal right . . . should not be diminished by applying ordinary rules of waiver and forfeiture associated with guilty pleas." *See also United States v. Dubouchet*, 63 M.J. 586 (N-M. Ct. Crim. App. 2006) (holding that *Mizgala* "stands for the proposition that only litigated Article 10 issues survive a waiver stemming from a guilty plea, and thus does not affect our decision in this case where the [accused] . . . never raised or litigated the issue of speedy trial and pled guilty unconditionally")

e) ***Multiplicious charging***. *United States v. Lloyd*, 46 M.J. 19 (C.A.A.F. 1997) (waiver of multiplicity issues that are not facially duplicative); *United States v. McMillian*, 33 M.J. 257 (C.M.A. 1991) (multiplicious charges made during sentencing not waived by guilty plea to the charges).

f) ***Statute of limitations***. *United States v. Province*, 42 M.J. 821 (N-M. Ct. Crim. App. 1996) (no waiver of statute of limitation defense "unless an

accused, on the record, voluntarily and expressly waives the statute of limitations as bar to trial").

g) ***Selective prosecution***. *United States v. Henry*, 42 M.J. 231 (C.A.A.F. 1995) (selective prosecution not waived where facts necessary to make claim not fully developed at time of plea).

D. **CONDITIONAL GUILTY PLEA**. R.C.M. 910(a)(2).

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(a)(2) *Conditional pleas.* With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

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1. ***Overview***. Accused and Government in a guilty plea (with consent of the military judge) can agree to preserve a litigated issue for appeal, even if the issue would normally be waived by a guilty plea. In practice, conditional guilty pleas are very rare.

2. ***Coordination with OTJAG***. In the Army, SJAs should consult with the Criminal Law Division, OTJAG, prior to the government's consent to an accused entering a conditional plea of guilty. AR 27-10, para. 5-26b ("Because conditional guilty pleas subject the government to substantial risks of appellate reversal and the expense of retrial, SJAs should consult with the Chief, Criminal Law Division, ATTN: DAJA–CL, Office of The Judge Advocate General, HQDA, prior to the government's consent regarding an accused entering a conditional guilty plea at court-martial. Once this coordination is complete, the Trial Counsel may consent, on behalf of the government, to the entering of the conditional guilty plea by the accused in accordance with R.C.M. 910(a)(2)."). *See generally* RCM 910(a)(2) ("The Secretary concerned may prescribe who may consent for Government . . .").

3. ***Case-dispositive issues***. The motion (or issue) in question should be case-dispositive. This rule comes from the Analysis to R.C.M. 910, which notes that the rule as applied in federal civilian practice requires a case dispositive issue. However, only the Air Force *requires* that the issue be case dispositive. *See* AFI 51-201, para. 8.3 ("When approving a guilty plea conditioned on preserving review of an adverse determination of a pretrial motion, the military judge should make the following findings on the record: (1) the offer is in writing and clearly details the motion that the accused wishes to preserve on appeal; (2) the government's consent is in writing and signed by an official authorized to consent; (3) the particular motion was fully litigated before the military judge; and, (4) *the motion is case dispositive*."); *United States v. Phillips*, 32 M.J. 955, 957 (A.F.C.M.R. 1991) ("Staff judge advocates and military judges should not

permit conditional pleas that only preserve issues that would not terminate the prosecution because to do so invites piecemeal appeals and the kind of appellate confusion suffered in this case."). As a practice point, where a conditional guilty plea is not case dispositive as to either the issue preserved for appeal or to all of the charges in a case, the military judge should address as part of the providence inquiry the understanding of the accused and the parties as to the result of the accused prevailing on appeal.

4. ***Military judge and government counsel must consent***. See MCM, R.C.M. 910 analysis, at A21-60 ("There is no right to enter a conditional guilty plea. The military judge and the Government each have complete discretion whether to permit or consent to a conditional guilty plea.").

5. ***Issue must be raised at trial***. *United States v. Forbes*, 19 M.J. 953 (A.F.C.M.R. 1985) (accused's failure to make motion to suppress drug test waived issue despite conditional plea).

6. ***Scope***. Conditional guilty pleas have nothing to do with (and are legally inconsistent with) fact-based or affirmative defenses.

7. ***Cases discussing conditional pleas***.

a) *United States v. Lawrence*, 43 M.J. 677 (A.F. Ct. Crim. App. 1995) (excellent discussion of the policy reasons behind conditional pleas).

b) *United States v. Proctor*, 58 M.J. 792 (A.F. Ct. Crim. App. 2003). Accused spent 107 days in pretrial confinement prior to preferral of charges, and a total of 161 days prior to arraignment. Accused entered a conditional plea of guilty, preserving the speedy trial issues for appeal. Court reversed and dismissed several charges and specifications with prejudice due to a violation of R.C.M. 707 grounds, but found no Sixth Amendment or Article 10 violation, and did not dismiss those offenses discovered after the imposition of pretrial confinement. The court noted that because of the "all-or-nothing effect" of R.C.M. 910, allowing an accused who enters a conditional plea to withdraw the plea if he prevails on appeal, "staff judge advocates are cautioned not to enter into conditional pleas unless the matter is case dispositive. . . . In this case, [accused]'s speedy trial issue was not case dispositive, because it did not require dismissal of those charges for which the [accused] was not placed into pretrial confinement. However, because the conditional plea was authorized for all the offenses, we must allow the [accused] to withdraw his pleas." The speedy trial clock for offenses discovered after the imposition of pretrial confinement began on the date of preferral of those charges. Note, an unconditional guilty plea following a litigated Article 10 motion does not waive the issue for appeal. *United States v. Mizgala*,

61 M.J. 122 (C.A.A.F. 2005). The N-M.C.C.A has held that an Article 10 motion that is not litigated at trial is waived by an unconditional guilty plea. *United States v. Dubouchet,* 63 M.J. 586 (N-M.C.C.A. 2006).

c) *United States v. Mapes,* 59 M.J. 60 (C.A.A.F. 2003). Accused convicted of involuntary manslaughter and various other offenses arising from his injection of a fellow soldier with a fatal dose of heroin. Accused entered into a pretrial agreement that permitted him to enter a conditional plea pursuant to R.C.M. 910(a)(2) that preserved his "right to appeal all adverse determinations resulting from pretrial motions." At trial, accused moved to dismiss all charges due to improper use of immunized testimony and evidence derived from that immunized testimony in violation of *Kastigar v. United States*, 406 U.S. 441 (1972). Although the CAAF dismissed most of the charges and specifications due to the *Kastigar* violation, accused was permitted to withdraw his plea to those remaining offenses which were not directly tainted by that violation, as the violation caused or played a substantial role in the GCM referral of those offenses. In so doing, CAAF noted that although military practice, unlike its federal civilian counterpart, does not limit conditional pleas to issues that are dispositive, there should be "cautious use of the conditional plea when the decision on appeal will not dispose of the case."

d) *United States v. Shelton,* 59 M.J. 727 (A. Ct. Crim. App. 2004). Pretrial agreement broadly preserved for appellate review "any adverse determinations made by the military judge of any of the pretrial motions made at [the accused's] court-martial." Defense made a motion to suppress accused's confession based on the clergy privilege, and also made a discovery motion seeking CID Agent Activity Summaries. "Based on the lack of emphasis given to the discovery motion at the trial level, the convening authority and staff judge advocate, and the parties at trial, may not all have been aware that accused's conditional guilty plea preserved the discovery motion." Also, the military judge mentioned that only the clergy privilege motion was preserved by the plea. Citing *Mapes*, the court found that "the military judge failed to thoroughly address the parameters of the conditional guilty plea's impact." Accordingly, both motions were preserved for appeal. Subsequently, CAAF held that the accused's confessions to his pastor were protected by the clergy privilege under M.R.E. 503 and determined that the accused was allowed to withdraw his conditional guilty plea. *See United States v. Shelton,* 64 M.J. 32 (C.A.A.F. 2006) ("[W]hat is at stake is the ability of an accused to put the Government to its burden of proving him guilty, beyond a reasonable doubt, using only legally competent evidence. As the evidence available to the Government did not meet that criterion, appellant is entitled, in accordance with his agreement with the Government and under the provisions of the *Manual*, to withdraw his plea of guilty.") (quoting *United States v. Barror*, 23 M.J. 370 (C.M.A. 1987)).

E. **PLEADING PROCEDURE – GUILTY PLEA AND PROVIDENCE INQUIRY**.

1. ***In General***. After the accused is arraigned under R.C.M. 804, the military judge will call on accused an counsel to enter a plea. If the accused pleads guilty to any offense, the military judge will follow this procedure to ensure the plea is voluntary and accurate. In the military system, an accused must admit his own guilt in open court. *See* R.C.M. 910(d)-(e). As a result, *Alford* pleas or nolo contendere pleas are not allowed.

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(d) *Ensuring that the plea is voluntary.* The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) *Determining accuracy of plea.* The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

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2. ***The origin***. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). The record "must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge or the president has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty."

3. ***Elements of providence inquiry***. R.C.M. 910(c)-(e). *See also Boykin v. Alabama*, 395 U.S. 238 (1969). Providence inquiry must include the military judge's explanation of the offenses and ensure the accused:

a) Understands that the accused waives certain rights: specifically the right against self-incrimination; trial of facts by court; and right of confrontation;

b) Understands the elements of offense;

c) Agrees that the plea admits every element, act or omission, and relevant intent;

d) Understands that the accused may be convicted on plea alone without further proof;

e) Is advised of the maximum sentence available based on the plea alone;

f) Has had the opportunity to consult with counsel;

g) Is entering the plea knowingly and voluntarily.

4. ***Military judge must advise the accused of his rights***. R.C.M. 910(c).

a) "The gravity of pleading guilty is such that the Supreme Court mandated the Constitutional requirement that any guilty plea must be entered into voluntarily, knowingly, and with an understanding of the surrounding circumstances and likely consequences." *United States v. Grisham*, 66 M.J. 501, 504 (A. Ct. Crim App. 2008) (citing *Santobello v. New York*, 404 U.S. 257, 262-63 (1971)).

b) Military judge must expressly advise accused of rights on the record. *United States v. Hansen,* 59 M.J. 410 (C.A.A.F. 2004) (setting aside findings and sentence in guilty plea because military judge failed to apprise accused of his right to confront witnesses and right against self-incrimination). CAAF refused to infer the accused understood these rights, noting that "where bedrock constitutional rights are at issue and are waived, we should not settle for inference and presumption when certainty is so readily obtained." *Id.* at 413.

c) Civilian standard is more stringent, requiring defense show: (1) plain error in rights advisement and (2) "reasonable probability that, but for the error, [defendant] would not have pled guilty." *United States v. Dominguez-Benitez*, 542 U.S. 74 (2004). Military system only requires a showing that Military Judge did not advise the accused of the rights waived in a guilty plea.

5. ***The military judge must advise the accused of his elements of the offense***. R.C.M. 910(c)(1) and Discussion.

a) ***Defining terms of art (like attempt).*** *United States v. Redlinski*, 58 M.J. 117 (C.A.A.F. 2003). Military judge erred by failing to adequately explain elements of attempted distribution of marijuana; plea improvident and set aside. Military judge failed to advise appellant that the offense requires an overt act done with specific intent, and that the act amounted to more than mere preparation and apparently tended to effect the commission of the intended offense, the four elements of an attempt offense. In order for plea to be knowing and voluntary, the record of trial must reflect that the elements of each offense charged have been *explained to the accused by the military judge*. If the judge fails to do so, the plea must be set aside unless "it is clear from the entire record that the accused knew the elements, admitted them freely, and pled guilty because he was guilty." The court "looks to the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially." For a plea to an attempt offense, "the record must objectively reflect that the appellant understood that his conduct, in order to be criminal, needed to go beyond preparatory steps and be a direct

movement toward the commission of the intended offense." *See also United States v. Burris*, 59 M.J. 700 (C.G. Ct. Crim. App. 2004) (plea to dishonorable failure to pay just debt improvident due to military judge's failure to define term "dishonor").

b) ***Higher standard than civilian courts***. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005). Judge did not advise defendant on specific intent element for the offense of aggravated murder in a capital case. The defense attorney, however, represented at the plea hearing that he had explained the intent element and the accused agreed with his counsel's representation. The Supreme Court stated that a judge is not required to advise the accused of the elements himself; "[r]ather, constitutional requirements may be satisfied where the record accurately reflects that the charge's nature and the crime's elements were explained to the defendant by his own, competent counsel."

c) ***Minimal requirements***. *United States v. Morris*, 58 M.J. 739 (A. Ct. Crim. App. 2003). During plea colloquy concerning wrongful appropriation, military judge "failed to follow the usual practice of Army military judges in that he did not read to appellant applicable definitions from the [*Benchbook*]," including the definitions of the terms "possession," "owner," "belongs," and "took." As for the colloquy concerning the forgery offense, the military judge likewise failed to provide any definitions from the *Benchbook*, including those for the terms, "falsely made or altered" and "intent to defraud." Nonetheless, ACCA affirmed the findings and sentence. For practitioners, in most complex offenses (such as conspiracy or accessory after the fact) failure to explain the elements will generally result in reversal; however, a plea is not "automatically rendered improvident by the military judge's failure to identify or explain the elements of the offense 'if the accused admits facts which establish that all the elements were true.'" Despite finding the military judge's failure reflects a "lack of attention to detail," the three most critical requirements for a provident guilty plea were met. Accused admitted facts necessary to establish the charges, expressed a belief in his own guilt, and there were no inconsistencies between the facts and the pleas.

6. ***Factual predicate for plea.*** R.C.M.s 910(c)(5), 910(e). The accused shall be questioned under oath about the offense(s) as part of the guilty plea inquiry. The military judge must ascertain why the accused believes he is guilty and advise the accused of the elements of the offense. As noted below, military practice requires the military judge to advise the accused of the elements of the offense(s) or to otherwise risk reversal. This contrasts sharply with Supreme Court precedent.

a) *United States v. Negron,* 60 M.J. 136 (C.A.A.F. 2004). Accused pled guilty to depositing obscene matters in the mail in violation of Article 134, UCMJ. During the providency inquiry, military judge failed to provide the correct definition of "obscene." An accused is not provident to an offense when military judge uses a substantially different definition of "obscene" from that proscribed by the offense charged. Additionally, CAAF cautioned judges "regarding the use of conclusions and leading questions that merely extract from the [accused] 'yes' and 'no' responses during the providency inquiry."

b) *United States v. Barton,* 60 M.J. 62 (C.A.A.F. 2004). Military judge did not repeat larceny elements for each larceny and conspiracy to commit larceny offense but rather cross-referenced his predicate statement of elements. For one specification, the accused failed to state and the stipulation of fact failed to mention that the value of the stolen property exceeded $100. The only admission regarding value existed in the accused's acknowledgement that he understood the elements of the larceny offense based on the judge's cross-reference. In affirming the providency of the plea, CAAF reasoned that the value determination is not a complex legal element and military judge made the accused look at the charge sheet for each specification and the specification in issue clearly stated the stolen property exceeded $100. CAAF cautioned, however, "we may have doubts that a similar methodology of cross-reference will work generally."

c) ***Higher standard than civilian courts***. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005) (holding that a judge is not required to advise the accused of the elements himself; "[r]ather, constitutional requirements may be satisfied where the record accurately reflects that the charge's nature and the crime's elements were explained to the defendant by his own, competent counsel").

d) *United States v. Hardeman*, 59 M.J. 389 (C.A.A.F. 2004). Plea improvident because a definitive report date is necessary for an AWOL specification. The providency inquiry did not ultimately reveal the date on which the accused was willing to admit he went AWOL.

e) *United States v. McCrimmon,* 60 M.J. 145 (C.A.A.F. 2004). Accused drill instructor pled guilty to bribery for asking for and receiving money from trainees to protect them from receiving an Article 15 for going to the post exchange (PX) without authorization. At the time of the bribe, the accused knew the Article 15 was a scare tactic by the first sergeant. ACCA questioned whether the accused could intend for the bribe to influence his official actions, an element of bribery, if he knew the Article 15 was merely a scare tactic. Although the first sergeant's threat of the

f) If the military judge conducts too little inquiry, the case may be set aside. *United States v. Bailey*, 20 M.J. 703 (A.C.M.R. 1985). Military judge must advise the accused regarding the meaning and effect of a guilty plea and the rights waived by pleading guilty. "Reliance upon assurances from counsel [that accused understood his rights] . . . is insufficient." *See also United States v. Frederick*, 23 M.J. 561 (A.C.M.R. 1986) (military judge's inquiry requiring simple yes or no answers when asked whether he did that which the specifications alleged was inadequate).

g) *United States v. Hitchman*, 29 M.J. 951 (A.C.M.R. 1990). (plea improvident when judge failed to elicit accused's admission that conduct was prejudicial to good order and discipline or was service discrediting regarding Article 134 wrongful discharge of firearm offense).

h) *United States v. Duval*, 31 M.J. 650 (A.C.M.R. 1990) (factual basis not sufficient if elicited in terms of legal conclusions, e.g., "Was your failure to pay the debt dishonorable?").

7. ***Factual predicate for plea – appellate review and "substantial basis" test***. *United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008). In reviewing a military judge's acceptance of a plea under the abuse of discretion standard, appellate courts apply a "substantial basis" test: Does the record as a whole show a substantial basis in law *or* fact for questioning the guilty plea? [1]

a) ***Questions of fact.*** "[T]he standard for reviewing a military judge's decision to accept a plea of guilty is an abuse of discretion." The court added, "A military judge abuses his discretion if he accepts a guilty plea without an adequate factual basis to support the plea."

[1] CAAF seemingly departed from prior caselaw and provided the following explanation regarding the substantial basis test, which now expressly requires *either* a substantial basis in law *or* a substantial basis in fact for questioning the providence of a guilty plea:

> Does the record as a whole show "'a substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).
>
> Traditionally, this test is presented in the conjunctive (i.e., law *and* fact) . . . however, the test is better considered in the disjunctive (i.e., law *or* fact). That is because it is possible to have a factually supportable plea yet still have a substantial basis in law for questioning it.

b) ***Issues of law.*** "[T]he military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo."

c) ***Practice tip – when is there a "substantial basis" in law?*** The CAAF provided this example: an accused who knowingly admitted the facts necessary to prove he or she met all the elements of an offense, but was not advised of an available defense. There would also be a substantial basis in law if the accused stated matters inconsistent with the plea that were not resolved by the military judge. By contrast, there would be a substantial basis in fact where the factual predicate for the guilty plea "falls short."

8. ***Inquiry into pretrial agreement (PTA)***. The military judge must fully explore the terms of the PTA with the accused to ensure (s)he understands them. There are two separate documents that constitute the PTA. First, the "offer" portion of the PTA sets the terms and conditions of the accused's plea. Second, the "quantum" portion of the PTA provides for a cap on the accused's sentence. If the military judge is sentencing the accused, the judge does not review the quantum portion of the PTA until after sentence is announced.

9. ***Inquiry into stipulation of fact***. Military judge must conduct inquiry into the stipulation of fact (the document that reinforces the accused's plea and embraces what both parties agree are the facts of the case). The PTA normally requires the accused agrees to enter into a stipulation of fact; it may form a basis for admitting aggravating evidence (e.g., accused will agree to stipulate to admissibility to ensure favorable pretrial agreement).

10. ***Acceptance of pleas and entering findings***. Military judge generally enters findings at the close of providency, however, it is error to do so if the trial counsel intends to prove a greater offense and the accused pled guilty to the lesser offense. *See United States v. Baker*, 28 M.J. 900 (A.C.M.R. 1989) (government intended to prove rape and MJ improperly entered findings pursuant to pleas of guilty to lesser included offense of carnal knowledge).

F. FACTUAL PREDICATE – SPECIFIC OFFENSES.

1. ***In General***. Pleas may be improvident if they are inconsistent with factual and legal guilt. The MJ must reopen the providence inquiry and resolve a conflict between the facts and the plea where facts brought out during the court-martial are inconsistent with the accused's plea.

a) *United States v. Outhier*, 45 M.J. 326 (1996). The accused was charged with aggravated assault likely to cause death or grievous bodily harm by binding the victim's hands and feet and allowing him to jump

into the deep area of a swimming pool as a practice exercise after accused had falsely asserted his qualification as a Navy SEAL and hospital corpsman. The accused's plea was improvident because the facts revealed during sentencing negated the "means likely to produce death or grievous bodily harm" element: the accused remained nearby with life preserver; had trained with victim the entire day; victim was not a novice swimmer; victim indicated desire to train while off duty, understood danger, and was aware he was not obligated to participate in exercise

b) *United States v. Jordan*, 57 M.J. 236 (2002). Conviction for unlawful entry onto a ship was reversed because accused's providence inquiry did not establish a basis for concluding that his conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces. The accused's "yes" response to the MJ's legally conclusive question as to whether his conduct was prejudicial or service discrediting does not establish a sufficient factual predicate.

2. ***Aiding and abetting offenses***. *United States v. Gosselin*, 62 M.J. 349 (C.A.A.F. 2006). Accused was approached by another airman about driving to the Netherlands to purchase hallucinogenic mushrooms. During providence inquiry for wrongful introduction of the mushrooms onto a base, accused admitted that he and his co-accused drove to the Netherlands to purchase mushrooms, that he was present when the mushrooms were purchased, that he knew the mushrooms were in the co-accused's car when they reached the base gate, and that he used mushrooms that night from roughly the same bag in which the mushrooms were purchased. However, he also mentioned his desire to travel to the Netherlands to buy a dragon statue. MJ repeatedly asked the accused to describe the original purpose of the trip and advised him that mere presence at a crime scene did not establish liability as a co-conspirator or an aider and abettor. MJ recessed the trial twice for the accused to discuss his case with counsel. After the second recess, the defense counsel stated that the accused was guilty under the aiding and abetting theory but accused never affirmatively agreed with his counsel. CAAF found the plea was improvident: "The providence inquiry failed to establish that [the accused] intended to facilitate [the] introduction of mushrooms onto a military installation or assisted or participated in the commission of the offense."

3. ***Assault and battery offenses***.

a) *United States v. Richards*, 63 M.J. 622 (A. Ct. Crim. App. 2006). Accused got into a mutual fight with another Soldier. Two other Soldiers joined the fight against the accused. At that point, accused stated "he was 'out numbered' so he reached into his pocket and took out [a] pocket knife." Accused made thrusting motions with his knife cutting two of the soldiers resulting in his plea to the offense of aggravated assault. ACCA

held the MJ failed to establish on the record whether the accused had a right to use deadly force to protect himself against three assailants and if the accused used more force than authorized whether his offer to use the force could otherwise be combined with the defense of accident. The court recognized that "if a lawful offer of . . . force results in an unintentional injury to the victim, the defense of accident may apply in conjunction with self-defense." The MJ provided a recess for the defense counsel to explain these concepts to the accused, and discussed these issues with both counsel off the record, but the record failed to establish the accused's understanding of the legal concepts or that the facts did not otherwise lead to a defense to the aggravated assault. *Cf. United States v. Smith*, 44 M.J. 387 (C.A.A.F. 1996) (military judge's failure to fully explain self-defense and defense of another did not render plea improvident where providence inquiry indicated a mutual affray which was jointly escalated, and appellant did not fear physical injury and utilized excessive force).

b) *United States v. Axelson,* 65 M.J. 501 (A. Ct. Crim. App. 2007). Accused (an Army O-4) pled guilty to aggravated assault with a dangerous weapon or other means or force likely to cause death or grievous bodily harm. Accused admitted beating his wife with a club, but stated during the providence inquiry that he did not recall striking her repeatedly (though he read reports indicating that there was more than one blow and agreed that the reports were accurate). A panel convicted accused, contrary to his pleas, of attempted premeditated murder and other military-related offenses. During the trial on the merits, the defense introduced evidence from a psychiatrist who testified that he suffered from general anxiety disorder, but there was no reason why the accused might lack mental responsibility for his actions. On appeal, accused claimed that his pleas and the subsequent trial on the merits raised evidence of partial mental responsibility and automatism, and his pleas were not knowing because the MJ did not instruct him on those defenses. ACCA concluded that the plea was knowing and no additional instructions on defenses were required because aggravated assault is a general intent crime to which partial mental responsibility is not a defense. Further, automatism is not a defense under R.C.M. 916 or other caselaw, and there was no evidence of automatism raised either in the providence inquiry or on the merits.

4. ***Attempt offenses***. *United States v. Bates*, 40 M.J. 362 (C.M.A. 1994). Accused in carnal knowledge prosecution told judge, "I had attempted intercourse with my daughter. I touched my penis to her vagina. She had said that it hurt. I stopped . . . ." The court indicates "attempt" in context of providence inquiry was a "term of art." Plea not improvident. However this seemed like a close call. Judge Wiss dissented: "The providence inquiry is a model of inadequacy," particularly the judge's failure to advise accused of "penetration" requirement.

5. ***AWOL and related offenses***.

a) *United States v. Gaston*, 62 M.J. 411 (C.A.A.F. 2006). During the providence inquiry, the accused, a Senior Airman, told the military judge that his 13-17 January 2003 AWOL was terminated by apprehension because his dorm manager came to his room and told him that his squadron was looking for him. On review, CAAF noted that this providence inquiry was "bare bones" and looked to the entire record, to include the accused's testimony during a pretrial motion, to clarify the facts surrounding the accused's interaction with his dorm manager. During a pretrial motion, the accused said the dorm manager told him that his squadron was looking for him, the accused told the manager he would get dressed and meet him down front, and the manager said he would call the accused's first sergeant to pick him up. CAAF, reversing, held that the record did not show that the accused's contact with the dorm manager established his return to military control. "Nothing in the record establishes that the dorm manager believed Gaston had committed an offense or that the dorm manager had the authority to take him into custody. Without this authority, the mere fact that the dorm manager made contact with Gaston while he was on base and in his dormitory room is not sufficient to establish that Gaston was under military control." Finding amended to the lesser offense of AWOL.

b) *United States v. Pinero*, 60 M.J. 31 (C.A.A.F. 2004) (overturning plea to unauthorized 53-day absence where accused submitted to a fitness for duty screening at approximately Day 7 of the alleged 53-day AWOL).

c) *United States v. Hardeman*, 59 M.J. 389 (C.A.A.F. 2004) (plea improvident because a definitive report date is necessary for an AWOL specification; providence inquiry did not ultimately reveal the date on which the accused was willing to admit he went AWOL).

d) *United States v. Estes*, 62 M.J. 544 (A. Ct. Crim. App. 2005). Accused pled guilty to an AWOL from 7-11 June 2002. During the providence inquiry, the accused told the military judge that he remained in his barracks' room from 7-11 June 2002 but that he took some side trips to the dining facility (DFAC) and post exchange (PX). On appeal, defense argued the accused was not "absent from his unit" because he remained in his barracks, citing *United States v. Smith*, 37 M.J. 583, 586 (N.M.C.M.R. 1993) (holding that a servicemember who remains in their unit barracks is not AWOL). ACCA, affirming, stated that "the essence of [the accused's] offense was that he was not present with his fellow soldiers, i.e., his 'unit,' performing military duties during the work day." Accused told the military judge that he missed several formations from 7-11 June 2002, that his fellow Soldiers were working, and that he was not working but was

"goofing off." ACCA stated, "We decline to take our sister court's position that ownership or control of a barracks building is the determining factor in whether a soldier is absent from his unit while remaining in those barracks . . . [a] unit is comprised of soldiers, not buildings."

e) *United States v. Scott*, 59 M.J. 718 (A. Ct. Crim. App. 2004). Plea to AWOL from 16 August through 5 November 2002 improvident because accused signed in with CQ on 11 September 2002. Court divided one longer period of absence into two shorter AWOLs and affirmed the findings and sentence.

f) *United States v. Duncan*, 60 M.J. 973 (A. Ct. Crim. App. 2005). The accused received permission from his squad leader to miss formation under the false pretense that the accused needed to take his son to the hospital. On appeal for his FTR conviction, the accused asserted he had authority to miss formation, "albeit authority obtained by making a false statement," so his plea was improvident as to the element of "without proper authority." ACCA, affirming the case, ruled that authority obtained by a false statement "goes against the plain meaning of 'without proper authority.'" An FTR or AWOL occurs if it is "preceded by the use of false statements, false documents, or false information provided by or on behalf of an accused."

g) *United States v. Malone*, 34 M.J. 213 (C.M.A. 1992). Guilty plea to unauthorized absence improvident when MJ failed to resolve the issue as to whether the accused's command had turned him over to civilian authorities to serve a civilian sentence.

h) FTR under Article 86–The Deliberate Avoidance Doctrine. *United States v. Adams*, 63 M.J. 223 (C.A.A.F. 2006). Military judge did not accept the accused's plea to AWOL but did accept his plea by exceptions and substitutions to failing to go to his appointed place of duty. During the providence inquiry for failing to go to his appointed place of duty, the accused testified he did not know the location of his unit's formation but that he purposefully avoided determining the location. N-MCCA, acknowledging that the accused's knowledge of the report location is an element of the offense, held his "deliberate and conscious efforts to avoid learning of his duty nevertheless rendered his guilty plea to failing to go to his reported place of duty provident." Under a "deliberate avoidance or ignorance" theory a finder of fact may "rely on upon a permissive inference that the accused had knowledge of the fact that the accused deliberately avoided." CAAF, affirming, held that a "deliberate avoidance" theory is available for Article 86, UCMJ offenses. The test is whether the accused "was subjectively aware of a high probability of the

existence of illegal conduct, and purposely contrived to avoid learning of the illegal conduct." This doctrine is consistent with federal practice and "a literal application of actual knowledge to Article 86, UCMJ, offenses would result in absurd results in a military context . . . –[s]ervicemembers might avoid their duties and criminal sanction by hunkering down in their barracks rooms or off-base housing, taking care to decline all opportunity to learn of their appointed place of duty at formation or through the receipt of orders."

i) *United States v. Gilchrist*, 61 M.J. 785 (A. Ct. Crim. App. 2005) (reversing accused's conviction for going from his appointed place of duty when record failed to establish that accused knew he was required to report).

6. ***Bad check cases***. *United States v. Mixon*, No. 35363, 2005 CCA LEXIS 27 (A.F. Ct. Crim. App. Jan. 28, 2005) (unpub.). During the providence inquiry, the accused pled guilty to numerous specifications of dishonorably failing to maintain sufficient funds to pay his checks. The accused, however, made statements that he attempted to pay off some checks and negligently failed to check funds on other checks. The court held "[t]he recurring characterizations by the [accused] that his conduct was negligent warranted further inquiry by the military judge, which never occurred."

7. ***Communicating a threat***. *United States v. Greig*, 44 M.J. 356 (C.A.A.F. 1996). Plea to communicating a threat provident even though accused testified he only made the threats "to stay in the hospital" and attending psychiatrist did take threats seriously (psychiatrist testified that "he was suspicious [of accused] at the time and felt it probably an effort at manipulation in order to maintain hospitalization"). CAAF held: the accused need not entertain the "intent expressed in the utterances"; accused stated during providence inquiry that he was not joking; and in a guilty plea, accused's statements, and not witnesses, are the focal point for resolving any inconsistency.

8. ***Conspiracy***.

a) *United States v. Linteau*, No. 20010926 (A. Ct. Crim App. Mar. 20, 2007) (unpub.). The accused challenged guilty plea to conspiracy, alleging that the facts raised the defense of withdrawal and the military judge did not explain the defense during the providence inquiry. The court held the plea provident because the accused "did not sufficiently raise the defense of withdrawal to substantially conflict with his pleas." The accused provided sufficient facts on the record to establish that the withdrawal defense did not apply. Although the accused did not participate in the crimes, he did not comply with the legal requirements for withdrawal and believed that he was still part of the agreement to commit

b) *United States v. Dal*, No. S20957, 2007 CCA LEXIS 291 (A.F. Ct. Crim. App. Feb. 13, 2007) (unpub.), *rev. denied*, 65 M.J. 478 (C.A.A.F. 2007). The accused pled guilty to conspiracy to commit arson based on a scheme where he and another airman planned to set a fire in the barracks and then "heroically resolve the crisis" in order to secure an early promotion. When it came time to execute the plan, the accused sought to confirm the participation of the other airman, who said, "Whatever" or "Do what you gotta do." Yet when the accused started the fire, the other airman appeared "very shocked and speechless." Accused argued on appeal that the providence inquiry failed to show an agreement because, although the accused believed there was an agreement, his testimony that the other airman appeared shocked and surprised "casts substantial doubt on whether such an agreement actually existed." The AFCCA found the accused plea to conspiracy to be improvident but guilty of attempted conspiracy. *See also United States v. Brewster,* No. 200602269, 2007 CCA LEXIS 315 (N-M. Ct. Crim. App. Aug. 14, 2007) (unpub.) (accused's plea to larceny as a co-conspirator was improvident where the record established that the co-conspirator stole the vehicle *before* the conspiracy was formed).

9. ***Drug/alcohol cases***.

a) *See United States v. Gosselin*, 62 M.J. 349 (C.A.A.F. 2006), discussed in aiding and abetting section, *supra*.

b) *United States v. Lee,* 61 M.J. 627 (C.G. Ct. Crim. App. 2005) (holding that "merely planting [mushroom] spores which were not a controlled substance, even with the intent to grow the mushrooms, did not constitute the manufacture of the mushrooms in the absence of any controlled substance in the planting . . . [h]owever, the planting did support the offense of attempting to manufacture a controlled substance."); *United States v. Eckhardt*, No. 20021377 (A. Ct. Crim. App. July 15, 2005) (unpub.) (amending a wrongful use of MDA specification to use of MDMA).

c) *United States v. Pinero*, No. 200101373, 2005 CCA LEXIS 8 (N-M. Ct. Crim. App. Jan. 14, 2005) (unpub.). On remand from CAAF regarding the providence of an AWOL offense, the N-MCAA found the accused's plea to marijuana use was improvident. Accused was charged with using marijuana on 15 December 2000 but during the providence inquiry the

military judge asked the accused to discuss his usage on 29 August 2000 (relating to a methamphetamine usage). The colloquy between the judge and the accused did not clarify this inconsistency and there was "a failure of the record to reflect any discussion of the [accused's] involvement with marijuana on or about 15 December 2000."

d) *United States v. Denaro*, 62 M.J. 633 (C.G. Ct. Crim. App. 2006). The accused assisted a coworker by providing her a masking agent to avoid a positive urinalysis for cocaine. Accused intended to undermine the urinalysis to prevent his co-worker's administrative discharge. The accused's plea to wrongfully interfering with an adverse administrative proceeding (and conspiracy to do so) was provident because it was reasonable to conclude that an adverse administrative proceeding would commence against his coworker based on a positive cocaine urinalysis and the accused intended to assist his coworker in masking her results.

e) *United States v. Thomas,* 65 M.J. 132 (C.A.A.F. 2007). The accused, a Navy Seaman Recruit, drove his car onto Fort Lewis about 45 minutes after smoking a marijuana cigarette that he had prepared from marijuana in his possession. After executing an illegal u-turn, military police pulled him over and discovered trace amounts of marijuana in a bag in his car. The accused pled guilty to wrongful introduction of a controlled substance onto a military installation. In the stipulation of fact, the government and the accused agreed that the accused "did *not* pass through a security gate and was *unaware* that he was driving on military property." Concluding that the offense was one of "strict liability," the N-MCCA had affirmed. CAAF reversed, finding that the offense required "actual knowledge that he was entering onto the installation. "[T]he stipulated fact that [the accused] did not know that he was entering the installation renders his plea to wrongful introduction improvident." However, the court affirmed a finding of the lesser-included offense of wrongful possession of marijuana, and affirmed the sentence.

10. ***Fleeing the scene of an accident***. *United States v. Littleton*, 60 M.J. 753 (N-M. Ct. Crim. App. 2004). The *Manual*'s explanation to the offense of fleeing the accident scene states it "covers 'hit and run' situations where there is damage to property other than the driver's vehicle or injury to someone other than the driver or a passenger in the driver's vehicle." The accused, driving in a borrowed vehicle, hit a curb while intoxicated resulting in damage to his vehicle but no other damage to property or persons; he then fled the accident scene. Based on these facts, the accused's plea to fleeing the accident scene was improvident.

11. ***Fraternization***. *United States v. Jackson*, 61 M.J. 731 (N-M. Ct. Crim. App. 2005). Accused pled guilty to violating a lawful general regulation by fraternizing with four junior enlisted female marines. In the process of organizing

a fund raiser fashion show, the accused requested the four marines to provide him with their measurements in the hopes that his contacts with the women would result in sexual relationships. The Navy's fraternization regulation requires a showing that a "personal relationship" existed between the parties. The N-MCCA held that a "personal relationship" did not occur between the parties from the accused asking the type of questions discussed above. Findings on the lawful general regulation violation overturned and sentence set aside.

12. ***Indecent acts with another and similar offenses***.

a) *United States v. Johnson*, 60 M.J. 988 (N-M. Ct. Crim. App. 2005) (accused's plea to an indecent act with another was provident where he voluntarily observed another Marine engaging in sex and stated to him "that's my dog").

b) *United States v. White*, 62 M.J. 639 (N-M. Ct. Crim. App. 2006) (affirming accused's conviction to communicating a threat to injure reputation when he told a 15-year-old girl that he would tell "her parents, her boyfriend's parents and/or anyone else who would listen" about their sexual encounters; accused acknowledged that he made the statement and his purpose was to frighten the girl into silence involving their sexual activities).

13. ***Kidnapping***. *United States v. Newbold*, 45 M.J. 109 (C.A.A.F. 1996). Guilty plea to kidnapping (based on the victim being moved no more than 12 feet within the same room, and detained only long enough to complete rape, forcible sodomy, indecent assault, and indecent acts) was *provident* where facts indicated that the victim was physically detained from leaving room, exit was blocked, the victim continued to try to leave, a loaded firearm was pointed at victim, the victim was physically assaulted to prevent departure, and sexual offenses were committed during the confinement period.

14. ***Larceny***.

a) *United States v. Harding*, 61 M.J. 526 (A. Ct. Crim. App. 2005). Accused pled guilty to two larceny specifications charging him, on divers occasions, with stealing currency of a value of more than $1,000 dollars. During providence inquiry, accused stated he took over $1,000 dollars but he never admitted that he took over $100 at any given time as needed to authorize a higher maximum sentence based on property value (case occurred prior to the $500 value change in 2002). Findings amended and sentence re-adjusted from 21 months to 6 months confinement.

b) *United States v. Sierra*, 62 M.J. 539 (A. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006). Accused was charged with wrongfully stealing services of a value of less than $100 from Priceline.com, a website for airline tickets. The record of trial, however, contained no evidence that the Priceline.com services had "any" value. There was no indication "that Priceline.com ever charged a service fee in connection with its operation. [The accused] cannot be found guilty of wrongfully obtaining free services by false pretenses." Finding set aside.

c) *United States v. Ezelle*, No. 200301560 (N-M. Ct. Crim. App. Nov. 29, 2004) (unpub.). Accused, a Lieutenant Commander Supply Officer, pled guilty to numerous larceny related offenses, to include stealing two military autofryers and a frozen drink machine for his personally owned bar. Because of the lack of an operable supply system, over $200,000 in lost and stolen equipment accrued during the accused's and previous supply officers' tenures. During the providence inquiry for the offense of wrongful disposition of military property through neglect, the exact amount of property lost or stolen during the accused's tenure as supply officer was never stated. While the court determined the property was of "some" value, the failure to specifically assert on the record that the value exceed $500 made the plea improvident as to the aggravating element of an amount over $500. *See United States v. West*, No. 20030277 (A. Ct. Crim. App. Feb. 23, 2005) (unpub.) (reversing the accused's conviction for larceny of an amount over $500 where the stipulation of fact and the record of trial failed to establish the amount of the approximately fifteen pieces of luggage stolen by accused in Pittsburgh International airport).

d) *United States v. Irby*, No. 35424, 2004 CCA LEXIS 293 (A.F. Ct. Crim. App. Dec. 30, 2004) (unpub.) (finding the accused's plea to larceny improvident but affirming the offense of wrongful appropriation where the accused stated she intended to pay back the credit card company but the MJ failed to resolve this inconsistency).

e) *United States v. Hughes*, 45 M.J. 137 (C.A.A.F. 1996). Plea to wrongful appropriation improvident as there was no taking or withholding of property. Victim continually placed personal items in accused's wall locker after being told not to do so; accused placed a lock on the wall locker to teach victim a lesson.

15. ***Lawful order***.

a) *United States v. Stapp*, 60 M.J. 795 (A. Ct. Crim. App. 2004) (reversing accused's guilty plea for violating a general order at Fort Lewis prohibiting minors from sleeping overnight at barracks; stipulation and

accused's testimony established he did not know the two girls who slept in his room were under eighteen until two days after the offense).

b) *United States v. Rokey*, 62 M.J. 516 (A. Ct. Crim. App. 2005). The accused attempted to cut his own hair, without significant success; his NCO ordered him to take off his cover in the front of formation, an order the accused disobeyed fearing public humiliation. The military judge advised the accused that if the NCO's purpose was to humiliate him than the order was not lawful. The military judge then asked the accused a series of leading questions to solicit a factual basis for the offense. ACCA held that the military judge did not sufficiently resolve the inconsistency regarding the accused's perception of humiliation when the MJ followed by only asking a series of leading questions.

16. ***Element of "prejudicial to good order and discipline"***.

a) *United States v. Jordan*, 57 M.J. 236 (C.A.A.F. 2002). Conviction for unlawful entry onto a ship reversed because accused's providence inquiry did not establish a basis for concluding that his conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces. The accused's "yes" response to the military judge's legally conclusive question as to whether his conduct was prejudicial or service discrediting does not establish a sufficient factual predicate.

b) *United States v. Erickson*, 61 M.J. 230 (C.A.A.F. 2005). The accused was charged with wrongfully inhaling nitrous oxide (laughing gas) in violation of Article 134. The accused admitted that his conduct was prejudicial to good order or was service discrediting because: (1) he was "high" for ten seconds, and (2) nitrous oxide destroys brain cells and as an airman he was "supposed to be on [his] toes." CAAF, affirming, stated that the accused admitted that his conduct would "undermine his capability and readiness to perform military duties—a direct and palpable effect on good order and discipline." CAAF noted that the decision does not preclude an accused from challenging, in the future, whether inhaling nitrous oxide is prejudicial to good order or service discrediting.

c) *United States v. Sweeting*, No. 20020720 (A. Ct. Crim. App. Sept. 9, 2004) (unpub.). Military judge explained the elements of adultery and obstruction of justice and included a lengthy description regarding the element of prejudicial to good order and service discrediting with the accused, who was a sergeant first class (E-7) with over sixteen years in service. Accused stated he understood the elements of both offenses and that the elements and definitions, taken together, correctly described his actions, but failed to specifically tell the military judge why his conduct was prejudicial and discrediting on the obstruction of justice charge. The

court stated even though the accused did not specifically state his conduct was prejudicial and discrediting he did provide sufficient objective factual statements to conclude his conduct was prejudicial and discrediting. "While this providence inquiry was not a model *Care* inquiry, under the facts and circumstances of this case, the record of trial does not raise a substantial, unresolved question of law and fact as to the providence of [the accused's] guilty pleas to obstruction of justice."

17. ***Sale of military property***. *United States v. Aleman*, 62 M.J. 281 (C.A.A.F. 2006). Accused pled guilty to, among other offenses, willfully suffering the sale of military property. An element of this offense requires that the accused allowed or permitted the property's sale by a certain omission or disregard of a duty. In the stipulation of fact and providence inquiry, the accused admitted that he assisted a co-accused by driving him to pawnshops, by loaning him his car to take to pawnshops, by keeping lookout while the co-accused stole property, and by helping the co-accused carry stolen equipment into the pawnshops. CAAF held that "[t]he military judge did not elicit any testimony from [the accused] regarding any duty he may have had to safeguard the property, and [the accused] did not articulate such a duty." Failure to obtain this evidence created a substantial basis in law and fact to question the plea. The findings as to the suffering the sale of military property were set aside.

18. ***Sodomy***. For sodomy offenses, the "[p]rovidence inquiry must now establish a factual predicate which objectively supports a finding that an accused's conduct was outside the liberty interest identified in *Lawrence* and discussed in *Marcum*." *United States v. Bullock*, No. 20030534 (A. Ct. Crim. App. Nov. 30, 2004) (unpub.) (holding a plea of consensual sodomy between the accused and an adult female civilian in the accused's barracks room was improvident). *But see United States v. Avery*, 2005 CCA LEXIS 59 (N-M. Ct. Crim. App. Feb. 28, 2005) (unpub.) (determining accused's plea to sodomy with two adult females was provident because military factors existed, specifically his subordinates and the local Japanese nationals knew about his extra-marital affairs).

19. ***Unlawful entry cases***.

a) *United States v. Rockwell,* No. 20011057 (A. Ct. Crim. App. June 28, 2004) (unpub.) (accused's plea to unlawful entry not provident when the MJ failed to refute claim that the accused was an invited guest).

b) *United States v. Speed*, No. 20020573 (A. Ct. Crim. App. Feb. 2, 2005) (unpub.). Accused charged with numerous offenses related to sexually harassing and stalking junior enlisted women. One evening, the accused (while drunk) convinced the Staff Duty NCO to provide him the barracks' master key. With the master key, the accused entered PFC C.R.'s barracks room and attempted to enter PV2 A.M.'s room but another

Soldier visiting PV2 A.M. placed the security chain on the door just as the accused attempted to enter. Accused's plea to unlawful entry into PV2 A.M.'s room was not provident in that he never actually entered the room but the court found a "sufficient factual basis to support [accused's] conviction to an attempt to commit an unlawful entry."

G. **FAILURE TO RESOLVE POTENTIAL DEFENSES**.

1. ***Attempt offenses–larceny***. *United States v. Thornsbury*, 59 M.J. 767 (A. Ct. Crim. App. 2004). Accused's statements during providence inquiry into attempted larceny by breaking into a car did not reasonably raise potential defense of voluntary abandonment where accused had caused substantial harm to the victim as a result of the attempt (specifically cutting the back window out of the convertible top of the vehicle).

2. ***Attempt offenses–bigamy***. *United States v. Davis*, No. 20010678 (A. Ct. Crim. App. Nov. 25, 2003) (unpub.). Accused abandoned attempted bigamy by manifesting a "change of heart." Finding set aside where military judge did not explain the defense and resolve the conflict or reject the plea.

3. ***AWOL–voluntary termination***.

a) *United States v. Scott*, 59 M.J. 718 (A. Ct. Crim. App. 2004). Plea to AWOL from 16 August through 5 November 2002 improvident because accused signed in with CQ on 11 September 2002. Court reiterated holding in *Rogers*, *infra*, which held that if, "during a plea inquiry, evidence is adduced indicating the accused's casual presence in the unit area during the AWOL period alleged on the charge sheet, then before accepting the plea the military judge should explain voluntary termination and ensure that no factual basis exists for it. In doing so, the military judge should focus on . . . presentment, with intent to return, presentment to a military authority, identification and disclosure of status, and submission to actual or constructive control."

b) *United States v. Rogers*, 59 M.J. 584 (A. Ct. Crim. App. 2003). Plea to AWOL provident even though accused remained at or near the post and saw some NCOs in her unit. This casual presence did not rise to the level of voluntary termination of the AWOL. Court sets four-part test that must be satisfied to voluntarily terminate an AWOL.

c) *United States v. Phillippe*, 63 M.J. 307 (C.A.A.F. 2006). Accused pled guilty to an AWOL from 24 July 2001 to 31 March 2004. However, during his unsworn statement, accused stated he attempted to turn himself in right after the 9/11 bombing to an Air Force base in Montana and in

Summer 2002 he tried to meet up with his hometown recruiter in Illinois. CAAF held that the accused's statement regarding his attempt to return right after 9/11 raised a matter inconsistent with pleading guilty to an almost three year AWOL. CAAF affirmed an AWOL for a shorter period (24 July 2001 to 11 September 2001) and set aside the sentence.

4. ***AWOL–duress***.

a) *United States v. Barnes*, 60 M.J. 950 (N-M. Ct. Crim. App. 2005). During a motion in limine the accused testified to facts establishing a potential duress defense to his AWOL. The accused alleged that he went AWOL from his ship after receiving beatings that his chain of command failed to stop. The accused returned to his ship after a few weeks but was told he was returning to the same section and additional threats of abuse were lodged causing the accused to again go AWOL for 52 months. The MJ granted the government's motion in limine to preclude the accused from raising a duress defense and the accused pled guilty to a 52-month AWOL. During the providence inquiry, the MJ did not advise the accused on the defense of duress and the accused did not discuss the facts surrounding his duress defense. On appeal, the N-MCCA held that the MJ erred in failing to advise the accused on the defense of duress particularly in light of the accused's "extensive testimony" on that issue in the court-martial motion's stage.

b) *United States v. Phong T. Le*, 59 M.J. 859 (A. Ct. Crim. App. 2004). Military judge failed to resolve conflict between plea of guilty to desertion and statements indicating accused deserted under duress. Court finds the threat that resulted in duress dissipated within four days, when accused was safely away from the threat, and affirmed the desertion time period running from four days after initial date of desertion through the termination period of the desertion. *See United States v. Whiteside*, 59 M.J. 903 (C.G. Ct. Crim. App. 2004).

c) *United States v. Southard,* No. 20021317 (A. Ct. Crim. App. Feb. 8, 2005) (unpub.). The accused's team leader told him he was going to kill him. On 8 May 2001, the accused went AWOL and called his company commander a few days later. After talking to the commander, accused stated he no longer felt threatened but he remained absent until mid-October 2002. The MJ did not adequately address a duress defense by failing to resolve the immediacy of the threat and failing to determine whether the accused has a reasonable opportunity to avoid the AWOL without subjecting himself to harm. The court amended the AWOL specification finding "that the duress ceased to be a motivating factor for [accused's] AWOL by 19 MAY 01."

5. ***AWOL–mental responsibility defense***.

a) *United States v. Harrow*, 62 M.J. 649 (A.F. Ct. Crim. App. 2006). The accused was on authorized leave, but on the day she was to return her parents took her to a civilian mental health center. Accused told the center that she was in the military: "I told them to call, sir, to let my unit know where I was, but I didn't plan on coming back [to the base]. I planned to stay at the hospital." Accused's AWOL specification overturned because a "substantial conflict" existed as to "whether the accused's mental health status precluded her ability to report to her place of duty."

b) *United States v. Coleman*, No. 20030173 (A. Ct. Crim. App. Feb. 2, 2005) (unpub.). During providence inquiry the accused pled guilty to a five day AWOL. On the second day of the AWOL the accused went to the psychiatric clinic for depression and during providence inquiry asserted he was "mentally" prevented from going to work. Failure to advise the accused of the mental responsibility defense results in reversible error for that finding.

6. ***AWOL–inability***.

a) *United States v. Jones*, 64 M.J. 621 (C.G. Ct. Crim. App. 2007). Accused pled guilty to an AWOL offense, but stated during the providence inquiry that he was unable to return to his unit because he was confined by civilian authorities. He returned to his unit shortly after release from the civilian incarceration. While incarceration due to an accused's own misconduct does not excuse an absence offense, detention that is *not* the result of an accused's misconduct does excuse such an offense. In this case, the providence inquiry did not resolve the issue of whether the civilian incarceration was the result of the accused's misconduct, and therefore, there was an "unresolved matter inconsistent with the plea." The finding as to the AWOL specification was set aside and the sentence was reassessed.

b) *United States v. Kinchen*, No. 20040707 (A. Ct. Crim App. Oct. 31, 2006) (unpub.). Guilty pleas to four specifications of failing to report to accused's appointed place of duty were held to be improvident due to the military judge's failure to address the physical impossibility defense raised during his unsworn statement. During the unsworn statement, accused stated that his prescribed medication prevented him from waking up, thus raising the defense and leaving "substantial, unresolved questions of law and fact."

c) *United States v. Boyd*, No. 20021264 (A. Ct. Crim. App. June 16, 2004) (unpub.) (military judge erred by accepting accused's plea without explaining the inability defense to the accused).

7. ***Entrapment***. *United States v. Williams*, 61 M.J. 854 (N-M. Ct. Crim. App. 2005). Accused pled guilty to distributing ketamine to two uncover female NCIS agents after their request for drugs. While the plea inquiry established that the accused distributed ketamine based on an inducement from the NCIS agents, the accused did not otherwise indicate that he lacked a predisposition to distribute so the defense of entrapment was not raised. *See also United States v. Ricottone*, No. 30337, 2005 CCA LEXIS 226 (A.F. Ct. Crim. App. June 15, 2005) (unpub.) (affirming the plea because of the military judge's inquiry into whether an entrapment defense existed and the lack of factual basis to support the defense even though the military judge failed to advise the accused of the elements of the entrapment defense).

8. ***Larceny–Abandonment of Property***. *United States v. Coffman*, 62 M.J. 677 (N-M. Ct. Crim. App. 2006). The accused pled guilty to stealing a force vest, canteen covers, and a duty belt while serving in Iraq. During the providence inquiry, accused told military judge that he found the equipment while in a room he had been ordered to clean out, that there were items in the room "that people just never went and got . . . [t]hey just left it there for trash," that he had been ordered to get rid of the gear in the room and the stolen equipment was from a box in the room, and that he had attempted to determine the owner of the equipment. Accused used the gear for about a month until his section leader inquired about how he procured the property. MJ did not advise the accused of the mistake of fact defense or give the legal definition of abandoned property. The N-MCCA, reversing, held "[b]y not explaining the relevant legal terms, the military judge denied the [accused] the ability to make an informed decision concerning the answers he provided." The N-MCCA also provided a reminder that it is not only the military judge's job to conduct a proper providence inquiry but that the trial counsel is also charged with safeguarding the proceeding: "Trial counsel, in particular, should be ever vigilant during the plea providence inquiry and assist the military judge by suggesting areas of further inquiry concerning the elements of the offense or potential defenses."

9. ***Mental responsibility***. "We do not see how an accused can make an informed plea without knowledge that he suffered a severe mental disease or defect at the time of the offense. Nor is it possible for a military judge to conduct the necessary *Care* inquiry into an accused's pleas without exploring the impact of any potential mental health issues on those pleas." *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

a) *United States v. Glenn*, 66 M.J. 64 (C.A.A.F. 2008). The accused pled guilty to wrongful use of ecstasy and an unauthorized absence.

presentencing, the accused made a sworn statement to members. He claimed he "always had the bipolar disorder" and "always fought depression . . . [and] extreme mood swings." He said that before his unauthorized absence, he was admitted to an Army hospital and diagnosed with "borderline personality disorder." The defense called a social worker and forensic counselor who screened the accused before he was placed in pretrial confinement. Based on this screening, she concluded the accused had a "mood disorder, not otherwise specified," based on "some ups and downs in his mood." The social worker added that a psychiatrist later diagnosed the accused with cyclothymic disorder, a condition characterized by rapid cycling of moods that would not normally affect day-to-day activities. The defense then called the accused's sister, who testified that their family had a history of bipolar disorder. The court noted "two important and longstanding principles," that the accused is "presumed to be sane" and that counsel is "presumed to be competent." On appeal, a guilty plea will not be set aside unless there is a substantial basis in law or fact for questioning the plea. The accused's passing comment about bipolar disorder, balanced against the other testimony that he actually suffered from a less-serious mental condition, was not enough to raise a substantial basis in law or fact to question the plea. To the contrary, the passing reference to a mental disorder only raised a "mere possibility" of conflict with the plea.

b) *United States v. Johnson*, 65 M.J. 919 (C.G. Ct. Crim. App. 2008). Accused pled guilty to wrongful use of cocaine and several other offenses pursuant to an approved pretrial agreement. On appeal, the defense argued the accused's pleas were improvident because the military judge failed to resolve the defense of lack of mental responsibility. During the presentencing phase of trial, defense called a clinical social worker who had been treating the accused for substance abuse. The social worker testified that he had been told by a Tricare psychologist that the accused had been diagnosed with major depressive disorder and schizophrenia, and that the accused suffered from "full-blown panic attacks" and "hallucinations." When questioned about the accused's "ability to determine right from wrong," the social worker replied, "Most of the time, yes. He does have a schizophrenic piece to him that could sometimes take precedent." Relying on *United States v. McGuire*, 63 M.J. 678, 681 (A. Ct. Crim. App. 2006), the Coast Guard court noted the military judge must re-open the providence inquiry even if mental health professionals had previously decided the accused was mentally responsible for the charged offenses. The court noted that if such a defense is raised, the military judge must explain the affirmative defense to the accused, who must then "demonstrate an understanding of the defense" and give a "factual basis for why it does not apply to him." Consistent with other cases dealing with defenses in guilty plea, it is not enough for the accused to summarily state that the defense does not apply: "Defense counsel's naked

concessions are not a substitute for the requirement to conduct a meaningful inquiry into any affirmative defense raised by the record, and to ascertain from the accused himself whether his pleas are fully informed and voluntary."

c) *United States v. McGuire*, 63 M.J. 678 (A. Ct. Crim. App. 2006). Accused pled guilty to several specifications of indecent exposure related to masturbating at Target, K-Mart, Wal-Mart, and the PX. Two of these incidents occurred days prior to his court-martial. Several times on the record the accused laughed when answering the judge's questions, cried once, and stated he was seeking "psychiatric therapy and taking medication." During sentencing, the defense introduced a psychiatric evaluation stating, among other things, that the accused could appreciate the wrongfulness of his actions. On appeal, defense argued that the military judge erroneously failed to explain the defense of lack of mental responsibility to the accused. ACCA affirmed, finding "nothing to indicate that [the accused] was suffering from a *severe* mental disease or defect" and "declin[ing] to conclude that any reference to psychiatric treatment or problems, no matter how vague or oblique, is sufficient to create a substantial basis for questioning a guilty plea."

10. ***Mistake-of-fact defense***.

a) *United States v. Zachary*, 61 M.J. 663 (A. Ct. Crim. App. 2005), *aff'd*, 63 M.J. 438 (C.A.A.F. 2006). During providence inquiry for indecent acts with a child under the age of sixteen, accused stated that he did not know the child was under the age of sixteen until notified by CID and no other facts were introduced during guilty plea to show that the accused's mistake as to the child's age was unreasonable. On appeal, ACCA and CAAF rejected the accused's plea to indecent acts with a child under the age of sixteen based on his mistake as to the child's age but affirmed a finding of guilt as to the lesser included offense of indecent acts with another.

b) *United States v. Thomas*, 45 M.J. 661 (A. Ct. Crim. App. 1997). Military judge committed reversible error in providence inquiry by misstating that force and lack of consent could be established by mere fact that sodomy victims were under age 16, and by failing to inquire into mistake of fact defense regarding consent of victims. Accused was charged with forcible sodomy and indecent acts with a child (a 12-year-old and a 13-year-old). Accused's responses raised issues of reasonable and honest mistake, and military judge's misstatements about legal effect of girls' ages effectively foreclosed development of additional facts which might have supported or negated the defense. The stipulation of fact also contained contradictory paragraphs containing the accused's version (no

force and consent) and the victims' version (force and without consent). ACCA cautioned against "including conflicting 'stipulated testimony' as part of a stipulation of fact supporting a plea of guilty."

c) *United States v. Pitre*, No. 20010258 (A. Ct. Crim. App. Aug. 20, 2004) (unpub.). During the drill sergeant accused's providence inquiry for indecent assault against a trainee, the military judge asked the civilian defense counsel if the mistake-of-fact defense applied. The defense attorney erroneously responded that an indecent assault offense turns on the apprehension of the victim and the elements of the assault were met if the victim believed an assault occurred. The mistake-of-fact defense, however, can exist for an indecent assault specification if the accused believed the individual consented to his acts and his belief was reasonable under all the circumstances. Based on the defense counsel's response, the military judge did not read the elements of the mistake-of-fact defense to the accused and did not resolve the factual inconsistency as to whether a mistake-of-fact defense existed.

d) *United States v. Clanton*, No. 20020279 (A. Ct. Crim. App. Dec. 20, 2004) (unpub.) (holding plea for failing to go to appointed place of duty improvident when the MJ failed to explain the mistake of fact defense raised by the accused during providence inquiry). *See also United States v. Coleman*, No. 20030173 (A. Ct. Crim. App. Feb. 2, 2005) (determining MJ erred for failing to advise the accused of the mistake of fact defense when the accused stated his first sergeant frequently released soldiers from duty for similar reasons and the first sergeant retroactively gave the accused a two-day pass).

11. ***Voluntary intoxication***.

a) *United States v. Brown*, No. 35837, 2004 CCA LEXIS 209 (A.F. Ct. Crim. App. Aug. 30, 2004) (unpub.). Accused pled guilty to cocaine use but did not mention alcohol use on the night in question during his providence inquiry. During sentencing phase, trial counsel introduced substantial evidence of accused's abundant use of alcohol by admitting the verbatim Article 32 testimony of two Air Force agents who stated that on the night in question the accused told them the cocaine "made his tongue 'numb' but that he was 'too drunk' to feel any other effects of the cocaine." Trial counsel also admitted the verbatim Article 32 testimony of the accused's girlfriend in which she stated that he was "getting pretty drunk." Accused, during his unsworn statement, stated he was "pretty buzzed." Military judge erroneously failed to reopen the providence inquiry (despite the numerous statements regarding the accused's level of intoxication) to determine if his use of cocaine was with actual knowledge. Findings and sentence set aside.

b) *United States v. Metivier,* No. 20050615 (A. Ct. Crim App. July 24, 2007) (unpub.). The accused was charged with several offenses relating to his consumption of alcohol while deployed in Iraq. He was charged, *inter alia,* with drunk on duty, drunken driving, willfully discharging a firearm, and attempting to flee from apprehension. He pled guilty to all of the charges and provided facts during the providence inquiry related to the offenses. However, as all of the offenses occurred relatively close in time, it was clear that the accused was intoxicated at the time he committed the offenses. In addition, the accused stated, "Everything that happened that night, I blame it on that drink." Both willfully discharging a firearm and attempted flight from apprehension are specific intent offenses, and voluntary intoxication provides a defense to both offenses. The charge sheet, the providence inquiry, and the stipulation of fact all raise the issue of voluntary intoxication, yet the military judge failed to address this defense with the accused. He "failed to advise [the accused] of the existence of the defense and failed to resolve the applicability of the defense to [the accused's] plea of guilt." As such, the court found that there was a "substantial basis in law or fact" to question accused's plea to these specific intent offenses.

H. **INQUIRY INTO PRETRIAL AGREEMENT**.

1. *United States v. King*, 3 M.J. 458 (C.M.A. 1977) (military judge must secure from trial and defense counsel "confirmation that the written agreement encompasse[s] all of the understandings of the parties, and that the judge's interpretation of the agreement comport[s] with their understanding both as to the meaning and effect of the plea bargain").

2. *United States v. Green*, 1 M.J. 453 (C.M.A. 1976) (military judge must establish "on the record that the accused understands the meaning and effect of each provision in the pretrial agreement").

3. *United States v. Felder*, 59 M.J. 444 (C.A.A.F. 2004). Military judge did not inquire into a term of the PTA regarding defense's waiver of any motions for sentence credit based on Article 13 and/or restriction tantamount to confinement. Defense counsel did inform the MJ that no punishment under Article 13 or restriction tantamount to confinement had occurred. While the MJ's failure to discuss the term was error, the accused failed to show the error materially prejudiced a substantial right.

4. *United States v. Sheehan*, 62 M.J. 568 (C.G. Ct. Crim. App. 2005). Military judge failed to cover a misconduct clause and "specially negotiated provisions" of the accused's PTA and provided an incorrect explanation as to another provision. CGCCA found that the military judge erred but that his omissions and misleading explanation did not prejudice the accused's substantial personal rights.

5. *United States v. Whetstone*. No. 9500619, (A. Ct. Crim. App. Apr. 8, 1996) (unpub.). PTA provided that any confinement in excess of 24 months would be suspended for 24 months. MJ adjudged a $10,000 fine with proviso that if not paid by end of 24 months confinement, then accused would serve additional 12 months confinement. CA approved adjudged sentence. PTA ambiguous on suspension of confinement resulting from an adjudged fine. Ambiguity resolved in favor of accused by suspending the confinement resulting from the fine.

6. *United States v. Acevedo*, 50 M.J. 169 (C.A.A.F. 1999). A term in a pretrial agreement requiring the Government to suspend for 12 months and then remit a dishonorable discharge did not preclude approval of an adjudged bad conduct discharge. *See also United States v. Gilbert*, 50 M.J. 176 (C.A.A.F. 1999) (identical holding in companion case).

I. **UNDISCLOSED TERMS (*"SUB ROSA"* AGREEMENTS) ARE PROHIBITED**. *See* R.C.M. 705(d)(2), R.C.M. 910(f)(2) Discussion; *United States v. Jones*, 52 M.J. 60, 66 (C.A.A.F. 1999) ("The terms of the agreement should be understood by all parties to the agreement to permit full disclosure at trial and to allow a full inquiry by a judge. The substance of these agreements must be in writing. Thus, the primary goal of RCM 705 is to preclude misunderstandings about the terms of an agreement and to prohibit *sub rosa* agreements.").

1. *United States v. Rhule*, 53 M.J. 647 (A. Ct. Crim. App. 2000). Accused attempted to plead guilty to several bad check offenses under Article 123a. He was also charged with larceny and forgery, to which he pled not guilty. After the MJ rejected the pleas as improvident, the defense announced the accused requested trial by military judge alone, and the government moved to dismiss the larceny and forgery specifications. Post-trial affidavits showed there was a *sub rosa* agreement for the government to dismiss the larceny and forgery offenses in exchange for the accused's election for trial by military judge alone and for proceeding to trial that day. This agreement was governed by R.C.M. 705 and it should have been in writing and disclosed at trial so that the judge could ensure on the record that the waiver was knowing and voluntary. Moreover, the TC should not have acted to bind the convening authority. It was clear, however, that the accused's waiver of a panel was knowing, voluntary, and intelligent. There was no prejudice to the accused. The court makes clear that while not all *sub rosa* agreements require corrective action and will be examined for their effect on the trial, all pretrial agreements should be disclosed to the trial judge.

2. *United States v. Sherman*, 51 M.J. 73 (C.A.A.F. 1999). Accused pled guilty to offenses stemming from his insubordinate behavior at an off-duty dinner. After trial, accused told his appellate defense counsel that unlawful command influence had affected his pretrial confinement and his trial but was told that if the defense raised the issue they would lose the favorable pretrial agreement. TC's affidavit noted that he recalled defense raising the possibility of pretrial motions, to include

an issue of command influence, but they never discussed waiving those issues as part of a pretrial agreement, and that his understanding was that even after the government agreed to the PTA, "the defense was free to raise the issues it was concerned with without fear of losing the benefits of the agreement." DC's affidavit noted that the TC had implied that he might not recommend a pretrial agreement if the UCI motions were raised, particularly since motions would require delay and the deal would be contingent to going to trial on a date certain. CAAF set aside the ACCA decision and directed a *Dubay* hearing on whether there was a *sub rosa* agreement.

3. *United States v. Bartley,* 47 M.J. 182 (C.A.A.F. 1997) (setting aside case based on *sub rosa* agreement to waive claim of unlawful command influence).

4. *United States v. Allen*, 39 M.J. 581 (N.M.C.M.R. 1993) (waiver of Article 32 and the admissibility of uncharged misconduct in stipulation of fact were undisclosed terms of pretrial agreement; court expresses concern over assurances from trial and defense counsel to military judge that his inquiry covered all terms).

J. **INQUIRY INTO STIPULATION OF FACT**. *United States v. Resch*, 65 M.J. 233 (C.A.A.F. 2007). Accused was charged with desertion terminated on 17 March 2003 and pled guilty to lesser-included offense of unauthorized absence terminating on 22 January 2003. In accordance with his pretrial agreement, accused entered into a stipulation of fact that included the "circumstances surrounding his two arrests in Michigan . . . [and] how [he] was returned to military control." The stipulation of fact also contained the following: "These facts may be considered by the Military Judge in *determining the providence of the accused's plea of guilty*, and they *may be considered by the sentencing authority* . . . even if the evidence of such facts is deemed otherwise admissible." (emphasis supplied by the court). The stipulation also included a "Stipulation to Admissibility of Evidence," stating, "the following evidence is *admissible at trial*, may be considered by the military judge *in determining the providence of the accused's plea of guilty*, and may *be considered by the sentencing authority* . . . ." (emphasis supplied by the court). The paragraph then listed several exhibits, including the stipulation of fact. During the providence inquiry, military judge advised the accused as to how the stipulation of fact would be used, stating that it would be used to determine guilt of the offenses to which the accused plead guilty and to determine an appropriate sentence. After the military judge accepted the accused's plea, the government presented evidence for the desertion charge; trial counsel called only one witness, who testified that he did not know the accused and was surprised to see him in his company formation on 17 March 2003, the alleged termination date of the accused's AWOL. After both sides rested, trial counsel sought to clarify that the providence inquiry *would not be considered* by the court in proving defenses to the alleged desertion. The defense counsel stated, "We believe the contents of the providence inquiry can be used for proving the elements of the greater offense . . . and the defense can also used anything exculpatory elicited I the providence inquiry as well." MJ said he would "consider the stipulation of fact and everything I have heard up to now in determining the guilt or innocence of [the accused]

on the greater offense." During argument, trial counsel used the facts in the stipulation of fact and the providence inquiry to argue that the accused had formed the intent to remain away permanently. On appeal, CAAF concluded that it was error to use the providence inquiry statements in determining guilt of the contested offense. During providence inquiry, military judge advised the accused that he was giving up his right to self-incrimination, but only to the offenses to which he was pleading guilty. Therefore, to use admissions from the providence inquiry during the contested portion of the trial was inconsistent with the advice the military judge gave the accused. As such, there was an "insufficient basis to determine that [the accused] knowingly consented to the use of the stipulation and the adjoining exhibits in the Government's case on the merits."

K. **ACCEPTANCE OF PLEAS AND ENTERING FINDINGS**. *United States v. Baker*, 28 M.J. 900 (A.C.M.R. 1989) (military judge who knew that trial counsel intended to prove rape improperly entered findings pursuant to pleas of guilty to lesser included offense of carnal knowledge).

L. **REFUSAL OF MILITARY JUDGE TO ACCEPT PLEAS**.

1. ***Improvident pleas***. For a plea to be inconsistent with factual and legal guilt, there must be more than the possibility of a defense; however, if the accused raises an inconsistency the MJ must resolve it. *United States v. Johnson*, 25 M.J. 553 (C.M.A. 1987). If accused's comments or any other evidence reasonably raises a defense, military judge must explain elements of defense to accused. It is not relevant that comments are not credible; the sole question is whether accused made a statement during the trial that was in conflict with his plea.

a) *United States v. Outhier*, 45 M.J. 326 (C.A.A.F 1996). A military judge must reopen providence and resolve a conflict between the facts and the plea where facts brought out during sentencing were inconsistent with accused plea. The accused was charged with aggravated assault likely to cause death or grievous bodily harm by binding the victim's hands and feet and allowing him to jump into the deep area of swimming pool as a practice exercise after accused had falsely asserted his qualification as a Navy SEAL and hospital corpsman. The accused's plea was improvident because the facts revealed during sentencing negated the "means likely to produce death or grievous bodily harm" element. Specifically, the accused remained nearby with life preserver and had trained with victim the entire day; the victim was not a novice swimmer, indicated desire to train while off duty, understood danger, and was aware he was not obligated to participate in exercise.

b) *United States v. Handy*, 48 M.J. 590 (A.F. Ct. Crim. App. 1998) (mere possibility that the accused could have used his mental condition to

dispute knowledge elements of the drug related offense was waived by pleading guilty).

c) *United States v. White*, 46 M.J. 529 (N-M. Ct. Crim. App. 1997). Plea to dereliction of duty (failure to notify finance section of wrongful receipt of allowances) was improvident where MJ failed to factually establish and elicit source of duty to account from accused during providence inquiry.

2. ***Irregular pleas***. R.C.M. 910(b).

a) ***Guilty plea in capital case***. *United States v. Fricke,* 53 M.J. 149 (C.A.A.F. 2000). Military judge did not err in accepting accused's plea to premeditated murder where there was no written record of CA withdrawing capital referral and re-referring as non-capital case. Military judge noted noncapital referral on record with no objection of parties.

b) ***Plea that does not admit guilt***. *Alford* and nolo contendre pleas are not recognized under the UCMJ. If the accused attempts to enter such a plea (which purports to be a guilty plea without admitting guilt) military judge is required to enter a plea of not guilty on the accused's behalf.

3. ***Voluntary and intelligent pleas***.

a) *United States v. Redlinski*, 58 M.J. 117 (C.A.A.F. 2003). CAAF examined the record of trial to determine if the military judge ensured the accused's plea was knowing and voluntary. Court held the military judge erred by failing to adequately explain the elements of attempted distribution of marijuana. Guilty pleas were improvident.

b) *United States v. Roeseler*, 55 M.J. 286 (C.A.A.F. 2001). Under the terms of a PTA, the accused pled guilty to conspiracy to murder and attempted murder of a Soldier in his unit and two people who in fact did not exist. On appeal, accused argued his guilty pleas regarding the fictitious individuals were improvident because the MJ failed to instruct on the defense of impossibility and one of the conspirators knew the targets did not exist. CAAF noted that guilty pleas in the military justice system must be both voluntary and intelligent, and the military judge is tasked with ensuring that the military accused understands the nature of the offenses to which guilty pleas are accepted. Noting that some leeway must be afforded the trial judge concerning the exercise of her judicial responsibility to explain a criminal offense to an accused, the court held that the MJ's explanations in this case were sufficient.

c) *Redlinski* does not overrule *Roeseler*. *Redlinski* stands for the proposition that, to be provident, a guilty plea must be supported by a record of trial that shows the military judge adequately explained the elements of each offense. If the military judge fails to do so, there is reversible error, unless it is clear from the entire record that the accused knew the elements, admitted them freely, and pled guilty because he was guilty. *Roeseler* continues to stand for the proposition that the accused is not entitled to a "law school lecture" on the technicalities of the law. Taken together, both opinions show that CAAF will look at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially, rather than focusing on a technical listing of the elements of an offense.

4. ***Misunderstanding of maximum possible sentence***.

a. ***Confusion about maximum sentence may render plea improvident***. *United States v. Castrillion-Moreno*, 7 M.J. 414 (C.M.A. 1979). *But see United States v. Hunt*, 10 M.J. 222 (C.M.A. 1981) (all factors are examined to determine if misapprehension of maximum punishment affected guilty plea, or whether the factor was insubstantial in accused's decision). *See also United States v. Poole*, 26 M.J. 272 (C.M.A. 1987); *United States v. Kyle*, 32 M.J. 724 (A.F.C.M.R. 1991); *United States v. Hemingway*, 36 M.J. 349 (C.M.A. 1993).

b. *United States v. Silver*, 40 M.J. 351 (C.M.A 1994). After findings in provident guilty plea, military judge noticed that maximum punishment was five years more than he had previously advised the accused. Military judge asked accused if he still wished to plead guilty. Accused indicated he did. No error on part of judge by failing to expressly advise accused (per the *Benchbook*) of his right to withdraw his plea.

c. *United States v. Ontiveros,* 59 M.J. 639 (C.G. Ct. Crim. App. 2003) (incorrect advice as to maximum sentence did not render plea improvident where evaluation of all the circumstances of the case revealed that it was "an insubstantial factor in the decision to plead guilty).

d. *United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995). Accused charged with writing bad checks and wrongful appropriation. Military judge advised accused that maximum punishment included 6½ years and ***Dishonorable Discharge***. Pretrial agreement was 39 months. Correct maximum was 109 months (9 years and 1 month) and ***BCD***. No prejudice.

M. **EFFECT OF REFUSAL TO ACCEPT GUILTY PLEA**.

1. Plea(s) of not guilty entered on behalf of accused.

2. No automatic recusal of military judge; however, in a trial by military judge alone, refusal of the request for trial by military judge alone will normally be necessary when a plea is rejected or withdrawn after findings. R.C.M. 910(h)(2) Discussion; *United States v. Rhule*, 53 M.J. 647 (A. Ct. Crim. App. 2000) (finding the Army preference is for the MJ to recuse himself); *United States v. Winter*, 32 M.J. 901 (A.F.C.M.R. 1991). S*ee also United States v. Flynn*, 11 M.J. 634 (A.F.C.M.R. 1981) (after rejecting guilty plea because accused raised entrapment issue, military judge advised accused of his right to challenge the judge for cause; defense did not challenge the military judge, who made findings of fact that he would remain impartial, so no prejudice).

N. INABILITY TO RECALL FACTS.

1. ***Lack of personal recollection not a bar to pleading guilty***. *United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977). Accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea.

2. ***Nevertheless the accused must be convinced of, and able to describe all the facts necessary to establish guilt***. *See also* R.C.M. 910(e) Discussion; *United States v. Wiles*, 30 M.J. 1097 (N.M.C.M.R. 1989).

O. **USE OF GUILTY PLEAS IN MIXED PLEA CASES**.

1. ***Panel not notified***. Generally, panel will not be informed when the accused enters mixed pleas. R.C.M. 910(g) Discussion; R.C.M. 913(a) (if mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pled guilty until after the findings on the remaining contested offenses have been entered). Thus, where an accused pleads guilty to offense A, but not guilty to offense B, military judge should defer informing court members of the plea to offense A until *after* findings are announced on contested offense B. *United States v. Smith*, 23 M.J. 118, 120 (C.M.A. 1987). *See also United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993) (reversible error to advise members that accused had pled guilty to other offenses).

2. ***Entering findings***. Typically, the military judge will enter findings immediately after acceptance of a plea. R.C.M. 910(g). However, where the accused pleads guilty to a lesser included offense and the prosecution intends to go forward on the contested charge: (1) the military judge should *not* enter

findings after the accused pleads pursuant to R.C.M. 910(g)(2); and (2) prior to commencement of trial on the merits, military judge will instruct the members that they should "accept as proved the matters admitted in the plea, but must determine whether the remaining elements are established" pursuant to R.C.M. 920(e) Discussion.

3. ***Exceptions***: (a) If the accused requests members be informed of guilty pleas, or (b) if guilty plea is to a lesser included offense and the trial counsel intends to prove the greater offense. R.C.M. 913(a), Discussion. *United States v. Irons*, 34 M.J. 807 (N.M.C.M.R. 1992) (military judge committed error in not cleaning up flyer, which reflected greater offense to which the accused pled not guilty and which the government did not intend to pursue, was not waived by accused's failure to object; sentence set aside).

a) Where an accused pleads guilty to Offense A, which is a lesser included offense of offense B, and the government intends to try to prove offense B before a panel, the military judge should instruct the panel that they may accept certain previously admitted elements of the greater offense as proven. R.C.M. 913(a) Discussion.

b) In cases of multiple offenses, however, the military judge should instruct the panel that it may not use the plea of guilty to one offense to establish the elements of a separate offense. R.C.M. 920(e) Discussion. *Cf. United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993).

4. *United States v. Kaiser*, 58 M.J. 146 (C.A.A.F. 2003). Accused, an instructor at the Defense Language Institute, was charged with numerous violations arising from improper relationships with students. Accused pled guilty to some of the offenses; military judge informed the panel of the guilty plea prior to commencement of trial on the merits. When the defense raised a question as to why the offenses to which the accused pled guilty were on the flyer that the members would see, the military judge mistakenly replied that the *Benchbook* required him to inform the members of the guilty pleas. The panel convicted accused of two additional offenses, and found him not guilty of other offenses. Held: "The law in this area is clear—in a mixed plea case, in the absence of a specific request made by the accused on the record, members of a court-martial should not be informed of any prior pleas of guilty until after the findings on the remaining contested offenses are made. This rule is long standing and embodied in the *Benchbook*." Error was prejudicial and required reversal of findings and sentence, as it directly impacted the presumption of innocence and the fundamental right to a fair trial.

5. *United States v. Smith*, 50 M.J. 451 (C.A.A.F. 1999). The accused was charged with raping and sodomizing H, his stepdaughter, and with committing indecent acts with her. He pled guilty by exceptions and substitutions to the

indecent acts offense (which alleged that he had placed his fingers into—and is penis upon—H's vagina and anus; accused claimed he had penetrated her anus and vagina with his fingers and that he had placed his penis on her vulva, but that he had not placed his penis on her anus). He denied ever raping her or attempting to sodomize her. Accused further stated that the actions took place on three different occasions in June, July, and August (he was charged with committing the indecent acts "from . . . June 1995 to . . . August 1995"). Military judge instructed the panel that they could consider that the accused's plea to Charge III established certain elements of Charge III, as well as certain elements of Charge I and Charge II (the rape and sodomy offenses). CAAF treated the issue on appeal as one of instructional error, and, applying the waiver provision of R.C.M. 920(f), found the defense counsel's actions amounted to an affirmative waiver of the requirement for the prophylactic instruction concerning the use of the accused's plea. *See* Colonel Ferdinand D. Clervi, *Annual Review of Developments In Instructions–1999*, ARMY LAW., Apr. 2000, at 108 (*Smith* "is important in emphasizing the need for all parties to be clear and unambiguous when discussing proposed instructions").

P. **REOPENING THE PROVIDENCE INQUIRY**.

1. *United States v. Marcy*, 62 M.J. 611 (N-M. Ct. Crim. App. 2005). Accused pled guilty to possessing child pornography. During sentencing, the prosecution called two witnesses who testified that the accused had previously told them that the "pictures 'are just pictures, they are not really people.'" During the accused's unsworn statement he apologized to the children in the photos and described them as victims. On appeal, defense argued that the military judge erred by failing to reopen the providence inquiry to clarify the accused's previous statements. The N-MCCA affirmed, finding that the accused's unsworn statement showed his conviction that the children in the pictures were real. The court discussed a military judge's discretion to reopen a providence inquiry stating that "we do not believe the drafters intended—and we hereby decline to adopt —a per se rule requiring them to do so every time the prosecution offers an accused's pre-plea denials, excuses, or rationalizations." The court further focused on the fact that these additional statements were not matters raised by the defense.

2. *United States v. Crain,* 63 M.J. 607 (N-M. Ct. Crim. App. 2006). Accused was charged with two unauthorized absences (UAs) and one larceny specification and pled guilty to one of the UA specifications at one court-martial session. At a later session, the accused agreed to plead guilty to all charges and specifications. The MJ conducted a providence inquiry into the larceny specification but failed to conduct a hearing on the second UA specification. Subsequently, the MJ found the accused guilty of all charges and specifications. Prior to the record's authentication, the MJ caught the omission and convened a post-trial 39a session to conduct a hearing on the second UA. Defense counsel and the accused agreed that they perceived no material prejudice to the accused's rights in conducting this post-trial session. On appeal, defense asserted that the post-trial session changed

the MJ's announcement of findings in violation of R.C.M. 922(d). The court held it did not change the MJ's findings but "[r]ather, it affected the underlying factual basis for the findings announced." In this case the MJ "correctly identified a deficiency in the record and sought to resolve the issue as expeditiously as possible and in a manner consistent with the [accused's] rights . . . —to hold otherwise would elevate form over substance."

3. *United States v. Kawai,* 63 M.J. 591 (A.F. Ct. Crim. App. 2006). Accused pled guilty to attempted unpremeditated murder and obstruction of justice. The government proceeded to a contested MJ alone case for premeditated murder which resulted in a conviction. During the contested portion of the trial, the accused, for the first time, testified that a third party told him to kill the victim or the accused and his girlfriend would be harmed. The accused also said he slit the victim's wrist after killing him because of this duress in contrast to his providence inquiry statements that the wrist was slit to cover the crime and to make the police think the victim committed suicide. Accused's statement raised the issue of duress as to the attempted unpremeditated murder and obstruction of justice plea and the MJ should have reopened the providence inquiry to discuss the potential defense. The MJ's error was harmless as to the attempted unpremeditated murder offense because the government presented overwhelming evidence to support the more serious conviction of premeditated murder. The unresolved inconsistent statements as to the slitting of the victim's wrist, however, required reversal as to the obstruction of justice plea.

Q. **USE OF PROVIDENCE INQUIRY ADMISSIONS IN MIXED PLEAS**.

1. ***Use of providence inquiry during merits phase in mixed plea***.

a) *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001). Accused shot his wife. At trial, MJ rejected the accused's plea of guilty to attempted premeditated murder, but accepted his plea to the lesser-included offense of aggravated assault by intentional infliction of grievous bodily harm. On the merits (of the greater offense) the MJ used not only the accused's plea to the lesser offense, but also his admissions during the GP inquiry. The MJ then convicted the accused of attempted premeditated murder. Following settled case law, CAAF held the MJ properly used the accused's plea to the lesser-included offense, but erred by considering statements made by the accused during the plea inquiry.

b) *United States v. Ramelb*, 44 M.J. 625 (A. Ct. Crim. App. 1996). Providence inquiry can be used only to establish common elements between LIO and greater offenses. After accused pled guilty to LIO of wrongful appropriation, TC proved greater offense of larceny through testimony about what accused said in providence inquiry concerning intent. TC must obtain independent evidence to prove greater offense.

c) *United States v. Nelson*, 51 M.J. 399 (C.A.A.F. 1999). Accused sought to enter a plea of guilty to the AWOL, but moved to preclude the use of his statements during providence inquiry on the merits of the other offenses. Military judge denied the motion, accused entered pleas of not guilty, and was convicted of all charges. ACCA affirmed the findings and sentence without opinion. CAAF ruled the accused had not preserved for appeal the issue of whether the military judge erred in ruling that the accused's providence inquiry admissions could be used against him on the merits of the other offenses.

2. ***Use of providence inquiry admissions on sentencing***.

a) ***Rule***. *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988). Sworn testimony given by accused during providence inquiry may be received as admission at sentencing hearing and can be provided either by properly authenticated transcript or by testimony of court reporter or other persons who heard what accused said during providence inquiry.

b) *United States v. Dukes*, 30 M.J. 793 (N.M.C.M.R. 1990). Court indicated that *Holt* permits the trial counsel to offer an accused's responses during the providence inquiry into evidence, "but that such responses are not automatically in evidence . . . an accused must be given notice of what matters are being considered against him . . . opportunity to object . . . on grounds of improper aggravation, undue prejudice, or whatever." *See also United States v. Irwin*, 42 M.J. 479 (C.A.A.F. 1995) (accused's description of his misconduct–AWOL, rape, sodomy, indecent acts, kidnapping, threats, and unlawful entry–was so detailed and graphic that trial counsel played tape to members; tape was proper aggravation under R.C.M. 1001(b)(4) and not cumulative because there was no stipulation of fact).

c) *United States v. Figura*, 44 M.J. 308 (C.A.A.F. 1996). CID agent charged with forgery. Trial counsel sought to use providence inquiry to establish the dates of checks, where written, and where the checks were cashed because information did not appear in stipulation of fact. Parties agreed to have MJ summarize for court members the information stated during providence inquiry, rather than have a written stipulation of spectator testify. Court held there is no demonstrative right or wrong way to introduce evidence taken during providence inquiry, and that MJ giving summary to members was probably to accused's advantage.

d) ***Exclusion of witnesses from providence inquiry***.

(1) *United States v. Langston,* 53 M.J. 335 (C.A.A.F. 2000). Defense requested exclusion of witnesses from courtroom during

providence inquiry. Military judge refused the request, ruling incorrectly that M.R.E. 615 did not apply to providence inquiry. CAAF held the accused was not prejudiced, however, as the bulk of the witnesses' testimony went to victim impact.

(2) *See* M.R.E. 615 on excluding "victims" from trial proceedings.

3. ***Use of testimony gained from "busted" (unsuccessful) providence inquiry***.

a) R.C.M. 910(e) allows for accused to be prosecuted for making false statements during a providence inquiry.

b) M.R.E. 410(a) addresses the "Inadmissibility of Pleas, Plea Discussions, and Related Statements" made during the course of "any judicial inquiry" regarding a plea of guilty which is later withdrawn. M.R.E. 410(a) goes on to state, however, that such statement(s) are admissible "in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it." *See United States v. Doran*, 564 F.2d 1176 (5th Cir. 1977), *cert. denied*, 435 U.S. 928 (1978). *See also United States v. Mezzanato*, 513 U.S. 196 (1995) (statements made during plea negotiations admissible where accused decided to plead not guilty and understood the nature of agreement).

c) *United States v. Seward*, 48 M.J. 1 (C.A.A.F. 1998). After accused had undergone *Care* inquiry and court-martial was terminated by mistrial, it was error for the military judge to incorporate by reference the previous *Care* inquiry to establish the factual predicate for the guilty plea in the subsequent court-martial. *See generally Mitchell v. United States*, 526 U.S. 314 (defendant's right under the Self-Incrimination Clause of the Fifth Amendment applies during sentencing in a criminal case).

R. **ACCUSED'S WITHDRAWAL OF GUILTY PLEA**. R.C.M. 910(h)(1).

1. Prior to acceptance by military judge—A matter of right.

2. Prior to announcement of sentence—For good cause only.

II. PRETRIAL AGREEMENTS.

A. **AGREEMENT BETWEEN CONVENING AUTHORITY AND ACCUSED**. *Only* the convening authority can bind government. *But see United States v. Manley*, 25

M.J. 346 (C.M.A. 1987). Once accused completed performance of pretrial agreement, as modified by parties at trial, the convening authority was not authorized to unilaterally withdraw from the agreement.

B. **TYPICAL AND SIMPLEST AGREEMENT**.

1. Accused promises to plead guilty; convening authority agrees when case reaches him for review he or she will limit sentence to that specified in agreement.

2. Guilty plea entered.

3. Military judge examines agreement, insures accused understands.

4. ***"Two Bites at the Apple."*** Sentencing authority (military judge or members) proceeds unaware of limitation in agreement. If announced sentence is lower than agreement, accused gets the lower sentence.

C. **NATURE OF AGREEMENT**. R.C.M. 705(b).

RCM 705. Pretrial agreements

. . . .

(b) *Nature of agreement.* A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

(D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Take specified action on the sentence adjudged by the court-martial.

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1. An accused may: "[P]lead guilty to, or enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement which are not prohibited under this rule . . ."

2. The convening authority may promise to do one or more of the following:

a. Refer the case to a certain level of court-martial;

b. Refer a capital offense as noncapital;

c. Withdraw one or more charges or specifications from the court-martial;

d. Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

e. Take specified action on the sentence adjudged by the court-martial.

D. **PROCEDURE**. R.C.M. 705(d).

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. . . .

(d) *Procedure.*

(1) *Negotiation*. Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) *Formal submission.* After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

(3) *Acceptance.* The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

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1. ***Offer/negotiation***. Either side may propose any term or condition not prohibited by law or public policy.

2. ***Formal submission***. Must be in writing, encompassing all terms, and signed by accused and defense counsel.

a. ***No oral pretrial agreements***. *United States v. Mooney*, 47 M.J. 496 (C.A.A.F. 1997). Military judge erred by accepting accused's guilty plea and pretrial agreement after it was clear that the pretrial agreement was not in writing as required by R.C.M. 705(d)(2). However, while CAAF criticized counsels' and the judge's disregard for the rule, court held that reversal of conviction not required where the specific terms of the oral agreement were placed on the record, all parties acknowledged and complied with terms of agreement, and accused conceded that he received the benefit of the bargain.

b. *United States v. Forrester*, 48 M.J. 1 (C.A.A.F. 1998). Term in *stipulation of fact* which required the accused to waive his right to "any and all defenses" did not violate R.C.M. 705 or public policy. CAAF cautions the Government not to attempt to avoid the requirements of R.C.M. 705(c)(1)(B) by including terms in a document other than the pretrial agreement itself (terms must not be in a stipulation of fact).

3. ***Acceptance***. Is within sole discretion of convening authority; must be signed by CA or person authorized by CA to do so.

4. ***Military judge's inquiry at trial***.

a. *United States v. Felder*, 59 M.J. 444 (C.A.A.F. 2004). Military judge did not inquire into a term of the PTA regarding defense's waiver of any motions for sentence credit based on Article 13 and/or restriction tantamount to confinement. Accused's counsel did inform the military judge that no punishment under Article 13 or restriction tantamount to confinement had occurred. While the judge's failure to discuss the term was error, the accused failed to show the error materially prejudiced a substantial right.

b. *United States v. Dunbar*, 60 M.J. 748 (A. Ct. Crim. App. 2004). The accused's PTA stated "[a]ny adjudged confinement of three (3) months or more shall be converted into a [BCD], which may be approved; any adjudged confinement of less than three (3) months shall be disapproved upon submission by the accused [of a Chapter 10]" with a handwritten annotation stating "with an Other Than Honorable (OTH) discharge." The MJ sentenced the accused to a BCD, two months confinement, and reduction to PFC, causing the parties to disagree whether the convening authority could approve the BCD. Defense argued the convening authority could not approve both an OTH and a BCD discharge. The government's position was that the accused could submit a Chapter 10 and the convening authority must disapprove the two months confinement but the PTA did not require the convening authority's approval of the Chapter 10. R.C.M. 910(h)(3) provides, after the sentence is announced, if the parties disagree with the PTA terms the MJ shall "conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea." The MJ did not clarify the accused's understanding or attempt to conform the agreement. Findings and sentence set aside.

c. *United States v. Sheehan*, 62 M.J. 568 (C.G. Ct. Crim. App. 2005). Military judge failed to cover a misconduct clause and "specially negotiated provisions" of the accused's PTA and provided an incorrect explanation as to another provision. CGCCA found that the military judge erred but that his omissions and misleading explanation did not prejudice the accused's substantial personal rights.

d. *United States v. Sharper*, 17 M.J. 803 (A.C.M.R. 1984) ("While the military judge may not have the authority to directly intervene in the pretrial negotiations between an accused and a convening authority, he does have the responsibility to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as adherence to basic motions of fundamental fairness.").

E. **WITHDRAWAL FROM THE PRETRIAL AGREEMENT**.

1. ***By the accused***. Under R.C.M. 705(d)(5)(a), "The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively."

a. *United States v. Bray*, 49 M.J. 300 (C.A.A.F. 1998). A convening authority may increase the sentence cap of a pretrial agreement when an accused withdraws a guilty plea after successful completion of a providence inquiry and, in the same court-martial, later reenters pleas of guilty to the same charges. The accused entered guilty pleas to assault and battery on a child, communicating a threat, and drunk driving. During extenuation and mitigation, a defense witness testified that the accused could have committed the offenses after being exposed to insecticide poisoning. Accused withdrew his guilty plea and from the pretrial agreement, which limited confinement to 20 years to pursue the "bug spray" defense. Accused obtained a new pretrial agreement after changing his mind. The sentence cap under the new PTA limited confinement to 30 years. Neither case law nor R.C.M. 705 prohibit a convening authority from increasing a sentence cap in a new pretrial agreement after the convening authority properly withdraws from the original pretrial agreement. Accused chose to reopen the initial providence inquiry based on the "bug spray" defense and voluntarily withdrew from the original agreement after full consultation with counsel. The consequences of withdrawal were addressed in the original agreement, explained on the record, and the accused failed to object at trial.

b. *United States v. Olson*, 25 M.J. 293 (C.M.A. 1987). Accused had right to withdraw his guilty plea in light of additional, unanticipated subtraction from pay, if he had good-faith belief that he had fully settled his liability to reimburse Government for overpayment under allegedly false travel vouchers and if that belief had induced accused's entry of his pleas.

2. ***By the convening authority***. Under R.C.M. 705(d)(5)(b), the convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

a. *United States v. Williams*, 60 M.J. 360 (C.A.A.F. 2004). Accused's pretrial agreement required him to reimburse his victim(s) "once those individuals and the amounts owed have been ascertained." On the day of

trial the government withdrew from the PTA reasoning, under R.C.M. 705(d)(4)(B), that the accused's failure to reimburse his victim breached a material PTA term. Defense argued he was not in breach because the term failed to establish a time limit, allowing for restitution after trial. Defense requested specific performance of the PTA arguing (also under R.C.M. 705(d)(4)(B)) that his execution of a stipulation of fact with the government constituted performance and he had not otherwise breached any material term. CAAF did not rule whether entrance into a stipulation of fact constitutes performance or whether the accused failed to fulfill a material term. CAAF, focusing on the parties' failure to establish a meeting of the minds for the restitution time limit, held, under R.C.M. 705(d)(4)(B), that the government can withdraw from a PTA if the MJ "discloses a disagreement as to a material term in the agreement."

b. *United States v. Parker*, 62 M.J. 459 (C.A.A.F. 2006). Accused entered into a PTA to plead guilty to AWOL and missing movement by neglect in return for the CA suspending any adjudged BCD or confinement in excess of thirty days. The military judge, however, rejected the accused's plea to missing movement by neglect because the accused said he only overheard statements by his NCOs, as opposed to a direct or official conveyance, regarding the place and time of the movement. When the military judge rejected the accused's plea, the government withdrew from the PTA and moved forward to trial before the military judge alone on the charge of missing movement by design. The military judge found the accused guilty of missing movement by design and sentenced him to a BCD and five months confinement. The N-MCCA held that the military judge erroneously rejected the accused's plea by questioning the reliability of the information the accused relied upon to make his providence inquiry statements. Under this theory, the accused was entitled to his original PTA sentence limitation of a suspended BCD and no more than thirty-days confinement. After trial, however, the accused submitted a clemency letter stating he did not desire suspension of his BCD. CAAF held that the MJ did not erroneously reject the accused's plea and defense never requested the MJ to reopen the plea. Therefore, PTA failed to exist and the accused's express and repeated request for a non suspended BCD during his unsworn statement and clemency matters controls.

c. *United States v. Pruner*, 37 M.J. 573 (A.C.M.R. 1993). Convening authority withdrew from proposed agreement by accused. Performance of pretrial agreement was not commenced per R.C.M. 705(d)(5)(b) when accused had not yet signed proposed stipulation of fact and had not yet requested witnesses.

d. *United States v. Villareal*, 52 M.J. 27 (C.A.A.F. 1999). Convening authority could lawfully withdraw from pretrial agreement based upon

pressure from victim's family members, who were opposed to permitting the accused to plead guilty to manslaughter instead of murder. The decision to withdraw was based in part on the advice of the CA's superior. Afterward, the case was forwarded to a third, impartial CA, who convened the court, and the accused pled not guilty. CAAF, by a 3-2 vote, held that the military judge did not err in refusing to order specific performance of the pretrial agreement. The accused had not relied to his detriment on the agreement in any manner that would prejudice his right to a fair trial.

F. **PROHIBITED TERMS OR CONDITIONS**.

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(c) *Terms and conditions*

(1) *Prohibited terms or conditions.*

(A) *Not voluntary.* A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) *Deprivation of certain rights.* A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

1. ***Not voluntary***. A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

2. ***Deprivation of certain rights***. A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge jurisdiction of the court-martial; the right to speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

a. *United States v. Libecap*, 57 M.J. 611 (C.G. Ct. Crim. App. 2002). Accused contended that the pretrial agreement, requiring him to request a bad conduct discharge at trial, was unenforceable. The appellate court concluded that R.C.M. 705(c)(1) prohibited the provision because it deprived the accused of a complete sentencing proceeding by negating the value of putting on a defense sentencing case. Moreover, the requirement to request a bad conduct discharge improperly placed the accused in the position of either giving up a favorable pretrial agreement or forgoing a complete sentence proceeding. The provision was against public policy for similar reasons. The accused was prejudiced by the provision, even though he had not requested a bad conduct discharge at trial, because he was precluded from telling the military judge that he wanted a second chance and from arguing for a sentence that did not include a punitive discharge. Since the accused had specifically stated that the error did not affect the voluntariness of his pleas, the appellate court determined that the appropriate remedy was a rehearing on sentence.

b. *United States v. McLaughlin*, 50 M.J. 272 (C.A.A.F. 1999). Accused offered to waive a speedy trial issue in his pretrial agreement (accused had been in pretrial confinement for 95 days). CAAF held that under the MCM this provision is unenforceable, so the military judge should have declared it impermissible, upheld the remainder of the agreement, and then ask the accused if he wished to litigate the issue. If he declined to do so, the waiver would be clearer. Nevertheless, the accused must make a prima facie showing or colorable claim for relief. Despite 95-day delay, no showing of prejudice.

c. *United States v. Benitez*, 49 M.J. 539 (N.M. Ct. Crim. App. 1998). Accused offered to waive all non-constitutional and non-jurisdictional motions. The military judge determined there was a speedy trial issue, and that the term was proposed by the government. The accused had been in pretrial confinement for 117 days at the time of arraignment. The court held that there was a colorable showing of a viable speedy trial claim and that it was not convinced this was harmless error. Finding and sentence set aside.

3. ***Term involving individual military counsel***. *United States v. Copley*, No. 20011015 (A. Ct. Crim. App. Feb. 26, 2004) (unpub.). Increase in confinement cap from 12 to 13 months due to accused's exercise of his right to an individual military counsel which caused a delay in proceedings "inferentially implicated appellant's right to individual military counsel," and violated public policy. Court reassessed sentence and affirmed only 11 months confinement.

4. ***Waiver of clemency or parole***. *United States v. Tate*, 64 M.J. 269 (C.A.A.F. 2007). The accused, in his PTA, agreed to decline any clemency or parole offered to him for a period of twenty years. The MJ sentenced the accused to life without parole but the PTA limited the accused's confinement to fifty years, which, but for his PTA term, would have made him eligible for clemency in five years and parole in ten years. CAAF held that a PTA term limiting the accused's right to clemency or parole violates RCM 705(c)'s right to a complete and effective exercise of post-trial and appellate rights. Allowing such a term would improperly impede the ability of service secretaries to exercise their clemency and parole powers, "as well as ultimate control of sentence uniformity" throughout their respective service. CAAF struck the PTA's specific term but ruled the stricken term did not impair the balance of the agreement and the plea. *See also United States v. Thomas,* 60 M.J. 521 (N-M. Ct. Crim. App. 2004) (any PTA provision precluding the accused from accepting clemency violates public policy, even if accused's sentence could have included death or required a mandatory minimum of confinement for life for a premeditated murder conviction),.

5. *United States v. Sunzeri*, 59 M.J. 758 (N-M. Ct. Crim. App. 2004). Term, originating with accused, that prohibited accused from presenting testimony of

witnesses located outside of Hawaii either in person, by telephone, letter, or affidavit, violated public policy as it impermissibly deprived the accused of a complete sentencing proceeding. By contrast, it is permissible to waive *personal appearance* of sentencing witnesses, so long as other methods are available for presenting that evidence to the factfinder (like telephonic testimony or stipulations of expected testimony).

6. *United States v. Davis*, 50 M.J. 426 (C.A.A.F. 1999). Accused offered a PTA in which he agreed to plead not guilty and, in exchange for a sentence limitation, to enter into a confessional stipulation and present no evidence. The stipulation admitted basically all elements of the offenses except the wrongfulness of marijuana use and the intent to defraud concerning the bad check offenses. CAAF found the provision violated the prohibition against accepting a confessional stipulation as part of a pretrial agreement promising not to raise any defense. *See also United States v. Keyes*, 33 M.J. 567 (N.M.C.M.R. 1991) (improper to have accused waive in pretrial agreement military judge's disqualification after judge's impartiality is reasonably questioned).

7. *United States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992). Accused pled guilty in exchange for a pretrial agreement which would suspend a bad-conduct discharge, provided confinement for more than four months was adjudged. Confinement adjudged was for less than four months, and convening authority did not suspend the discharge. Agreement found to be contrary to public policy and fundamentally unfair.

8. *United States v. Thomas,* 60 M.J. 521 (N-M. Ct. Crim. App. 2004). Where an accused's sentence could include death and required a mandatory minimum of confinement for life for a premeditated murder conviction, any PTA provision precluding the accused from accepting clemency, if offered, violates public policy.

9. *United States v. Schmelzle,* No. 200400007, 2004 CCA LEXIS 148 (N-M. Ct. Crim. App. July 14, 2004) (unpub) (based on the accused's eligibility for retirement, a provision requiring the accused to not request transfer to the reserves, if a punitive discharge was not adjudged, violated public policy).

10. ***Conditional Requests for Delay***. *United States v. Giroux*, 37 M.J. 553 (A.C.M.R. 1993). Defense counsel submitted a post-trial "Conditional Request for Delay" to cover a portion of time between the preferral of charges and the date of trial. Defense counsel was willing to accept either 37 or 72 days of processing time in return for sentence mitigation by the convening authority. Ambiguity in convening authority's acceptance was resolved in favor of accused. A.C.M.R. pronounced that "for obvious reasons, we strongly recommend that convening authorities and staff judge advocates not entertain agreements of this nature in the future."

11. *United States v. Conklan*, 41 M.J. 800 (A. Ct. Crim. App. 1995). Pretrial agreement in which the quantum portion was increased if the accused raised claims of de facto immunity encumbered the accused's due process right to challenge the jurisdiction of the court-martial. The litigation of non-frivolous claims of lack of jurisdiction and immunity are not the proper subjects for plea bargaining.

12. ***Testifying without Immunity***. *See United States v. Profitt*, 1997 CCA LEXIS 117 (A.F. Ct. Crim. App. Apr. 4, 1997) (unpub.) (term "testify without a grant of immunity" should be interpreted with common sense, which dictates that the convening authority was requiring the accused testify in future trials related to the offenses in which he was involved). The court held the PTA is valid under R.C.M. 705 in a case involving guilty plea to false official statement and use and distribution of LSD in exchange for the accused promises to: not ask convening authority to provide funding for more than three sentencing witnesses (R.C.M. 705 (c)(2)(E)); testify without grant of immunity against any other military members (R.C.M. 705 (c)(2)(B)); and not raise any waivable pretrial motions. The MJ questioned accused and counsel extensively during providence and all parties agreed the term did not encompass motions of a Constitutional dimension. *See also United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), *affirming* 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term which required accused to "testify in any trial related in my case without a grant of immunity" did not violate public policy, *under facts of this case* as accused had not yet been called to testify).

13. *United States v. Forrester*, 48 M.J. 1 (C.A.A.F. 1998). Term which required the accused waive his right to "any and all defenses" did not violate R.C.M. 705 or public policy. Accused charged with attempted housebreaking, attempted larceny, violation of a lawful general regulation, and aggravated assault. Requirement to waive all defenses was not overly broad, considering that the accused failed to raise any defense during the providence inquiry or sentencing.

14. ***"Waive all waivable motions."*** "It is well established that this provision does not per se violate either Rule for Courts-Martial 705 or public policy." *United States v. Gladue*, 65 M.J. 903, 904 n.2 (A.F. Ct. Crim. App. 2008).[2] However, such a provision can be problematic. Under R.C.M. 910(f)(4), the military judge must ensure the accused understands the pretrial agreement. If the accused and counsel did not anticipate a motion at trial, yet purported to waive all motions, the waiver of the unanticipated motion was arguably unknowing. Military judges, in an abundance of caution, should ask defense counsel what specific motions are being waived under a "waive all waivable motions" provision. This practice precludes challenges on appeal that an accused was

[2] On 3 December 2008, the CAAF heard oral arguments in *Gladue* but has not issued an opinion. The CAAF granted review on this issue: "Whether the lower court erred when it found that a provision in appellant's pretrial agreement to 'waive all waivable motions' was an express waiver that bars appellant from asserting any claims of multiplicity or multiplication of charges on appeal."

unaware of other motions or (more problematic) believed he was waiving a non-waivable motion (like speedy trial).

a. *Cf. United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), *affirming* 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term in PTA which required that accused waive "all pretrial motions" was too broad, and purported to deprive accused of right to make motions that could not be bargained away); *United States v. Jennings*, 22 M.J. 837, 838-39 (N.M.C.M.R. 1986) (provision in pretrial agreement to "waive any pretrial motion I may be entitled to raise" is "null and void" as "contrary to public policy").

b. *See also United States v. Silva*, 1997 CCA LEXIS 267 (N-M. Ct. Crim. App. 1997) (unpub.). Term in PTA, which required accused to "waive all waiveable motions" not contrary to public policy and R.C.M. 705(c)(1)(B). Such a term does not include motions that are nonwaivable under R.C.M. 705(c)(1)(B).

15. ***Vacation of suspension term***. *United States v. Perlman*, 44 M.J. 615 (N-M. Ct. Crim. App. 1996), 48 M.J. 353 (C.A.A.F. 1998) (sum. disp.) (affirming but expressing no opinion on whether term is lawful). Government argued that term in PTA permitted SPCMCA to execute vacation of suspension without forwarding case to GCMCA for action. Court held that although PTA does not indicate that accused wanted to waive those rights; Congressional intent was to grant accused an important procedural due process right for vacation actions and it is doubtful whether such rights are waivable. *See also United States v. Smith*, 46 M.J. 263 (C.A.A.F. 1997) (holding that PTA term providing for vacation proceedings and processing under Article 72 and R.C.M. 1109 in the event of future misconduct cannot be interpreted as waiver of the GCMCA's authority to review and take action on vacation).

16. ***Remedy for unenforceable terms***. *United States v. McLaughlin*, 50 M.J. 217 (C.A.A.F. 1999) (a term requiring accused to "waive the speedy trial issue" is impermissible under R.C.M. 705(c)(1)(B) and the military judge should have declared it void and unenforceable, while upholding the rest of the agreement; judge should have also asked the accused if he wanted to raise the issue).

17. ***Stipulations of fact and polygraphs***. *United States v. Clark,* 53 M.J. 280 (C.A.A.F. 2000). Accused submitted a false claim, then took a polygraph (which he failed). He was charged and elected to plead guilty. Accused and convening authority agreed to PTA which included a promise to enter into a "reasonable stipulations concerning the facts and circumstances" of his case. MJ at trial noticed the polygraph in the stipulation, noted that accused had agreed to take a polygraph test and that the "test results revealed deception." There was no objection to the stipulation and he admitted the stipulation into evidence. Applying M.R.E. 707 and *United States v. Glazier*, 26 M.J. 268, 270 (C.M.A.

1988), CAAF held it was plain error for military judge to admit the evidence of the polygraph, even via a stipulation.

G. **PERMISSIBLE TERMS OR CONDITIONS**.

1. ***Stipulation of fact***. A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty is entered or as to which a confessional stipulation will be entered. *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977).

2. ***Promise to testify***. Accused may agree to testify or provide assistance to investigators as a witness in the trial of another person. However, it is likely impermissible to require an accused testify without a grant of immunity. *See United States v. Profitt*, 1997 WL 165434 (A.F. Ct. Crim. App. 1997) (unpub); *United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997), *affirming* 44 M.J. 527 (A.F. Ct. Crim. App. 1996) (term which required accused to "testify in any trial related in my case without a grant of immunity" did not violate public policy, *under facts of this case* as the accused had not been called to testify. Both cases discussed *supra*.

3. ***Provide restitution***. *United States v. Mitchell*, 46 M.J. 840 (N-M. Ct. Crim. App. 1997). Accused who fails to make full restitution pursuant to a defense proposed term in PTA is not unlawfully deprived of the benefit of the PTA where the failure to comply with the restitution obligation is based on indigency. Accused uttered bad checks and defrauded financial institutions of $30,733. The defense proposed a term that required accused to make full restitution in exchange for suspension of confinement in excess of 60 months. The accused was sentenced, *inter alia*, to 10 years confinement. While in jail, the accused made partial restitution until his business failed. The accused, now indigent, cannot necessarily use indigency to negate operation of PTA term requiring full restitution. CA properly vacated suspension under PTA.

4. ***Conform accused's conduct to certain conditions of probation***.

a. *See United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994) (an indeterminate term of suspension of up to 15 years to complete sex offender program was inappropriate).

b. *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). Accused sentenced to life without parole. In accordance with his pretrial agreement, the convening authority suspended all confinement in excess of 30 years for the period of confinement plus 12 months after accused's release. Accused argued that the period of suspension could only be 5 years from the date sentence was announced. HELD: Pretrial agreement provision suspension period for the period of confinement and one year

from date of release does not violate public policy. R.C.M. 1108 states that a period of suspension should not be unreasonably long. "It is this Court's opinion that placing Accused on probation for 31 years of an adjudged life sentence without possibility of parole is not unreasonably long and does not violate public policy."

5. ***Other misconduct provisions.***

a. *United States v. Bulla*, 58 M.J. 715 (C.G. Ct. Crim. App. 2003). Pretrial agreement included a misconduct provision "that permitted the convening authority, among other things, to disregard the sentence limiting part of the pretrial agreement if the [accused] committed a violation of the UCMJ between the time the sentence was announced at her court-martial and the time the convening authority acted on the sentence." Accused was in an unauthorized absence status for two days shortly after the end of court-martial proceedings. Relying on the misconduct provision, the convening authority approved the sentence as adjudged, rather than as would have been limited by the PTA (which would have suspended the BCD for twelve months from action). Although CGCCA had "reservations about some of the potential results of this misconduct provision, it held that provision does not violate public policy" at least as applied in this case to a sentence element that the convening authority only agreed to suspend." Further, accused's two-day AWOL was a "material breach" of the PTA that allowed the convening authority to be released from his obligations under the agreement. Finally, court finds that prior to finding accused violated the misconduct provision, convening authority should hold a proceeding similar to that provided for by Article 72, UCMJ and R.C.M. 1109 (vacation proceedings) and apply a preponderance of the evidence burden of proof. Although convening authority applied a lesser, incorrect burden of proof, the error was harmless.

b. *United States v. Tester,* 59 M.J. 644 (A. Ct. Crim. App. 2003). Pretrial agreement contained deferral of confinement provision and misconduct provision similar to that in *Bulla*, *supra*. Court held procedures of R.C.M. 1109 (vacation of suspension) must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement. Convening authority followed provisions to rescind deferral of confinement.

6. ***Waive unreasonable multiplication of charges***. *United States v. Mitchell*, 62 M.J. 673 (N-M. Ct. Crim. App. 2006). The accused agreed in his PTA to waive a motion alleging unreasonable multiplication of charges. The military judge reviewed this provision with the accused but did not ask him if he had an unreasonable multiplication of charges motion to make. On appeal, defense

argued that the term violated public policy, requiring the nullification of the accused's PTA under R.C.M. 705(c)(1)(B). N-MCCA, noting the issue as one of first impression, held that an unreasonable multiplication of charges motion is not of a constitutional dimension and is not specifically prohibited under R.C.M. 705 (c)(1)(B). Based on the facts of the accused's case, the court held the provision did not violate public policy.

7. ***Waive Article 32 investigation and other procedural protections***. Accused may waive the Article 32 as well as the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings. *United States v. Gansemer*, 38 M.J. 340, (C.M.A. 1993) (upholding term requiring accused waive separation board if punitive discharge was not adjudged; term does not violate public policy or fundamental fairness, as accused can ask for discharge in lieu of court-martial and there was no overreaching).

8. ***Forfeiture of personal property (computer)***. *United States v. Henthorn*, 58 M.J. 556 (N-M. Ct. Crim. App. 2003). Accused convicted of receiving child pornography in violation of 18 U.S.C. § 2252A. Court holds that provision in pretrial agreement that required accused "to forfeit his personal property (laptop computer) pursuant to 18 U.S.C. §2253 did not constitute an unauthorized forfeiture or fine and was not an excessively harsh punishment." Because the computer was used in the commission of the crime, its forfeiture was consistent with the application of the federal forfeiture statute, and was not a "punishment." "Needless to say, if the [accused] found his agreement too onerous, he could have withdrawn from it."

9. ***Unlawful command influence***. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995). While it is against public policy to require an accused to withdraw an issue of unlawful command influence in order to obtain a pretrial agreement, accused may *initiate* a waiver of unlawful command influence in order to secure a favorable pretrial agreement. *But see* Judge Wiss' concurrence, which warns "that this Court will witness the day when it regrets the message that the majority opinion implicitly sends to commanders."

10. ***Fines***. *United States v. Smith*, 44 M.J. 720 (A. Ct. Crim. App. 1996). Including fines as a term in pretrial agreements is a recognized "good reason" for imposing same, where agreement is freely and voluntarily assented to avoid some more dreaded lawful punishment. Accused was convicted of felony murder. Military judge imposed a fine as part of the sentence which required the accused to pay the $100,000 by the time he is considered for parole (sometime in the next century) or be confined for an additional 50 years or until he dies, whichever come first. The court held the fine was permissible but the contingent confinement provision was not, as it circumvented Secretary of Army's parole authority.

11. ***Waive Article 13 punishment.*** *United States v. McFadyen*, 51 M.J. 289 (C.A.A.F. 1999). Accused's waiver of Article 13 issue as part of pretrial agreement does not violate public policy. For all cases in which "a military judge is faced with a pretrial agreement which contains an Article 13 waiver, 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." Here, accused agreed to plead guilty and, in exchange for a sentence limitation, to waive his right to challenge his pretrial treatment under Article 13. Accused was an airman who complained about his treatment in pretrial confinement at a Navy brig (where he was stripped of rank, prevented from contacting his attorney, and had his phone calls monitored). While announcing a prospective rule only, the court found no reason to disturb the waiver here: Accused did not contest the voluntariness of waiver, an inquiry was conducted by the military judge, the accused was allowed to raise and argue in mitigation his claims of ill-treatment at the hands of the Navy, and the military judge was able, if he wished, to consider the nature of pretrial confinement in determining the sentence.

12. ***Waive comparative sentencing information***. *United States v. Oaks*, 2003 CCA LEXIS 301 (A.F. Ct. Crim. App. Dec. 10, 2003) (unpub.). Term waiving right to present comparative sentencing information in unsworn statement does not violate public policy. Term does not impermissibly limit right to present a full sentence case to the sentencing authority. Court finds *United States v. Grill,* 48 M.J. 131 (C.A.A.F. 1998), inapplicable, as presenting sentence comparison material was not permitted by military judge; in contrast, accused here agreed to waive his right under *Grill* in exchange for the benefits of a pretrial agreement.

13. ***Enrollment in a sexual offender treatment program***. *United States v. Cockrell,* 60 M.J. 501 (C.G. Ct. Crim. App. 2004). MJ failed to discuss with the accused a provision in the PTA requiring the accused to enroll in a sexual offender treatment program following his release from confinement and the ramifications if he failed to comply with that requirement. While the ramifications of failing to comply with the terms of the sexual offender treatment program were unclear in the PTA, and left unexplained by the MJ, the court does not state that requiring an accused to enroll in a sexual offender treatment program is a per se impermissible term.

14. ***Agreement not to discuss alleged constitutional violation***. *United States v. Edwards*, 58 M.J. 49 (C.A.A.F. 2003). As part of PTA, accused agreed not to discuss, in his unsworn statement, any circumstances surrounding potential constitutional violations occurring during AFOSI's interrogation of him (interrogation after detailing of defense counsel without first notifying defense counsel). If a provision is not contrary to public policy or R.C.M. 705, accused may knowingly and voluntarily waive it. R.C.M. 705 does not prohibit this pretrial term, and specifically does not deprive the accused of the right to a complete sentencing proceeding. Military judge conducted detailed inquiry of the

accused to determine he knowingly and voluntarily agreed to it, and whether he understood the implications of his waiver.

15. ***Forum selection (military judge alone)***.

a. *United States v. Burnell*, 40 M.J. 175 (C.M.A. 1994). Government would not agree to two-year sentencing limitation unless accused waived members. COMA rules that with accused's voluntary and intelligent waiver, PTA was not violative of public interest. Even if government had declined *any* PTA unless accused waived members, the "government would not be depriving [accused] of anything he was entitled to."

b. *United States v. Andrews*, 38 M.J. 650 (A.C.M.R. 1993). Government indicated during pre-trial negotiations that if accused elected trial with members, "then the quantum portion would be higher than if we went with military judge alone." Court ruled, "[W]e hold that the change to R.C.M. 705 now permits the government to propose as a term of the pretrial agreement, that the [accused] elect trial by military judge alone, and the amount of the sentence limitation may depend on that election." *See also United States v. McClure*, A.C.M.R. No. 9300748 (A.C.M.R. Nov. 23, 1993) (unpub.) (convening authority's handwritten counter-offer on pretrial agreement stated: "The foregoing is accepted only if the accused elects to be tried by military judge alone.").

c. Appellate courts might invalidate a pretrial agreement if accused asserts (s)he was "coerced" into waiving trial by members. *United States v. Young*, 35 M.J. 541 (A.C.M.R. 1992).

d. A service or command policy, such as standardized pretrial agreements, which undermines the legislative intent of Article 16 "will be closely scrutinized." However, agreements are permissible if waiver is "freely conceived defense product." *United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987).

H. **INQUIRY INTO QUANTUM AND RESOLUTION OF AMBIGUOUS TERMS**.

1. ***Contract principles govern***. *United States v. Grisham*, 66 M.J. 501 (A. Ct. Crim. App. 2008). ACCA provided an excellent summary of the contract principles used to interpret pretrial agreements. In *Grisham*, the approved pretrial agreement included this provision: "The government agrees not to prefer any additional charges or specifications against the accused for any potential misconduct of which the *government is aware at the time this offer is signed*." (emphasis supplied by the court). The government became aware of misconduct in the nine days between the date the accused signed the pretrial agreement and

the date the convening authority approved it: the accused and counsel signed the pretrial agreement on 1 December 2004; the accused (who was in pretrial confinement) provided a urine sample as part of a prison-wide urinalysis; on 6 December 2004, the Army's laboratory found amphetamines in the accused's sample; on 10 December 2004, after conducting several standard confirmatory tests, the laboratory certified the positive result; also on 10 December 2004, the convening authority approved the pretrial agreement. The accused pled guilty pursuant to his pretrial agreement in *Grisham I*. The government preferred additional charges for a second court-martial, *Grisham II*, including the wrongful use of amphetamines from December 2004. The ACCA held the pretrial agreement referred to the date *the accused* signed the pretrial agreement (as opposed to the date the convening authority signed it) and upheld the conviction for wrongful use.

a. ***Law***. "A pretrial agreement is a contract created through the bargaining process between the accused and the convening authority. It is well established in federal and military courts that pretrial agreements will be interpreted using contract law principles."

b. ***Military judge's duty to resolve ambiguity***. The military judge has a duty to "resolve any ambiguities, inconsistencies, or misunderstandings between the accused and the government during the providence inquiry." The court emphasized that if there is ambiguity, "it is the military judge's responsibility to clarify the terms of the agreement on the record, and ensure that all parties, especially the accused, understand the terms and their implications"

c. ***Practice point***. Against this lengthy dissertation of the law, the case ultimately came down to the military judge's discussion of the PTA with the accused. The military judge in *Grisham I* asked the accused about the effective date of the disputed provision and all parties agreed that it was 1 December 2004, the date the accused signed the offer to plead guilty. Military judges should force parties to clarify vague provisions on the record. ACCA commended the military judge in the first trial for asking the accused if he understood the term to mean that 1 December 2004 was the effective date.

2. *United States v. Acevedo*, 50 M.J. 169 (C.A.A.F. 1999). Accused entered into a PTA which provided 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." The military judge sentenced accused to confinement for 30 months, total forfeitures, reduction to E-1, and a bad-conduct discharge. The military judge then stated regarding the BCD, "there's nothing [in the PTA] about doing anything to a bad-conduct

discharge so that is not suspended. Right?" to which both counsel agreed. The CA approved the BCD. CAAF held that it appeared that all parties had the same understanding, that an unsuspended bad-conduct discharge was envisioned as a possible approved and executed punishment.

3. *United States v. Gilbert,* 50 M.J. 176 (C.A.A.F. 1999). A companion case to *Acevedo.* The PTA had a similar provision relating to suspension of a DD, and also suspended confinement in excess of 6 months for 12 months. The military judge sentenced accused to confinement for 12 months, reduction in grade to E-2, forfeiture of all pay and allowances for 12 months, and a bad-conduct discharge. The military judge recommended suspension of the BCD. The military judge noted the impact of the PTA, on the adjudged sentence. None of the parties commented with respect to the military judge's recommendation that the convening authority suspend the bad-conduct discharge, which would have been an empty gesture if the agreement already required it. CAAF held the provision was lawful and that the BCD could be approved.

4. *United States v. Sutphin,* 49 M.J. 534 (C.G. Ct. Crim. App. 1998). Accused entered into a PTA that described five parts of the sentence covered by the agreement. One portion was characterized as the "amount of forfeiture or fine," and it included forfeitures of pay and allowances as being included under the agreement but did not mention the possibility of a fine; the last portion of the PTA stated "any other lawful punishment (which shall expressly include, among others, any enforcement provisions in the case of a fine)." The military judge never inquired whether the accused understood a fine could be approved and imposed. The military judge ensured the accused understood that the sentence was a limitation on what could be done with him. The military judge then instructed the members they could adjudge a fine, along with confinement and a punitive discharge; the panel's sentence included a $5,000 fine. The court held the portion of the sentence which included a fine must be disapproved, since the reasonable conclusion was that only forfeitures may be approved.

5. *United States v. Edwards*, 20 M.J. 439 (C.M.A. 1985). Where fine not mentioned in agreement and sentence includes total forfeitures plus a $1,000 fine, the fine could not be approved. *See also United States v. Morales-Santana*, 32 M.J. 557 (A.C.M.R. 1991); *United States v. Gibbs*, 30 M.J. 1166 (A.C.M.R. 1990).

6. *United States v. Womack*, 34 M.J. 876 (A.C.M.R. 1992). Accused submitted agreement to plead to drunk driving if government would not go forward on related assault charge. Pretrial agreement was silent as to punishment. MJ opined (after reading this sentence and comparing it to the PTA) that the literal meaning was that the CA could only impose "no punishment." Military judge and trial counsel "agree to disagree." Military judge should have resolved ambiguity. Failure to resolve ambiguity resolved in favor of accused.

I. **POST-TRIAL RE-NEGOTIATION OF PRETRIAL AGREEMENT**.

1. *United States v. Pilkington*, 51 M.J. 415 (C.A.A.F. 1999). An accused has the right to enter into an enforceable post-trial agreement with the convening authority when the parties decide that such an agreement is mutually beneficial. Accused pled guilty to conspiracy to maltreat subordinates, maltreatment, false official statements, and assault. In a pretrial agreement, the convening authority agreed to suspend the bad-conduct discharge for 12 months. Accused and the convening authority agreed, in a post-trial agreement, that the latter could approve the punitive discharge as long as he "limited confinement to 90 days." On appeal, the accused argued that the post-trial agreement should be invalidated because it prevented judicial scrutiny of the terms and conditions. The court refused to invalidate the agreement, noting that the accused proposed the agreement after full consultation with counsel, stated that he voluntarily entered the agreement, and the post-trial agreement was directly related to the convening authority's obligations under the sentencing provisions of the pretrial agreement. Additionally, the court held that while the trial court did not review the post-trial agreement, the intermediate appellate court always have the opportunity to review such agreements.

2. *United States v. Dawson*, 51 M.J. 411 (C.A.A.F. 1999). Accused and CA agreed to a PTA in which the first 30 days of any adjudged punishment would be converted into 15 days' restriction. Confinement in excess of 30 days would be suspended. The accused received 100 days confinement and a BCD. She was placed on restriction, missed a muster, and was notified of pending vacation proceedings. She went AWOL, but was later apprehended and placed in confinement. Accused entered a new agreement with the CA where she agreed to waive the right to appear at a hearing to vacate the suspension of her sentence (the SJA had opined the one held in her absence was illegal), to waive any claims she might have concerning post-apprehension confinement, and to release the CA from the prior agreement. In return, the CA would withdraw the new absence charge, and provide day-for-day credit toward her time served in "pretrial confinement" (on the new charge). The SJA advised that, based on the errors that occurred in the first trial, he should disapprove all confinement. The CA approved the BCD and disapproved the confinement. CAAF held that this was a valid post-trial agreement that did not involve post-trial renegotiation of an approved PTA. The agreement related to proceedings collateral to the original trial, and did not require the approval of a military judge.

J. **STIPULATIONS OF FACT (PRETRIAL AGREEMENT CASES)**. R.C.M. 811.

1. ***Government can require the accused to stipulate to aggravation evidence or refuse to accept pretrial agreement***. *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985); *United States v. Sharper*, 17 M.J. 803 (A.C.M.R. 1984).

a. Government can require accused to agree to both truth and admissibility of matters contained in the stipulation of fact. The stipulation should be unequivocal that counsel and the accused agree not only to the truth of the matters stipulated but that such matters are admissible in evidence against the accused.

b. *United States v. Vargas*, 29 M.J. 968 (A.C.M.R. 1990). Defense counsel objected at trial to the inclusion of the uncharged misconduct and indicated that the accused only agreed to the stipulation out of fear of losing the deal. Military judge gave the accused an opportunity to withdraw, but the accused elected to adhere to the stipulation; no overreaching by the Government. *See also United States v. Mezzanayto*, 513 U.S. 196 (1995) (agreement to waive evidentiary provisions are subject to waiver by voluntary agreement of the parties).

2. ***Use of confessional stipulation after "busted" providence inquiry are permissible with consent of the accused***. Otherwise military judge not at liberty to consider matters presented in the unsuccessful attempt to plead guilty. *United States v. Matlock*, 35 M.J. 895 (A.C.M.R. 1992). Prosecution cannot receive the benefit of the stipulation without the concomitant limitations of the pretrial agreement. *See United States v. Cunningham*, 36 M.J. 1011 (A.C.M.R. 1993).

3. ***Stipulations in mixed plea cases***. Unless otherwise agreed to by the accused, confessional stipulation in connection with guilty pleas may not be considered by military judge as to those charges to which accused has pled not guilty (contested charges). *United States v. Banks*, 36 M.J. 1003 (A.C.M.R. 1993).

a. Confessional stipulation is the equivalent of entering a guilty plea to a charged offense; accused must knowingly and voluntarily consent to any use of stipulation beyond the limited purpose of facilitating providence inquiry. *United States v. Rouviere*, No. 9200242 (A.C.M.R. Aug. 24, 1993) (unpub.).

b. *United States v. Craig*, 48 M.J. 77 (C.A.A.F. 1998). Military judge erred by advising the accused that her confessional stipulation (which contained facts substantiating both guilty and not guilty pleas to drug offenses) waived her constitutional rights against self-incrimination, to a trial of by the facts, and to confront and cross-examine witnesses against her.

c. *United States v. Dixon*, 45 M.J. 104 (C.A.A.F. 1996). Where a stipulation leaves room for the defense to reasonably contest certain elements, and the defense in fact does so, a stipulation is not confessional. Accused entered mixed pleas to stealing mail. He entered into a stipulation of fact, in conjunction with his pretrial agreement, regarding

two uncontested specifications, and the Government presented evidence on the remaining two specifications. Specification 3 involved a larceny of mail matter. The stipulation established that accused removed mail matter from its lawful place and did not intend to return the parcel to the addressee. There was no requirement to do a *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977) inquiry. The stipulation was not "confessional" because it did not effectively establish an express admission that accused's removal of mail matter was done with an intent to steal.

K. **UNITARY NATURE OF PRETRIAL AGREEMENT**.

1. In absence of evidence to contrary, operation of sentence appendix to pretrial agreement on sentence of court not to be treated as divisible elements. *United States v. Brice*, 38 C.M.R. 134 (C.M.A. 1967); *United States v. Monett*, 36 C.M.R. 335 (C.M.A. 1966); *United States v. Neal*, 12 M.J. 522 (N.M.C.M.R. 1981).

a. *United States v. Barraza*, 44 M.J. 622 (N.M. Ct. Crim. App. 1996). Accused pled to sodomy and indecent acts in exchange for pretrial agreement which contained a term that all adjudged confinement in excess of 46 months was to be suspended for 12 months from date of convening authority's action. Accused was sentenced to 10 years, total forfeiture of all pay and allowances, reduction to E-1, and a dishonorable discharge. Defense counsel requested that the convening authority reduce confinement to aid the recovery process of accused's family. The convening authority approved the sentence and modified the punishment by suspending all confinement in excess of 14 months and 6 days for a period of 36 months. The action was lawful under the pretrial agreement because confinement was actually reduced by 32 months and was 22 months less than the accused requested in his clemency petition, even though there was a 2 year suspension increase. The reduced confinement and increased suspension periods, taken together, did not exceed confinement period authorized by the pretrial agreement.

b. *United States v. Sparks*, 15 M.J. 895 (A.C.M.R. 1983). In pretrial agreement, convening authority agreed to approve no sentence in excess of confinement for 4 months, ⅔ pay forfeitures for 4 months, reduction to E1, and bad-conduct discharge. The adjudged sentence was confinement for 2 months, ⅔ pay forfeitures for 6 months, reduction to E1, and bad-conduct discharge. Convening authority can approve sentence as adjudged, as overall severity not increased by extra two months forfeitures.

c. *Cf. United States v. Hayes*, No. 9002521 (A.C.M.R. Aug. 29, 1991) (unpub). In pretrial agreement, convening authority would suspend for 12

months any confinement over 20 months. The adjudged sentence was confinement for 5 years, total forfeiture of all pay and allowances, reduction to E-1, and dishonorable discharge. At action, convening authority approved confinement for 36 months (confinement over 18 months suspended for 18 months), TF, reduction to E1, and dishonorable discharge. HELD: Reducing confinement by two months and increasing the period of suspension by six months is more favorable to the accused than the pretrial agreement, so action was proper.

d. *United States v. Barratt*, 42 M.J. 734 (A. Ct. Crim. App. 1995). No PTA. Adjudged sentence was 16 months confinement, total forfeiture of all pay and allowances, and reduction to E1. Accused requested convening authority substitute bad-conduct discharge for reduction in confinement to 6 months; at action, convening authority approved new sentence of bad-conduct discharge and 6 months confinement. HELD: CA may *not* approve a punitive discharge when punitive discharge not adjudged at trial. Punitive discharge, as a matter of law is not a LIO punishment to confinement. *See* 10 U.S.C § 3811.

L. **POST-TRIAL**.

1. ***Effect of pretrial agreements***. *United States v. Griffaw*, 46 M.J. 791 (A.F. Ct. Crim. App. 1997). A sentence cap in a court-martial pretrial agreement is not a grant of clemency or true plea bargain identical to civilian practice. The cap is a ceiling (or "more like a flood insurance policy on a house") on what would otherwise be the maximum punishment provided by law. SJA, therefore, erroneously implied that convening authority fulfilled clemency obligation by reducing the adjudged confinement from 18 to 12 months to comply with terms of pretrial agreement.

2. ***Collateral consequences of terms***. *United States v. Lundy,* 60 M.J. 52 (C.A.A.F. 2004). Accused entered into PTA term, whereby the CA agreed to defer any and all reductions and forfeitures until the sentence was approved and suspend all adjudged and waive any and all automatic reductions and forfeitures. For sexually assaulting his children, the accused (a SSG) was sentenced to a DD, confinement for 23 years, and reduction to E-1, which subjected him to automatic reduction and forfeitures.

a. The CA attempted to suspend the automatic reduction IAW the PTA to provide the accused's family with waived forfeitures at the E-6, as opposed to the E-1, rate. The parties, however, overlooked AR 600-8-19 which precludes a CA from suspending an automatic reduction unless the CA also suspends any related confinement or discharge which triggered the automatic reduction. ACCA stated no remedial action was required because the accused's family was adequately compensated with

b. CAAF reversed, holding if a material term of a PTA is not met by the government three options exist: (1) the government's specific performance of the term; (2) withdrawal by the accused from the PTA, or (3) alternative relief, if the accused consents to such relief. Additionally, CAAF held an accused's family could receive TC while receiving either deferred or waived forfeitures if the receipt of TC was based on a discharge and if the receipt of TC was based only on the accused receiving forfeitures, the family could receive TC if not actively receiving the deferred or waived forfeitures. On remand, ACCA, ruled specific performance was "more appropriate because the [accused] has not indicated he would consent to any particular alternative relief." In January 2005, the Secretary of the Army (SECARMY) granted an exception to AR 600-8-19 allowing the suspension of the rank reduction and the provision of forfeitures at the E6 rate without requiring the CA to suspend the discharge or confinement triggering the automatic reduction. SECARMY did not approve interest on the E6 forfeiture amount and ACCA ruled it did not have the authority to provide the approximately $3,000 in interest on the original amount owed to the accused and remanded the case to the SA to approve the interest payment or to otherwise return the case to ACCA to set aside the findings and sentence.

c. In Fall 2005, SECARMY made the interest payment. In Summer 2006, CAAF issued another *Lundy* opinion, holding that the accused bore the burden to show that the timing of the payment was material to his decision to plead guilty.

d. *Lundy* is a good cautionary tale. Government counsel should ensure pretrial agreements are simple.

3. ***ETS and pay issues***. *United States v. Perron*, 58 M.J. 781 (C.A.A.F. 2003). In *Perron*, the accused agreed to plead guilty in exchange for sentence limitations that included pay and allowances going to his family. However, prior to trial the accused's term of service expired and once convicted he entered into a no-pay status. As a matter of clemency the accused's counsel asked the convening authority to release Perron from confinement "to gain immediate employment . . . to allow for the financial relief his family desperately needs." The convening authority did not grant the request, opting instead to grant alternative relief. A tortured set of appeals and remands where the adequacy of the alternative relief granted was at issue followed. The issue that finally reached CAAF was whether convening authorities and appellate courts may "fashion an alternative remedy of [their] own choosing" against the accused's wishes. CAAF said no: "It is

fundamental to a knowing and intelligent plea that where an accused pleads guilty in reliance on the promises made by Government in a pretrial agreement, the voluntariness of that plea depends on the fulfillment of those promises by the Government . . . Imposing alternative relief on an unwilling [accused] to rectify a mutual misunderstanding of a material term in a pretrial agreement violates the [accused]'s Fifth Amendment Right to due process."

4. ***Timing of terms in pretrial agreement regarding pay to dependents***. *United States v. Sheffield,* 60 M.J. 591 (A.F. Ct. Crim. App. 2004). Accused pled guilty to numerous military offenses and was sentenced to a BCD, four months confinement, and reduction to E-1. The accused's PTA contained a term that the CA would "waive automatic forfeitures in the amount of five hundred dollars, which sum was to be paid to the guardian appointed by the accused to care for his minor dependants." The SJAR failed to mention this term and the CA did not pay the five hundred dollars to the accused's dependents. On appeal, the accused requested the court to disapprove his adjudged BCD, or in the alternative, to allow him to withdraw from the plea. The government contended specific performance was appropriate. AFCCA held the government could not specifically perform because the accused could not receive the benefit of his PTA bargain (for his dependents to receive five hundred dollars per month during his incarceration). Likewise, the court failed to approve the accused's request to disapprove his BCD because the government did not agree to the alternative relief. ***The original PTA was nullified and findings and sentence set aside***.

III. CONCLUSION.

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IV. APPENDIX – PLEAS & PTAs SUMMARY

MAJOR POINT	*SUMMARY*
PERMISSIBLE PLEAS	• The recognized pleas are not guilty, guilty, guilty by exceptions, guilty by exceptions and substitutions, and guilty to a named lesser included offense. The plea of guilty to a named lesser included offense was created to bring pleas in line with the change to RCM 918 (gave the MJ authority to find an accused guilty of a lesser included offense). An accused can also enter a conditional plea with the consent of the GCMCA and approval of the MJ. • An accused cannot enter a plea of *nolo contendre* or plead guilty to a capital offense when there is a possibility of finally receiving a death sentence.
THE EFFECT OF A GUILTY PLEA	• A plea waives appellate review of all defects not raised at trial which are neither jurisdictional nor tantamount to a denial of due process. • Motions waived include: suppression of confessions, evidentiary motions, and speedy trial motions based on R.C.M. 707. Motions not waived include, *inter alia*, multiplicity motions that are not facially duplicative, unlawful command influence, and ineffective assistance of counsel.
MECHANICS OF *CARE* INQUIRY	• MJs are responsible for ensuring the providence of a plea. The accused's plea must be knowing, intelligent, and voluntary, and have a basis in fact to survive appellate review. MJ ensures this through *Care* Inquiry. • The *Care* Inquiry consists of arraignment and the providence inquiry. During the providence inquiry, the MJ must inform the accused of the elements of the offense using the *Benchbook*, that a plea admits the elements of the offenses, that the accused knowingly waives constitutional rights, communicate the maximum sentence that could be imposed, and secure a factual basis in the accused's words to support the plea. • MJs must be careful to ask open ended questions of the accused during the providence inquiry rather than conducting a cross examination. A cross examination type inquiry might invalidate the plea on appeal on the basis that the MJ forced the guilty plea. The MJ must also be careful to clearly explain the elements from the *Benchbook* and also in plain language so the accused understands them. The MJ should also examine and discuss the stipulation of fact with the accused. An accused need not personally recollect a crime in order to successfully plead.
USE OF THE PROVIDENCE INQUIRY; MIXED PLEA CASE PROCEDURE (RCM 913)	• The MJ should inform the accused that the providence inquiry will be used to determine an appropriate sentence. This use of the inquiry is permissible as long as the accused is aware of its potential use. • The accused's providence inquiry cannot be used in a mixed plea case to prove a contested greater offense (e.g., pleads guilty to the lesser included offense of wrongful and gov't seeks to prove larceny), nor can the providence inquiry for one charge be used to prove a separate charge. • When an accused enters mixed pleas, the accused will have the option, under RCM 913, to inform the court members of an earlier guilty plea. The exception to this rule is if the accused pleads to a lesser included offense and the gov't intends to prove the greater offense.
MILITARY JUDGE AND PTAs	• MJs must inquire into the propriety of PTAs as part of the entire in-court plea process. A military judge must intervene when an accused asserts any degree of force or gov't overreaching in negotiating or approving a PTA.
PERMISSIBLE AND IMPERMISSIBLE TERMS OF PTAs	A term that deprives an accused of a constitutional due process right cannot be part of a PTA. This includes waiver of speedy trial, jurisdiction, counsel, due process, complete sentencing proceedings, and inclusion of *sub rosa* agreements. Permissible terms include waiver of a members trial, promises of restitution, reasonable probation, and waiver of accusatory stage unlawful command influence. *US v. Weasler* has spurred the introduction of novel terms that require a high degree of scrutiny.

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